Mutembei v Republic (Criminal Appeal E033 of 2022)
[2023] KEHC 2752 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E033 OF 2022

LW GITARI, J

MARCH 23, 2023

BETWEEN

BENSON MUNENE MUTEMBEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Benson Munene Mutembei, the Appellant herein, was charged with the offence of robbery with violence contrary to Section 295 as read together with Section 296(2) of the *Penal Code* in the Chief Magistrate's Court at Chuka Criminal Case NBo.255 of 2020. It was alleged that on 24th November, 2020 at Yogari road, the Appellant jointly with others not before court, robbed one Nelson Kariuki Ndwiga of 24 bottles of mineral water, 3 table mats, 2kgs of sugar and Kshs. 3,000/= all of which was valued at Kshs. 4,220/= and during such robbery used actual violence to the said Nelson Kariuki Ndwiga.

   The appellant denied the charge and a plea of not guilty was entered against him.

2. After full trial, the court found the Appellant guilty of the Offence and he was sentenced to death.

3. Being dissatisfied by both the conviction and sentence, the Appellant filed the instant Appeal. He relied on the grounds of appeal contained in his Petition that was filed on 21st October, 2022 but substituted the same with the following grounds which contest against the sentence only:

   a. That the learned trial magistrate erred in law and facts by imposing a harsh and excessive sentence without considering the circumstances in which the offence was committed.

   b. That the learned trial magistrate erred in law and facts by failing to note that the purpose of a sentence of imprisonment is not only for retribution but also for rehabilitation.

4. The Appellant thus prays for this appeal to be allowed and that he be awarded a discharge on condition or a soft substitute be imposed.

5. The Appeal was canvassed by way of written submissions. I note that the Respondent submitted on both the Appellant's conviction and sentence. However, as stated above, the Appellant substituted his grounds of appeal to be only against his sentence.

Analysis

6. In *Francis Nkunja Tharamba v Republic* [2012]eKLR, the Court of Appeal held as follows when it came to a first appeal against sentence only:

> "...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

7. In this case, the Appellant faced the offence of robbery with violence which is contained in the provisions under sections 295 and 296(2) of the *Penal Code* as follows:

> "295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

> "296(2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

The trial magistrate stated as follows when passing the sentence.

> "I have considered the accused mitigation. I have considered the accused was in the company of his friends when they attacked the complainant. They inflicted injuries on him and stole his money and mobile phones. In the circumstances, I sentence the accused to DEATH as prescribed under section 296(2) of the *Penal Code*. Right of appeal 14 days."

In his submissions, the appellant submits, that his mitigation was not considered. From the record of the trial court, the appellant in his mitigation stated that he pleads for leniency and that he has a small child. The trial magistrate did consider that mitigation but proceeded to exercise discretion and pass the sentence that is prescribed under the law. In an appeal, the record of the court is of paramount importance as this court has no opportunity to see the witnesses. The record is presumed to be the true

account of what transpired in court unless the contrary is proved. I find that the trial magistrate did consider the mitigation by the appellant. This court of Appeal stated in the case of *Benard Kimani Gacheru v Republic* (2002) eKLR.

> "It is settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone or not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already as is shown to exist."

The learned trial magistrate stated that she passed the sentence which is prescribed under the law. I find that the sentence imposed by the learned trial magistrate is lawful. The contention by the appellant that the sentence violates article 50 (2) (p) of the *Constitution* cannot stand and is not relevant as Section 296(2) under which a person convicted may be sentenced. He was not charged with an offence whose maximum sentence is ten years as submitted by the appellant. The appellant has not demonstrated any of the grounds in the case of *Bernard Kimani Ndungu v Republic* (*Supra*). I find no reason to interfere with the sentence.

8. The Penal Code prescribes a death sentence for the offence of robbery with violence. Accordingly, the trial magistrate weighed the circumstances and exercised her discretion judiciously.

This is the first appellate court. It has a duty to analyse the evidence and come up with its own independent finding. This is as stated in the leading authority on the subject, *Okeno v Republic* (1972) EA 32. It is my view that this duty has to be exercised even where the appeal is on the sentence only. It would be doing an injustice as the appellate court to confirm as a sentence without satisfying myself that the conviction is based on sound evidence to support it. The Court of Appeal in the case of *Gitobu Imanyara & 2 Others v Attorney General* (2016) eKLR stated while addressing the issue stated that the principles upon which an appellate court acts are that the 1st appellate court must reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it neither see or heard the witness and should make due allowance in this respect. See *Peter v Sunday Post Ltd* (1958) EA and *Pandy v Republic* (1957) EA 336. The Court of Appeal in *Kiilu v Republic* (2015) 1 KLR 174 while emphasizing the duty of the 1st appellate court stated that the first appellate court has a duty to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions.

I have considered the evidence which was tendered by the five prosecution witnesses. A summary of the evidence is that the complainant, Nelson Kariuki Ndungu (PW1) was on his way home on 24/11/2020 at around 8.00 pm while carrying some items. He passed the appellant who was in company of one Karuma. That the two caught up with him while at a dark alley, confronted him and got hold of both his hands. The complainant testified that the two attacked him but managed to flee himself and fled from the scene leaving behind the items which he was carrying. He reported the matter at Kamwimbi Police Post which was some 400 metres away from the scene. Police officers accompanied him to the scene and he recovered some of the items. The complainant went and reported to the police. While there the appellant went there while wearing a mask which was stolen from the complainant.

The complainant identified him and he was arrested. The PW3 testified that items she recovered at the scene belonged to the appellant. The prosecution called PW4 a clinical officer who testified that the complainant had sustained injuries which were bodily harm. The P3 form was produced as exhibit.

The trial magistrate found that the appellant was identified by the complainant.

Having considered the evidence tendered before the trial court, I find that the prosecution discharged the burden to prove the charge against the appellant beyond any reasonable doubts. The appellant did not challenge the conviction as he abandoned his appeal on conviction.

Conclusion

9. For the reasons stated, I find that the appeal has no merits.

Order

10. The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 23RD DAY OF MARCH 2023.

L.W. GITARI

JUDGE

23/3/2023

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

23/3/2023