REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. E007 OF 2021

AZALI BAKARI BUNU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate Court at Lamu by Hon. T. A SITATI delivered on 23rd April 2020 and 27th April 2020 respectively in Criminal Case No. 58 of 2020)

CORAM: Hon. Justice Reuben Nyakundi

Appellant in Person

J. Mwangi for the DPP

JUDGEMENT

The Appellant, **Azali Bakari Bunu** was convicted and sentenced on his own plea of guilty in Lamu Principal Magistrate's Case No. 58 of 2020 for the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.

The particulars of the offence were that on 16th April 2020 at 0400hrs in India village of Langoni location, Lamu West sub county within Lamu county while armed with a dangerous weapon namely a panga robbed one **Nuru Abdullahi** of 13 packets of 1kg wheat floor and 1 packet of 2kg salt all valued at Ksh. 1040 and immediately after the time of such robbery, used actual violence against one **Daniel Kioko** a relative of **Nuru Abdullahi.**

The Accused was first presented to court on 21st April 2020. The charge was read out to him and he plead guilty. The court warned him of the seriousness of the charge and a guilty plea was entered. However, on 23rd April 2020 when the matter came up for sentencing, it was discovered that the accused person had used different names. The error was corrected via an amended charge sheet and the fresh charges were read out to the accused. He maintained his plea of guilty, even after being reminded that the offence carried the death penalty. On 27th April 2020, the Court sentenced the Appellant to 25 years imprisonment.

Aggrieved by the conviction and sentence, the accused by a Petition of Appeal dated 10th July 2020 sought to overturn the findings of the trial court on account of him being a first offender, his remorsefulness for the offence and the fact that he was the sole breadwinner of his family.

The Court is urged to allow the appeal, quash the conviction and set aside the sentence of the trial court.

Analysis and Determination

The role of this court in a first appeal such as this one is well settled. In **Pandya v R {1957} EA 336** it was held that a first appellate court is duty bound to appraise the evidence availed to the trial court afresh, analyze it and arrive at its own independent conclusion on the matter all the while keeping in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

Since the Appellant was convicted on his own plea of guilty, Section 348 of the Criminal Procedure Code limits his appeal to only against the extent or legality of the sentence, not the conviction. However, the rider here is that the guilty plea must have been unequivocal.

With regard to an unequivocal plea of guilty, more so where the accused person was unrepresented and facing a capital charge, my point of departure is the decision by Ngugi J in **Simon Gitau Kinene v Republic Criminal Appeal 9 of 2016 [2016] eKLR** where faced with such

an issue, he held**:**

> ***"19. Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported) this is what I said and I find it relevant here:***
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> > ***In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence. ….To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea."***

On the strength of the above, it was crucial that the Appellant be made to understand the gravity of the charges facing him. From the court record, when the Appellant was first presented to Court on 21st April 2020, before he took plea, the court informed him that the charge was capital in nature and carried the death penalty if convicted. The Appellant indicated that he understood. Once the charges were read out to him and explained in Kiswahili, he responded '*Ni Ukweli'* (it is true), which response was recorded verbatim. The court thereafter reminded the appellant that the offence carried the death penalty, to which the appellant responded, '*mashtaka ni kweli'* (the charges are true).

Upon the amendment of the charge sheet to correct the name of the accused, fresh charges were read out to him on the 23rd April 2020. The Appellant reiterated his guilty plea stating that '*mashtaka ni kweli'* (the charges are true). On this second occasion too, he was reminded of the gravity of the offence to which he replied *'nimekubali mashtaka'* (I have admitted the charges). The charge of guilty was thus entered against the accused person.

