



REPUBLIC OF KENYA

HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 181 OF 2018

EDWARD MOMANYI NYAMWEAAPPLICANT

VERSUS

REPUBLICRESPONDENT

(Appeal from conviction and sentence from the decision of; Hon. M. Mutuku (SPM), on 23rd August 2018, in

Criminal Case No. 449 of 2016; Chief Magistrate's Court, at Kibera).

JUDGMENT

1. On 1st February 2016, the Appellant was arraigned before the Chief Magistrate's Court, at Kibera charged vide; a Criminal Case No. 449 of 206, with the offence of; robbery with violence, contrary to section, 296(2) as read with section 295 of the Penal Code (Cap 63) Laws of Kenya.
2. The particulars of the offence state that, on the 29th January 2016, at Madaraka stage along Langata road, within Nairobi County, jointly with others not before court, while armed with an offensive weapon namely pistol, robbed Choul Ding Choul, a mobile phone; an infinix hot IMEI number 35655070000043, valued at Kshs 10,000 and at the time of robbery threatened to use actual violence against the said Chuol Ding Chuol.
3. The charge was read to the Appellant, wherein he pleaded not guilty. He was then remanded in custody and the case set down for hearing.
4. The prosecution called a total of five (5) witnesses who testified briefly that, Chuol Ding Choul (PW1) was taking his sister to school at about 10.30am on 29th January 2016, when he was accosted by the Appellant and another not before the Court, while armed with a weapon which the complainant described as a pistol and robbed of his phone. However, as the Appellant was fleeing from the scene, he was arrested by members of the public, and the stolen phone recovered. The accomplice managed to escape with the pistol.
5. That, the Police Officers on police traffic duties rescued the Appellant who was being assaulted by the members of the public, and took him to Langata Police Station and after investigations, he was charged accordingly.
6. At the close of the prosecution case, the Court ruled that, the Appellant had a case to answer and placed him on his defence. He testified briefly that, he stays at Kibra Soweto. That, on 29th January 2016, he was walking along Madaraka road going to work and at around 10.00am, when he reached near Tusky's, he heard noise behind him. The people making noise hit him and he fell down, and lost consciousness. He found himself at the Police Station being told to give the Police Officers the pistol. He did not have any pistol and neither was he aware of the charges.
7. At the conclusion of the case, the Court delivered a judgment dated 23rd August 2018, and found the Appellant guilty as charged and convicted him accordingly; under section 215 of the Criminal Procedure Code (Cap 75) Laws of Kenya (herein "the Code").
8. The Prosecution indicated, they did not have the previous record. The Appellant stated, in his mitigation that, he "provides for his mother". The Trial Court indicated that, it had considered the Appellant's mitigation and sentenced him to serve fifteen (15) years imprisonment. The right of appeal within fourteen (14) days was explained to him.
9. On 8th October 2018, the Appellant filed a Petition of Appeal, together with a document entitled "mitigating appeal", in which he states verbatim as follows:

- a) *That, the Honourable court be pleased to find that the appellant is a first offender;*
- b) *That, the Honourable court be pleased to intervene and reduce the appellant's sentence imposed as it has powers to do so;*
- c) *That, the appellant has reformed and promises never to get involved in any activity that would result into criminal activity breaching the rules of the public;*
- d) *That, the appellant has acquired practical skills through vocational training which will help him earn legal bread and assist his young family;*
- e) *That, the appellant is the sole bread winner of his needy family and elderly mother;*
- f) *That, the appellant be allowed to be present in court during the hearing of the mitigation seeking leniency.*

10. Finally, the Appellant prays in the final paragraph of the document, that, the Court do grant him a lesser sentence.

11. At the hearing of the Appeal, the Appellant orally addressed the court and told the Court that he is not pursuing the Appeal on conviction. That; his appeal was against the sentence alone. He reiterated that, the sentence is harsh.

12. The Respondent did not file any formal response to the application but opted to orally address the court on sentence. The Learned State Counsel; Ms Ndombi told the Court that the Appeal and/or interference with the sentence is opposed, as the offence the Appellant was charged with carries death sentence, though it has been declared unconstitutional. That, the period of fifteen (15) years given is not excessive taking into account the manner in which the offence was committed.

