REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 8 OF 2020

AYUB KIMATHI KAGEMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence by Hon. S.M. Nyaga (SRM) sitting at Marimanti Law Court in Criminal Case No. 586 of 2019 and delivered on the 7th .02.2020)

JUDGMENT

INTRODUCTION

The appellant was charged with the offence of robbery with violence contrary to **section 296 (2) of the Penal Code.**

The particulars being that on the 25th day of May,2019 at Kamatungu area in Tharaka South sub –county within Tharaka Nithi county while armed with a dangerous weapon namely panga robbed GK (1) complete gas cylinder of 6kgs green in colour from K-gas company (2) a flash disk of 4GB make – San disk red and black in colour (3) two mobile phones; a Nokia and itel model It2180 IMEI No. 356829085197681, (4) Kshs.200 all valued at Kshs. 12,300.00 and during the time of such robbery, used personal violence to the said GK.

The accused faced a second count of the charge of rape contrary to **section 3(1) (a) (c) (3) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence being that, on the 25th day of May,2019 at Kamatungu area in Tharaka Nithi South Sub County within Tharaka Nithi County, intentionally and unlawfully caused his penis to penetrate the vagina of GK by use of threats and force.

The accused person pleaded not guilty to the charges and a full trial was conducted. The trial magistrate in a Judgment rendered on 7/2/2020 found the appellant guilty as charged and convicted him. He then proceeded to sentence the appellant to life imprisonment on the 1st count of robbery with violence. on the 2nd count, the appellant was similarly sentence to life imprisonment but the trial magistrate ordered that the life imprisonment in count 2 be held in abeyance.

1. The appellant was dissatisfied with both the conviction and sentence and lodged this appeal in a petition which had seven grounds of appeal. He however filed amended grounds of appeal on 2/3/21. Limiting the appeal to the sentence only. He raises the following grounds:-

i. **THAT** he pleaded not guilty.

ii. **THAT** the learned trial magistrate erred in law and in fact by failing to take account of the appellant's dignity while imposing a harsh sentence upon him.

iii. **THAT** the trial magistrate erred in law when he failed to consider that the appellant being a first offender was qualified for a lenient sentence.

iv. **THAT** the learned trial magistrate erred in law when he failed to consider that the appellant as a first offender was constitutionally guaranteed the benefit of the least severe punishment.

v. **THAT** the learned trial magistrate erred in law by failing to consider the appellant's mitigation as part of the trial. (sic).

2. When the appeal came up for directions on hearing, the appellant opted to have the appeal canvassed by way of written submissions. The court then directed that the appeal be canvassed by way of written submissions. The appellant proceeded and filed written submissions which he relied on.

The respondent opposed the appeal and submissions were filed by the office of the Director of Public prosecutions. It was their prayer that the appeal be dismissed.

It is clear from the grounds of appeal that that what is before this court is the appeal on the sentence. In his submissions, the appellant seeks what he calls ***" Reddress (sic) to unfair trial in sentencing."***

The appellant thus prays that the appeal be allowed, sentence be set aside and conviction be quashed.

The appellant submits that the trial court never factored in his mitigation and the fact that he was a first offender in the process of sentencing him. He raised **Articles 25(c) ,27 (1) and 50(2**) in supporting his case.

That the appellant herein was under the influence of drugs and so he requests for another chance to make his wrongs right. That imposition of a life sentence upon him is inconsistent with the primary purpose of sentence and further disenfranchises him his constitutional rights.

The appellant relies in the case of **George Munyinyi Kihuyu v Republic Cr. No. 156 of 2016** at Nairobi.

The law is well settled by line of authorities by the Court of Appeal that sentence is a matter that rests in the discretion of the trial court. In ***Benard Kimani Gacheru -v- Republic (2002) eKLR the Court of Appeal*** stated that-

> ***" 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 Appellant 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 it shown to exist."***

The Court of Appeal in the above decision quoted with approve the case of ***Ogola s/o Owoura -v- Regnum (1954) 21 EACA 270*** where the court stated that an appellate court will not interfere with the exercise of discretion in sentencing by the trial Judge unless the Judge acted on some wrong principles or overlooked some material factor and further that the sentence is manifestly excessive in view of the circumstances case.

3. It is therefore well settled that sentencing is an exercise of discretion by the trial court and the appellate court will not interfere with the exercise of that discretion unless is shown that the trial court took into account an irrelevant fact or that among principle was applied or the sentence was manifestly excessive or harsh exposing an error of principle.

