



Sagero & 2 others v Republic (Criminal Appeal E038 & E046 of 2022 & E017 of 2023 (Consolidated)) [2023] KEHC 18581 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18581 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E038 & E046 OF 2022 & E017 OF 2023 (CONSOLIDATED)
AC MRIMA, J
JUNE 16, 2023**

BETWEEN

BENARD NYABARO SAGERO APPELLANT

AND

REPUBLIC RESPONDENT

**AS CONSOLIDATED WITH
CRIMINAL APPEAL E046 OF 2022**

BETWEEN

JASPER MORARA APPELLANT

AND

REPUBLIC RESPONDENT

**AS CONSOLIDATED WITH
CRIMINAL APPEAL E017 OF 2023**

BETWEEN

ERICK NGETICH KIPKEMOI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being appeals arising out of the conviction and sentence of Hon.
V. Karanja (Principal Magistrate) in Kitale Chief Magistrate's
Court Criminal Case No. 978 of 2014 delivered on 28th April, 2022)*



JUDGMENT

Background:

1. Benard Nyabaro Sagero, Erick Ngetich Kipkemoi and Jasper Morara, the Appellants herein, were charged in Kitale Chief Magistrate's Court Criminal Case No 978 of 2014.
2. Benard and Jasper were jointly charged with Stealing by servant contrary to Section 281 of the [Penal Code](#). The three faced a common charge of Conspiracy to defraud contrary to section 317 of the [Penal Code](#).
3. They all denied the charges and were tried. They were subsequently found guilty as charged and convicted.
4. Benard and Jasper were each sentenced to 3 years imprisonment on the first count and all the three were sentenced to 3 years imprisonment on the second count. The sentences for Benard and Jasper were to run concurrently.

The Appeal:

5. Being all aggrieved with the convictions and sentences, they lodged separate appeals. The appeals were consolidated by an order of this Court with Criminal Appeal No E038 of 2022 being the lead appeal.
6. The appeals were heard by way of written submissions where the appellants and the State filed their respective submissions.
7. At the hearing of the appeals, the Appellants wished not to pursue the appeals against the convictions, but only sentences.
8. They lamented that the sentences were harsh and excessive against the fact that they were remorseful, had families and were sole breadwinners.
9. On his part, the first Appellant herein, Benard Nyabaro Sagero, further pleaded that the sentence in this matter do run concurrently with the sentences he was serving in Kitale Chief Magistrate's Court Criminal Case No 1421 of 2014 and Kitale Chief Magistrate's Court Criminal Case No. 1458 of 2014.
10. The State opposed the appeals on sentences and urged this Court to dismiss them and not to disturb the sentences which were fair in the circumstances.

Analysis:

11. This Court is the first appellate Court.
12. The High Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.



13. I have considered this matter with caution and care. The trial Court was careful in the manner it conducted the sentencing proceedings.
14. The Court considered the nature of the offence and the mitigation, among other relevant actors.
15. This Court takes note that despite the plea by the first Appellant herein that the sentences he is serving in Kitale Chief Magistrate's Court Criminal Case No 1421 of 2014 and Kitale Chief Magistrate's Court Criminal Case No. 1458 of 2014 arose from the same transaction as the one in the instant matter, there was no evidence to that end.
16. It is imperative for parties to know that sentencing is a crucial part in the criminal process and the administration of justice and since sentencing Courts are called upon to exercise discretion, then parties are at liberty to even adduce evidence that may aid Courts reach most appropriate sentences (See the Supreme Court in Petition No 15 of 2015 *Francis Karioko Muruatetu & another v Republic* [2017] eKLR).
17. In this case, therefore, and for purposes of sentencing, the first Appellant was at liberty to produce the proceedings, judgment and sentences in the said cases for the sentencing Court to appreciate the matter further and to accord the State an opportunity to make its presentations on the same. As said, that did not happen.
18. In exercising its discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the Sentencing Guidelines published on April 29, 2016 vide Gazette Notice No 2970 by the Hon The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Supreme Court in Petition No 15 of 2015 Francis Karioko Muruatetu & another v Republic [2017] eKLR.
19. This Court is well abreast of the principles on sentencing and the 2016 Judiciary of Kenya Sentencing Policy Guidelines. As stated by the Supreme Court of Kenya in Francis Karioko Muruatetu & another case (*supra*), despite their importance, the guidelines do not replace judicial discretion. This is what the Apex Court stated: -
 - (72) We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.
20. The purpose of sentencing is expounded in page 15, paragraph 4.1 of the *Sentencing Policy Guidelines* as follows: -

Sentences are imposed to meet the following objectives:

 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims',



communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct.
21. In sentencing, the Court considers various mitigating factors. Some include: -
- (a) age of the offender;
 - (b) being a first offender;
 - (c) whether the offender pleaded guilty;
 - (d) character and record of the offender;
 - (e) commission of the offence in response to gender-based violence;
 - (f) remorsefulness of the offender;
 - (g) the possibility of reform and social re-adaptation of the offender;
 - (h) any other factor that the Court considers relevant.
22. In this matter, each of the Appellants is serving a prison term of 3 years. It is only the first Appellant who is serving further sentences in Kitale Chief Magistrate's Court Criminal Case No 1421 of 2014 and Kitale Chief Magistrate's Court Criminal Case No 1458 of 2014.
23. This Court has considered the charges. It seems that the charges of stealing by servant and conspiracy to defraud were committed in the same transactions. They were both committed between January 1, 2013 and March 7, 2014 at Khetia Drapers Limited in Kitale. Therefore, being offences committed in the same transaction, the sentences ordinarily run concurrently unless otherwise justified. That was how the Court handled the issue in this case in respect of the first and third Appellants.
24. Having carefully perused the sentencing proceedings, this Court does not see how the sentencing Court erred.
25. Consequently, the following final orders of this Court do hereby issue: -
- a. The appeals against the convictions in Criminal Appeal No E038 of 2022, Criminal Appeal No E046 of 2022 and Criminal Appeal No E017 of 2023 are hereby marked as Abandoned.
 - b. The appeals against sentences in Criminal Appeal No E038 of 2022, Criminal Appeal No E046 of 2022 and Criminal Appeal No E017 of 2023 are hereby Dismissed.
 - c. This file is hereby marked as Closed.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 16TH DAY OF JUNE, 2023.

A. C. MRIMA

JUDGE



Judgment delivered in open Court and in the presence of: -

Benard Nyabaro Sagero, Erick Ngetich Kipkemoi and Jasper Morara, the Appellants in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Chemutai – Court Assistants.

