REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 12 OF 2019

RICHARD MUTUKU MUTISYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the resentence of Hon. D. Orimba in Kangundo Senior Principal Magistrate's Court Criminal Case No. 1011 of 2004)

JUDGEMENT

1. The Appellant herein, **RICHARD MUTUKU MUTISYA** was jointly charged with his co-accused before the Senior Resident Magistrate's Court at Kangundo with two counts of Robbery with Violence, contrary to section 296(2) of the Penal Code and a 3rd count of assault occasioning actual bodily harm contrary to Section 251 of the Penal Code. He was found guilty and convicted in respect of count 1 and sentenced to death and acquitted under Section 215 of the Criminal Procedure Code in respect of count 2 and 3.

2. The Appellant lodged appeals to the both the high court and Court of Appeal which were dismissed. Following the Supreme Court's decision in Francis Karioko Muruatetu and Another V R (2017) Eklr the appellant filed an application seeking for a resentencing vide High Court Misc Cause 1/2019 whereupon it was directed that the file be taken back to the Kangundo Law courts for resentencing.

3. On 4.12. 2018, the resentencing proceedings were undertaken before Hon. D. Orimba SPM in which after hearing the mitigating circumstances and the pre-sentence report resentenced the appellant to eleven years' imprisonment in respect of count 1, eleven years imprisonment in respect of count 2 and one year imprisonment in respect of count 3.

4. The appellant is aggrieved by the sentence and has lodged this appeal in which he raised the following grounds as supplemented:

a) That the learned trial magistrate erred in law and fact by sentencing him in respect of count 2 and 3 and yet he was acquitted by the same court.

b) That he prayed that the sentence be consolidated so as to run concurrently instead of consecutively

c) That he prayed that he be given a non-custodial sentence.

d) That he be awarded remission under Section 46 of the prison Act CAP 90.

e) That the court do invoke section 333(2) of the Criminal Procedure Code as amended so that the period of time spent in custody is taken into account as part of the time served

5. According to the appellant this court ought to consider the time served in remand as per Section 333(2) of the Criminal Procedure Code Act.

6. On the part of the Respondent, it was submitted by Mr Machogu that the time served be considered.

7. I have considered the submissions made before me in this appeal. The singular issue to be determined is whether the court may make a review of the resentence by the trial court. It is important to point out that the appellant was found guilty and convicted in respect of count 1 and sentenced to death and acquitted under Section 215 of the Criminal Procedure Code in respect of count 2 and 3.

8. The East Africa Court of Appeal in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

"*The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."*

9. In the case of **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus:-

"*sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.*

10. I have also noted that the learned resentencing magistrate had not indicated when the sentence was to run but however took into account the time spent in remand. Section 333(2) of the Criminal Procedure Code provides 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.

11. It is therefore clear that the foregoing provision imposes an obligation on the trial court to take into account the period an accused has spent in remand in the determination of an appropriate sentence. Failure to comply with the foregoing provision renders the subsequent sentence a contravention of the law.

12. One of the grounds of appeal was on a point of law only as it was in respect of Section 333(2) of the Criminal Procedure Code and because the resentencing court did take into account the period the appellant spent in remand this ground fails.

13. One of the prayers sought by the appellant is that of remission and in this regard, I associate myself with the views of Korir, J in **Musa Wambani Makanda vs. Republic [2017] eKLR** that:

"The power to remit sentence as provided by Section 46 of the Prisons Act, Cap 90 is as follows:

"(1) *Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.*

Provided that in no case shall -

(i) any remission granted result in the release of a prisoner until he has served one calendar month;

(ii) any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.

(2) For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period-

(a) spent in hospital through his own fault; or

(b) while undergoing confinement as a punishment in a separate cell.

(4) A prisoner may be deprived of remission -

(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;

(b) where the Cabinet Secretary for the time being responsible for internal security considers that it is in the interests of public security or public order.

(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground.

14. The court in **Francis Opondo v Republic [2017] eKLR** stated that the power of remission lies with the prisons authorities and not the court. Therefore the appellant ought to address his request to the prisons authorities and this court has no jurisdiction to grant the appellants' request for remission.

15. The third limb of the issues for consideration is whether or not the sentence should be revised. **Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:**

"*Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

16. The trial magistrate is vested with wide discretion which an appellate court can only interfere with, if it occasioned a failure of justice, and justice will apply both ways to the victim and to the accused. In the instant appeal miscarriage of justice has occurred because the appellant was found guilty and convicted in respect of count 1 and sentenced to death and acquitted under Section 215 of the Criminal Procedure Code in respect of count 2 and 3, and this is enough for the court to warrant interference with the sentence of the trial court. I also note that the resentence of the trial court refers to one accused person and yet there were 2 accused persons. The appellant herein was the second accused in the trial court. There is no evidence whether or not the appellant's co accused lodged an appeal.

17. In that regard, the resentenced meted on the appellant in respect of count two and three are quashed and the resentence in respect of count one shall be upheld. For the avoidance of doubt I direct that the appellant is resentenced to 25 years imprisonment less the 14 years spent in remand custody thereby he shall serve 11 years from the date of resentencing.

18. In the result the appeal partly succeeds. The resentence on counts two and three are set aside. The resentence of **11 years** on count one from the 10/12/2019 is hereby upheld.

It is so ordered.

Dated and delivered at Machakos this 15th day of January, 2020.

D. K. Kemei

Judge