The facts of the offence were that on 16th April 2020 at 4.00 a.m. **Nuru Abdalla** was asleep in her room with her Sister **Issam** and a child Abdul Razak. **Daniel Kioko** was in the same house but in a different room. **Nuru Abdalla** was awakened by a noise in the house and when she went to investigate saw the figure of a stranger in the house. At first, she thought that it was her husband but upon calling out to him, the stranger shouted back at her to keep silent lest he cuts her up to pieces. She switched on her spotlight and shone it on the stranger. Seeing that he was armed with a panga, she raised an alarm by screaming loudly. Her screams prompted the stranger to commence fleeing while carrying of packets of wheat flour and salt. **Daniel Kioko** responded to the screams and bumped into the fleeing suspect who used his panga to slash **Daniel Kioko** on the head, left shoulder and arm. The neighbours who had been alerted by the screams by Nuru rushed to her house and pounced on and beat up the accused person thereby injuring him. He was overpowered and disarmed of his weapon. The stolen food packets were recovered. He was handed over to Lamu Police Station together with the recovered items. The recovered items were produced in court as follows:

1. ***P.EX.1-1 Panga marked as OB/06/16/4/2020.***
2. ***P.EX.2-(1-XIII)-13 packets of wheat flour each 1kg***
3. ***P.EX.3-2 kgs of salt.***

Additionally, **P.EX.4** a P3 Form for **Daniel Kioko** signed by Clinical Officer **Madi Sheyombe** was also produced.

When the above facts were read out to the accused person he confirmed their correctness and confirmed that the exhibits were indeed the recovered items. The court thus convicted the appellant on his own plea of guilty.

From the foregoing, I am satisfied that the guilty plea was unequivocal and thus the conviction was safe.

Regarding the sentence, the powers of the High Court in an appeal are found in **Section 354 of the Criminal Procedure Code** and include;

> ***(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—***
>
> ***(a) in an appeal from a conviction—***
>
> > ***(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or***
> >
> > ***(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or***
> >
> > ***(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;***
>
> ***(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.***

In passing the sentence against the Appellant, the learned trial magistrate considered the mitigating factors that the accused had pleaded

guilty, was remorseful and asked for leniency as well as the fact that he was terminally ill with HIV. However, the magistrate also outlined the aggravating factors that he had used violence on an unarmed civilian, the offence was premeditated and committed under cover of darkness to minimize chances of recognition and that the accused had previously been convicted twice; the first being in **Lamu Criminal Case 289 of 2017** where he had been charged with stealing and convicted of his own plea of guilty to one day community service. The other conviction was in **Lamu Criminal Case 351 of 2017** where for the offence of stealing he had been fined Ksh. 20,000/= or in default months imprisonment.

According to the trial magistrate, balancing between the safety of the community and the accused's right to penitence and a second chance, a departure from the death penalty based on the principles set out in **Francis Karioko Muruatetu v R {2017} eKLR** was justified. The Appellant was thus sentenced to a custodial sentence of 25 years imprisonment.

The grounds upon which an appeals Court can interfere with the sentence of a trial Court are well set out in the case of **Ogalo s/o Owuor v R {1950} EACA 270.** Additionally, regarding the role of the Court in reviewing sentences passed by the trial court on appeal, the Court of Appeal in **Benard Kimani Gacheru v Republic [2002] KLR** held:

> ***"…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."***

According to the Judiciary Sentencing Policy Guidelines, sentencing, must meet certain criteria including the age of the offender, the gravity of the offence, the character and record of the offender, remorsefulness of the offender, the possibility of reform, proportionality to the reason for detention and overall legitimate objective. When it comes to sentencing verdicts, I am of the school of thought that, there is need to balance between the rights of the offender and his or her possible rehabilitation, against the rights of the individuals who are victims of these crimes.

In this case, the appellant was convicted of robbing thirteen 1kg packets of wheat flour and one 2kg bag of salt worth a total of Ksh.1040/=. He used violence on one **Daniel Kioko** by cutting him on the head, left shoulder and arm. However, from the record, it is not clear the extent of the injuries suffered by Daniel Kioko as the P3 form is unfortunately not part of the record. While the violence and previous convictions were no doubt aggravating factors as rightly concluded by the trial magistrate, it is my view that though the trial magistrate was correct in departing from the death sentence, the 25 years imprisonment in this circumstance is manifestly excessive, it is not proportional to the offence.

I thus interfere with the sentence of 25 years imprisonment and substitute it with 15 years' imprisonment from the commencement date of 27th April 2021. Therefore, save for variation of sentence the appeal is dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The Appellant

2. Mr. Mwangi for DPP