13. I have considered the arguments and/or oral submissions by the respective parties on the Appeal on sentence and I find that, in deed in all matters before the court, sentencing principles form the basis of sentencing decisions. These principles have developed through legislation and common law and/or case law.

14. In that regard, section 329 of the Code states that, Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

15. In the same vein; the provisions of; section, 24 of the Penal Code provide for different kinds of punishments that may be inflicted by a Court and lists them as follows: -

- (a) death;*
- (b) imprisonment or, where the court so determines under the Community Service Orders Act, 1998, community service under a community service order;*
- (c) detention under the Detention Camps Act;*
- (d) deleted by Act No. 5 of 2003, s. 3;*
- (e) fine;*
- (f) forfeiture;*
- (g) payment of compensation;*
- (h) finding security to keep the peace and be of good behaviour;*
- (i) any other punishment provided by this Code or by any other Act.*

16. Similarly, the principles underpinning the sentencing process are stipulated in the Sentencing Policy Guidelines of the Judiciary under clause (3) and include; -

- a) Proportionality: The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence;*
- b) Equality/Uniformity/Parity/Consistency/Impartiality: Same sentences should be imposed for same offences committed by offenders in similar circumstances;*
- c) Accountability/Transparency: The reasons and considerations leading to the sentence should be clearly set out and in accordance to the law and the sentencing principles laid out in these guidelines;*
- d) Inclusiveness: Both the offender and the victim should participate in and inform the sentencing process.*

17. In addition, the same Policy Guidelines stipulates that, sentence is imposed to meet the following objectives: -

- a) *Retribution: To punish the offender for his/her criminal conduct in a just manner;*
- b) *Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences;*
- c) *Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person;*
- d) *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 demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs;*
- e) *Community protection: To protect the community by incapacitating the offender; Denunciation: To communicate the community's condemnation of the criminal conduct.*

18. The objectives were considered and affirmed in the case of; **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015.**

19. Further, the same Policy Guidelines further provide under clause 23 that, to determine the most suitable sentence, the Court shall take into account the aggravating and mitigating circumstances. These circumstances shall include but not be limited to, the following; aggravating circumstances that warrant a stiffer penalty than would be ordinarily imposed in their absence: -

- a) *Use of a weapon to frighten or injure a victim; the more dangerous the weapon, the higher the culpability;*
- b) *Multiple victims;*
- c) *Grave impact on national security;*
- d) *Serious physical or psychological effect on the victim;*
- e) *Continued assault or repeated assaults on the same victim;*
- f) *Commission of the offence in a gang or group;*
- g) *Targeting of vulnerable groups such as children, elderly persons and persons with disability'*
- h) *Previous conviction(s), particularly where a pattern of repeat offending is disclosed;*
- i) *Intricate planning of an offence;*
- j) *An intention to commit a more serious offence than was actually committed;*
- k) *High level of profit from the offence;*
- l) *An attempt to conceal or dispose of evidence;*
- m) *Flagrant use of violence or damage to person or property in the carrying out of an offence;*
- n) *Abuse of a position of trust and authority;*
- o) *Use of grossly inhuman and degrading means in the commission of an offence;*
- p) *Targeting those working in the public sector or providing a service to the public;*
- q) *Commission of offences motivated by ethnic, racial and gender bias.*

20. The mitigating circumstances that warrant a more lenient penalty than would be ordinarily imposed in their absence, include: -

- a) *A great degree of provocation;*
- b) *Commitment to repairing the harm caused by the offender's conduct as evidenced by actions such as compensation, reconciliation and restitution prior to conviction;*
- c) *Negligible harm or damage caused;*

- d) Mental illness or impaired functioning of the mind;
- e) Age, where it affects the responsibility of the individual offender;
- f) Playing of a minor role in the offence;
- g) Being a first offender;
- h) Remorsefulness;
- i) Commission of a crime in response to gender-based violence;
- j) Pleading guilty at the earliest opportunity and cooperation with the prosecution and the police.

21. However, while considering whether the principles referred to above were adhered to, the appellate Court must bear in mind that, **sentencing remains pre-eminently within the discretion of the sentencing Court, as held in the case of; Bernard Kimani Gacheru vs. Republic (2002) eKLR** .

