Katia & another v Republic (Civil Appeal 124 & 129 of 2019 (Consolidated)) [2024] KEHC 15963 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15963 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 124 & 129 OF 2019 (CONSOLIDATED)

REA OUGO, J

NOVEMBER 21, 2024

BETWEEN

CHRISPINUS WANJALA KATIA ..... 1ST APPELLANT

STANLEY SIMIYU WANJALA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the ruling on the sentence of Hon. E. N Mwenda (SRM) dated 30/7/2019)

JUDGMENT

1. This is an appeal against the sentence. The appellant filed an appeal before this court in Bungoma Criminal Appeal No 68 of 2017, and this court affirmed the conviction. However, on the issue of sentence, the court referred the matter back to the lower court for re-sentence.

2. The trial court in its re-sentencing ruling sentenced the appellants to 20 years imprisonment.

3. The appellants filed a petition of appeal challenging the conviction and sentence. However, they abandoned their appeal on conviction and are now focusing on the sentence. At the onset, I note that this court considered the appeal on conviction to its finality and affirmed the lower court's decision on conviction. The main ground of the appeal is t that the sentence by the trial magistrate was harsh and they pray for a lesser sentence.

4. The 1st appellant submits that the trial court did not consider their mitigation and the fact that they were first offenders. The 1st appellant submits that he is remorseful and has acquired a theological certificate while in prison. The judiciary sentencing policy guidelines require the court to consider the gravity of the offence, the threat of violence against the victim, and the nature and type of weapon used by the assailant to inflict harm. He submits that the victims were not fatally injured and the

property stolen was not of much value. He also submitted that he was the breadwinner of his family. In Ali Abdalla Mwanza v Republic Criminal Appeal, No 259 of 2012 the court reduced a 40-year sentence to 20 years arguing that the sentence would go beyond the life expectancy and in that case, it was manifestly excessive. He also urged the court to consider the provisions of section 333(2) of the Criminal Procedure Code allows the court to consider time spent in remand custody when sentencing.

5. The 2nd appellant in his mitigation submissions advanced that he has been in custody for 7 years and regrets committing the crime. He was 18 years old at the time of the offence and had no past criminal records. He relied on the case of Daniel Gichimu & Another v Rep [2018] eKLR where the court set aside the lower court's ruling on sentence because the court did not consider that the accused therein was a first offender. He also cited the case of Francis Opondo v Republic [2017] eKLR where the court discussed the principles of sentencing. He submitted that while in prison he has undergone rehabilitation programmes and is ready to be re-integrated back into society. He also urged the court to consider the time which was spent in remand as per section 333(2) of the Criminal Procedure Code.

6. The respondent opposed the appeal. It was submitted that the only factor for consideration was whether the 20-year sentence was manifestly harsh and excessive. The appellants attached the complainant at midnight, cut her, and stole her valuables. The mere fact that they regret their action is not sufficient reason to reduce their sentence. The 20-year sentence was passed after the court exercised its discretion under the prevailing circumstances of the offence. The appellant has not shown that discretion was not exercised judiciously.

Analysis And Determination

7. The only issue before the court concerns the sentence meted by the trial court. The principles governing the appellate court's interference with sentencing were aptly outlined in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

8. The Court of Appeal in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

> " 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 states is shown to exist."

9. The sentence for one convicted of robbery with violence as provided in law is a death sentence (see section 296 of the Penal Code). The death penalty remains lawful and is reserved for the most severe cases of robbery with violence. In this case, the trial magistrate meted out a 20-year sentence as opposed to the highest sentence allowed by law. The trial magistrate in his ruling on the sentence stated:

> "
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> "3. As part of the sentencing hearing I have required the convicts to provide further submissions in mitigation. I have considered these submissions as well as the earlier mitigation by Counsel for the convicts. I have also considered earlier pre-sentence reports as well as the rejoinder by the state...
>
> 6. The offence of Robbery with violence is a grave one. It has great psychological impact in the victims as can be readily seen in the victim report. It is an aggravated robbery that often involves gratuitous, infliction of harm on innocent parties and therefore it rightly attracts the death penalty.
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> 7. My role as a sentencing court is to weigh the rehabilitative purpose if punishment vis a vis the prohibitive value, retributive value and (sic) repudiative value of the sentencing. Considering all these factors, as well as the individual circumstances of the convicts in this case I do not see that despite their being first offenders, they merit a non-custodial sentence.
>
> 8. In arriving at the said decision I have considered that the convicts were part of a gang that broke into the dwelling space in the middle of the night and proceeded in concert to cut up their victims. Home invasions are traumatic experiences even for the bravest members of society. The society needs to punish those who commit such offences severely so as to raise a deterrent effect. The available sentence is therefore a custodial sentence...
>
> I hereby sentence each of the convicts Chrispinus Wanjala Katia and Stanley Wanjala Simiyu to 20 years imprisonment..."

10. A plain reading of the trial court's ruling reveals that the magistrate took into account the appellants' mitigation, the pre-sentence report, and the victim's report before passing the sentence. The appellants' claim that their mitigation was not considered is unfounded. It also considered several sentencing policy guidelines before it rendered its decision. The appeal on this ground therefore fails. The appellants attacked the complainant as a gang and cut her with a panga and as a result, she sustained injuries classified as harm. They also stole her valuables.

11. Although the appellants want the court to consider the time they spent in remand, the record reveals that they were released on bond at the subordinate court. The trial magistrate was therefore correct in holding that the sentence shall run from 30/6/2019. The appeal is hereby dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF NOVEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

For the 1st and 2nd Appellant - Present

Miss Matere -For the Respondent