



**Rotich v Republic (Criminal Appeal E069 of 2021)
[2023] KEHC 1809 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E069 OF 2021
JWW MONG'ARE, J
MARCH 9, 2023**

BETWEEN

ELIJAH KIPKORIR ROTICH APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the sentence in Eldoret CMCC 2718 of 2019 delivered
by Hon. R. Odenyo delivered at Eldoret CMs' court on 12th October 2021)*

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#). The particulars of the offence were that on the September 5, 2019 at Kipkabu trading centre in Eldoret East sub-county within Uasin Gishu county, he robbed Concepta Nekesa Juma of Kshs 2,000 and immediately before or immediately after the time of such robbery used actual violence to the said Concepta Nekesa Juma.
2. The appellant was convicted and sentenced to 10 years imprisonment. Being dissatisfied with the sentence, the appellant instituted this appeal *vide* a petition of appeal based on the following grounds;
 1. That, (I) am a first offender and thus beg for leniency.
 2. That (I) am remorseful, repentant and reformed since (I) have learnt incarceration in prison.
 3. That (I) am a young man and (I) pray to be reconstituted in the society and serve as a role model and a teacher/mentor to others of similar behaviour.



4. That the honourable court consider the time spent in custody and be commuted as part of the sentence on the part of the sentence pursuant to section 333(2) of the *Criminal Procedure Code*.
5. That this honourable court may be pleased to consider the sentencing policy of 2016 published by the Kenya judiciary to establish the mitigating circumstances that would lessen the custodial sentence.
6. That more grounds to be adduced at the hearing thereof and determination of the appeal.

The parties filed written submissions on the appeal.

Appellant's Case

3. The appeal herein is against sentence. The appellant did not make any submissions on the conviction. Instead, he challenged the severity of the sentence and requested the court to consider the circumstances and evaluate and reduce the same. Further, he submitted that since his arrest he has been in custody from 2019 and the process of incarceration has humbled him.
4. The appellant prayed the court impose a lesser sentence under the powers bestowed upon it by section 354 of the *Criminal Procedure Code* and articles 23(1), 159(2)(a) and (b), 165(3)(a),(b) and (d) and 258(1) of the *Constitution* of Kenya. He is remorseful and begs that the sentence be reduced.

Respondent's Case

5. Learned counsel for the state opposed the appeal. He submitted that the principles to be relied upon when reviewing sentences were captured by the Court of Appeal in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR. He stated that despite the fact, the only sentence provided under section 296(2) of the *Penal Code* is a sentence of death, the court still used its discretion and sentenced him to a custodial term of 10 years. He urged that considering the aggravating circumstances of the case i.e the accused used actual violence against the complainant causing her to sustain grievous harm as a result, a sentence of only ten years imprisonment was quite light. It was his submissions that the appellant had benefited from the emerging jurisprudence from the courts on minimum and maximum mandatory sentence and that this court had nothing to review in the circumstances.
6. He urged the court to find that the sentence was proper and prayed that the honourable court uphold the sentence.

Analysis And Determination

7. Upon considering the petition of appeal and the submissions of the parties, the following issue arises for determination;

Whether the sentence was harsh or excessive

8. Section 296(2) of the *Penal code* stipulates as follows;
 - (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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.



9. The prescribed sentence for the offence of robbery with violence is life imprisonment. The appellant was sentenced to 10 years imprisonment which in the view of this court was a lenient sentence.

The Court of Appeal in the *matter of Benard Kimani Gacheru*(supra) stated as follows;”

“It is now 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 are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

10. Similarly in *Maingi & Sothers v Director of Public Prosecutions & another* petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) where G.V Odunga J (as he then was) stated as follows;

“To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the *Constitution*. However, the court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine)”.

11. I have evaluated the submissions of both parties, the petition of appeal and the mitigation of the appellant and I am persuaded that in arriving at the sentence passed, the trial court must consider the factors of the case and the mitigating plea of the appellant and accordingly use its discretion to make the decision herein. I therefore hold that the sentence was commensurate with the offence and find no reason to disturb the decision of the trial court. The upshot of the above finding is that the appeal before me is dismissed for lack of merit. It is so ordered.

DATED, SIGNED AND DELIVERED ON THIS 9th DAY OF MARCH 2023

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J.W.W. MONGARE

JUDGE

Delivered virtually in the presence of;

Appellant-absent

Mr. Rop holding brief for Ms. Okok for the Respondent

Brian Kimathi – court assistant

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J.W.W. MONGARE

JUDGE

