



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 183 OF 2019**

**MESHECK WEKESA alias RAPHAEL ARUFANI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against the original Sentence in Criminal Case No. 422***

***of 2019 at the Chief Magistrates Court Bungoma by***

***Hon. J. Kingori – CM on 13/11/2019)***

**J U D G M E N T**

1. **Meshack Wekesa** alias **Raphael Arufani** jointly with another were charged with the offence of robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the Penal Code.
2. Particulars of the offence were that on the 22<sup>nd</sup> March 2019 at around 2100hrs at Bulondo, Bungoma South Sub-county, Bungoma County, jointly with others not before court robbed **Juliah Saina Wabwire** of Kshs 6,500/- cash, and at the time of such robbery used actual violence to the said **Juliah Saina Wabwire**.
3. In a nutshell, evidence adduced was that the complainant was at home with her children preparing supper when the appellant, a person well known to her with others invaded her house, demanded for money, assaulted her and stole from her Kshs 6500/- then dragged her outside the house before disappearing into a sugar plantation. The matter was reported to the local Administrators then the Police. Investigations were conducted and the appellant was arrested and charged.
4. Upon being placed on his defence the appellant denied having committed the offence and claimed to have been the complaint's man friend. That he opened a business (shop) for her and continued to support her.
5. The trial court considered evidence adduced, returned a verdict of guilty, convicted and sentenced the appellant to serve eight (8) years imprisonment.
6. Aggrieved, the appellant appeals against the sentence which he terms harsh and excessive.
7. He canvassed the appeal through written submissions. He urged that the sentence was harsh and pleaded with the court to be lenient and grant him the opportunity of serving the remaining term under probation supervision or any other non-custodial sentence.
8. The Respondent opposed the appeal. It urged that the court considered mitigating factors put forward by the appellant and was of the view that his reputation with villagers was not good, he was not remorseful, and, that all essentials of robbery with violence having been established he ought to have been sentenced to death, therefore, he was lucky to be sentenced to eight (8) years imprisonment.
9. This being a first appellate court, I must reconsider afresh what transpired at trial and reach my own conclusions.
10. An appellate court can only interfere with a sentence meted out by a lower court if it is excessive or if the court acted on wrong principles. In the case of **Bernard Kimani Gacheru Vs. 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.”*

11. Section 296 (2) of the Penal Code provides 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*

12. Ingredients of the offence as provided by statute were proved in the instant case. In passing the sentence, the trial court took into account not only the appellant’s mitigation but the gravity of the offence and the violence used during the act of robbery. Although the offence committed was punishable by death, when the sentence was passed, according to the principle that had been set by the case of ***Muruatetu vs. Republic (2017) eKLR***, the trial court was deemed to have discretion in meting out sentences. In the stated case the constitutionality of death penalty was questioned and found to be unconstitutional. I must however point out that ***Muruatetu & Another vs. Republic and Others (2021) eKLR*** gave clarification that the principle declaring the mandatory death sentence unconstitutional was only applicable to murder cases.

13. There was however no cross appeal by the Respondent for enhancement of sentence or a notice to that effect that would have prompted this court to act accordingly. (Also see ***Sammy Omboko & another vs. Republic (2019) eKLR***)

14. The upshot of the above is that the sentence of eight (8) years imprisonment meted out was neither harsh nor excessive, therefore, the appeal lacks merit, accordingly, it is dismissed.

15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

ODPP –Mr. Ayekha

Court Assistant - Esther