22. Therefore, the Appellate Court will not alter a sentence unless the trial court has acted upon wrong principles or overlooked some material factors, as stated by Court of Appeal, in the case of; Ogolla s/o Owuor vs. Republic, [1954] EACA 270, or that the Court meting out the sentence took into account an irrelevant factor or the sentence itself is so excessive and therefore an error of principle must be interfered, as stated in the case of; Sayeka –vs- R. (1989 KLR 306).

23. Indeed, these principles will apply, even if, the Appellate court feels that, the sentence is heavy and that it might itself not have passed that sentence. That alone will not be sufficient ground for interfering with the discretion of the trial Court on sentence unless, anyone of the matters aforesaid are shown to exist. (see Bernard Kimani Gacheru vs. Republic (supra)).

24. I note that, in the instant matter, the trial court stated as follows before pronouncing the sentence: -

“I have considered the mitigation by the accused and sentence him to 15 years’ imprisonment”

25. As already stated herein, the mitigation by the Appellant was in one sentence; “1 was providing for my mother”. It is therefore, not evident from the record, whether the trial Court took into account any other factors and/or the principles referred to herein. In that regard it is equally not clear whether indeed, the period the Appellant spent in during the trial, was considered.

26. However, it suffices to note that, the provisions of; section 333(2) of the Code stipulates that:

(2) Subject to the provisions of section 38 of the Penal Code, every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”.

27. By dint of section 333(2) of the Criminal Procedure Code, the Court of Appeal has held in the case of; Ahamad Abolfathi Mohammed & Another vs. Republic (2018) eKLR.

that, the court is obliged to take into account the period the Appellant has spent in custody before he or she are sentenced.

28. The Court of Appeal stated that: -

“Taking into account” the period spent in custody must mean considering that period so that, the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction, because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on; 19th June 2012.”

29. Similarly, clause 7.10 to and 7.12 of the Judiciary Sentencing Policy Guidelines states that: -

“7.10: The proviso to section 333 (2) of the Criminal Procedure Code obligates the Court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.

7. 11: In determining the period of imprisonment that should be served by an offender, the court must take into account the period in

which the offender was held in custody during the trial.

7.12: An offender convicted of a misdemeanor and had been in custody through-out the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely, under section 35 (1) of the Penal Code”.

30. As already stated it is not evident herein that, the aforesaid provisions were considered and in deed most of the factors alluded to herein; therefore, in my considered opinion; where the court imposing the sentence does not clearly indicate on record all the factors considered before determining the sentence, it shall be deemed and concluded that, the court **overlooked some material or salient factors** and therefore, invite the Appellate Court to re-examine the sentence afresh, in the circumstances of the case and/or these factors.

31. In that regard, it suffices to note that, the Appellant was in custody since the date of arrest on 29th January, 2016, to 23rd August 2018, when he was sentenced, a period of; two (2) years, five (5) months and twenty-five (25) days. It should be noted that, he was treated as a first offender and there was no evidence of aggravated circumstances. Similarly, the stolen phone was recovered.

32. Indeed, the Appellant was convicted of the offence of; robbery with violence under section 296 (2) which states that: -

“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.

33. Thus the sentence provided for the offence, is death, however, by the time the sentence herein was passed, the Supreme Court of Kenya in Muruatetu case (supra) had declared death sentence unconstitutional and allowed the Courts the leeway to exercise its discretion in sentencing person convicted of robbery with violence to any other sentence under the law.

34. The upshot of the aforesaid, is that, based on the aforesaid factors, I find this is a suitable case for review of sentence. I therefore, set aside the sentence imposed by the trial Court and substitute it with an imprisonment period of ten (10) years to run from the date the appellant was arrested on; 29th January, 2016.

35. In addition, the sentence shall be reduced by a period of; two (2) years, five (5) months and twenty-five (25) days the Appellant was in custody.

36. Right of appeal, within 14 days is explained to the Appellant.

37. It is so ordered.

DATED, DELIVERED VIRTUALLY ON THIS 17TH DAY OF MAY, 2021, AND SIGNED.

GRACE L. NZIOKA

JUDGE

In the presence of: -

No appearance for the Appellant

Appellant present in person

Ms Kimaru for the Respondent

Edwin Ombuna, the Court Assistant