



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 110 OF 2020

JOHN WANELOBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the sentence by Hon. M Mukenyenye (PM) in original

criminal case NO. 6 of 2019 of the Magistrates Court at Webuye on 24th June, 2020)

JUDGMENT

1. The Appellant was charged with the offence of robbery with violence contrary to **section 292 of the Penal Code**. The particulars of the offence were that on the 5th October 2018 at Matisi area along Bungoma – Eldoret highway, Webuye West sub-county within Bungoma county, jointly with others not before court while armed with dangerous weapons namely panga and knife, they robbed **Jevons Simiyu Mukhongo** of his cash Kshs. 18,000/=, 1 blue bag, assorted clothes, 1 electric iron box, 1 football, 1 car screen; all valued at kshs. 64,000/= and immediately before or immediately after the time of such robbery wounded the said Jevons Simiyu Mukhongo by hitting him using a blunt object.

2. A summary of the prosecution case was that on the night of 5th October 2018, at around 10pm, the Complainant was involved in a car accident along Bungoma, Eldoret Highway. He was subsequently attacked by a number of people including the Appellant who robbed him of his property. That the Complainant saw some of his attackers because the vehicles head lights were on. The Complainant received treatment for his injuries and reported the matter to the police station the following day. While at the station, he saw and identified the Appellant as one of his attackers. The Appellant was subsequently charged.

3. The Appellant gave sworn testimony in his defence and denied any wrongdoing. He contended that he was on his way to make bricks when he was approached by two people who asked him to follow them to the police station. On arrival at the police station, he was informed of a complaint that he had attacked someone and he was subsequently charged with the offence herein. He did not call any witnesses.

4. Following a full trial, the Appellant and his co-accused were found guilty and convicted. The appellant was sentenced to 10 years imprisonment. Being aggrieved by both the conviction and sentence, he filed an appeal based on the grounds that; the trial was conducted in a manner that violated his rights and that the evidence produced was contradictory. Further that the verdict was based on extraneous factors.

5. When the matter came to court for hearing on the 16th of September 2021, the Appellant however withdrew his appeal on conviction and pleaded with the court to have the sentence reviewed downwards. In mitigation he said he had been serving sentence since 2020 and that before sentence he was in remand.

6. The state counsel M/S Ahindukha opposed the appeal and submitted that the prosecution had proved its case against the appellant beyond reasonable doubt to warrant his conviction. She relied on the case of **Mohammed Ali V Republic (2013) eKLR**, where the court pointed out the ingredients of a charge of robbery with violence. The state also submitted that the 10 years sentence imposed on the Appellant was illegal since the Penal Code provided a mandatory death sentence for the offence of robbery with violence. It was their contention however, that the sentence should be upheld due to failure on their part to warn the appellant on their intention to seek enhancement.

7. In Court, M/S Mukangu for the State did not oppose the withdrawal of appeal. Counsel however urged the court not to interfere with the 10 years sentence imposed as it was below that provided by the law.

8. The Appellant is only appealing against the sentence. It is therefore imperative that the court set out the circumstances under which it can interfere with sentence on appeal. 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 (See the Constitutional Court of South Africa in **S vs. Malgas 2001 (1) SACR 469 (SCA)**).

10. The Court of Appeal, on its part, 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.”

11. The upshot of the foregoing is that for the court to interfere with the sentencing of the trial court it must be satisfied that the court overlooked a material factor, or took into account some wrong material or acted on a wrong principle.

12. The Appellant herein did not submit on the reduction of sentence and neither did he file any mitigating factors for the same. Prosecution counsel on the other hand beseeched this court to uphold the 10 years sentence imposed on the Appellant since the offence of robbery with violence, for which he was convicted, carries a mandatory death sentence under Section 296(2) of the Penal Code. The said section provides inter-alia;

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.

13. The Court of Appeal in **Joseph Njuguna Mwaura V. R.** held that:

“A look at all the provision of the law that impose the death sentence shows that these are couched in mandatory terms using the word “shall”. It is not for the Judiciary to usurp the Mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purport to impose another sentence that has not been provided in law.”

14. In other words, the court was saying that courts have no jurisdiction to alter the death sentence and purport to impose another sentence that is not provided for in law. The essence of this is that the court should not alter sentences prescribed by the legislature in sentencing the accused persons as such sentences are straitjacket and should be respected.

15. Prosecution waived its right to seek enhancement of sentence due to their failure to adequately warn the appellant on the same.

16. In considering whether or not to interfere with the sentence imposed by the trial court, I have borrowed from the decision of J. Ngugi, J in **Benson Ochieng & Another vs. Republic [2018] eKLR** in which the judge categorized the set of factors to be considered in sentencing.

“Re-phrasing the Sentencing Guidelines, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:

a. Circumstances Surrounding the Commission of the Offence: The factors here include:

i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.

ii. Was the offender armed with a gun?

iii. Was the gun an assault weapon such as AK47?

iv. Did the offender use excessive, flagrant or gratuitous force?

v. Was the offender part of an organized gang?

vi. Were there multiple victims?

vii. Did the offender repeatedly assault or attack the same victim?

b. Circumstances Surrounding the Offender: The factors here include the following:

i. The criminal history of the offender: being a first offender is a mitigating factor;

- ii. *The remorse of the Applicant as expressed at the time of conviction;*
 - iii. *The remorse of the Applicant presently;*
 - iv. *Demonstrable evidence that the Applicant has reformed while in prison;*
 - v. *Demonstrable capacity for rehabilitation;*
 - vi. *Potential for re-integration with the community;*
 - vii. *The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.*
- c. *Circumstances Surrounding the Victim: The factors to be considered here include:*
- i. *The impact of the offence on the victims (if known or knowable);*
 - ii. *Whether the victim got injured, and if so the extent of the injury;*
 - iii. *Whether there were serious psychological effects on the victim;*
 - iv. *The views of the victim(s) regarding the appropriate sentence;*
 - v. *Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;*
 - vi. *Whether the victim was targeted because of the special public service they offer or their position in the public service; and*
 - vii. *Whether there has been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."*

17. In the present case, the attackers were armed with a panga, knife, and metal rod. In the process of the robbery PW1 sustained injuries and also lost property worth Kshs. 64,000/=. It is noted that the appellant has shown no remorse. The injuries sustained by PW1 were corroborated by a p3 form and hospital receipts as well as testimony from PW2, a doctor.

18. In my considered opinion, bearing in mind the circumstances of the offence, the sentence of 10 years imprisonment was lenient and unlawful. However, the appellant having not been warned of the possibility of enhancement of his sentence as a consequence of his appeal not succeeding, it would not be in the interest of justice for this court to enhance the sentence to the one prescribed by law. The upshot of the foregoing analysis is that the appeal is found to lack merit and is hereby dismissed. The sentence is upheld.

19. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1st DAY OF DECEMBER 2021

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAppellant in person

In the presence of.....State Counsel