4. The appellant is taking issue with the trial court by contending that his mitigation was not considered. The proceedings of the trial court tells it all. At page 52 of the record the appellant was allowed to mitigate. It reads:-

> ***"Mitigation "***
>
> ***" I pray for my life. I have a small child. I am a son of a single mother who is sickly. I pray for a non custodial sentence so that I go on with my life."***

Based on this mitigation, the trial magistrate called for a pre-sentencing report. The social inquiry report was negative. It is clear from the record that the accused was given an opportunity to mitigate and the trial magistrate considered the mitigation and the probation officers report before sentencing. The trial court considered all the relevant factors and nothing appears on the record of the trial magistrate to suggest that a wrong principle was applied. The appellant was charged under **section 296 of the Penal Code** (Cap 63 Laws of Kenya) which provides:-

> ***" 1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***
>
> ***(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."***

As per the second count, the appellant was charged under **Section 3 of the Sexual Offences Act** which provides:-

> ***"A person commits the offence termed rape if –***
>
> ***(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;***
>
> ***(b) the other person does not consent to the penetration; or***
>
> ***(c) the consent is obtained by force or by means of threats or intimidation of any kind.***
>
> ***(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.***

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

The sentence passed by the trial magistrate was the sentence prescribed under the law and was therefore lawful. There was no misdirection. This is what the court stated at page 54 line 12-18.

''I do not see him remorseful. He only minded his interest and not even try to apologise. The accused, according to presentencing report is a first offender though he has survived other criminal matters.

The report has revealed that the accused is a well known criminal in the criminal in the community who is generally feared. He keeps changing his areas of abode from Marimanti, Nkubu, Meru and Chuka…..the circumstances behind the two offences does not afford any mercy to the accused by any reasonable judicial mind. The accused simply need to be separated from society for a long time…. The court notes that the accused has no parental responsibility.''

In **Joseph Muerithi Kanyita v Republic [2017] eKLR** where the Court of Appeal stated:

"In this appeal the sentence by the trial court was not illegal or unlawful. There is no palpable misdirection by that court apparent on the record. We do not perceive any material factor that the trial court overlooked or any immaterial factor that it took into account. It has not been demonstrated that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low….

Further the trial magistrate considered the mandatory death sentence and the minimum mandatory sentence for the offence of rape. The learned trial magistrate stated:-

" The charging law beginning with offence of robbery with violence provides a mandatory sentence of death. The other of rape provides a mandatory sentence of not less than ten (10) years imprisonment that may be enhanced to life imprisonment. The circumstances behind the two offences does not afford any mercy to the accused by any reasonable judicial mind.

The accused simply needs to be separated from the society for a long time.

Guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu and Another -vs- Republic Supreme Court Petition No.16 of 2015 and persuaded (sic) by the decisions of Court of Appeal in Christopher Ochieng -vs- Republic (2018) eKLR and Jared Korta Injiri (2019) eKLR, I hereby sentence the accused to serve a life imprisonment term instead of a death sentence regarding the offence of robbery with violence.

Now on rape, the accused violently after the robbery with violence raped the victim as her children watched. To repeat, it is said these people are still psychologically and socially suffering. I feel pity for them. However, today may mark the beginning of their road recovery. I therefore due to aggravating circumstances, herein enhance the minimum 10 years' imprisonment sentence provided by the law to a life imprisonment sentence. I have already sentenced accused to life imprisonment in Count 1. I therefor direct the life imprisonment in Count 2 to be held in abeyance."

The foregoing show that the trial magistrate took into account all relevant factors. There is nothing to show that the trial magistrate acted on the same wrong principles or overlooked some material factors. The record portrays a Judicial Officer who was a life to all the principles of sentencing and properly applied them.

There is no room for this court to interfere with the discretion of the trial magistrate. I will however deal with only one aspect of the sentence. The trial magistrate stated that the sentence of rape shall be held in abeyance. It is not clear why the learned trial magistrate state that but he however acted properly by imposing a separate sentence for each offence. The general rule is that sentences relating to offences committed in the same transaction should be served concurrently, see ***Peter Mbugua-v- Republic Court of Appeal Nairobi Appeal No.66 2015***. The appellant was sentenced to life imprisonment on each count. It was therefore possible for the sentences to be served concurrently.

I therefore set aside the order by the learned trial magistrate setting the sentence of rape in abeyance and order that the sentence imposed on the two counts shall run concurrently. **Section 37 of the Penal Code** provides:

" Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof: Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereto."

This section is further reinforced under **Section 14 of Criminal Procedure Code** which provides:

"1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences –

(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or (b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose. (3) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence."

Conclusion:

The appeal on the sentence is without merits and is dismissed.

Dated, signed and delivered at Chuka this 5th day of July 2021.

L. W. GITARI

JUDGE

The Judgment has been read out in open court, virtually, with appellant present from Meru Prison.

L.W. GITARI

JUDGE

5/7/2021