



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**HCCR APP NO. 137 OF 2019**

**EVANS OTIENO OMONDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

***(Being an appeal from the original conviction in Criminal Case No. 2197 of 2017 delivered on 5<sup>th</sup> August 2019 in the Chief Magistrate's Court at Eldoret by Hon. C. Obulutsa (Chief Magistrate)***

1. The appellant filed the present appeal against the sentence in the trial court in Eldoret Chief Magistrate's Court Criminal Case no. 2197 of 2017. The accused was charged with the offence of robbery with violence contrary to section 296(2) of the Penal code. The accused was also charged with handling of stolen goods contrary to section 322(1)(2) of the Penal Code.
2. The particulars of the offence are that on the 25<sup>th</sup> day of May 2017 at Kapseret area in Wareng' district within Uasin Gishu County, the accused person jointly with another not before the court while armed with dangerous weapons namely, panga, knife and robbed Michael Kipng'etich Rotich of his mobile phones, one Samsung Two LG V10 and cash kshs. 6,050/- all valued at kshs. 109050/- and at the time of the said robbery threatened to use actual violence to the said Michael Kipng'etich Rotich.
3. The accused was charged with an alternative charge of dishonestly retaining three mobile phones, one make Samsung and Two of make LG V10 knowing and having reason to believe them to be stolen goods.
4. The accused person was convicted of the offence of robbery with violence and sentenced to 10 years' imprisonment in the registered counts to run concurrently. He appeals against the conviction only for the offence of robbery with violence contrary to section 296(2) based on the grounds set out in the petition of dated 9<sup>th</sup> August 2020.
5. In the petition, the appellant seeks leave of the court to appeal by way of mitigation based on the following grounds;
  - 1) The appellant has no record of past conviction and thus a first offender
  - 2) The appellant is remorseful considering the mitigation tendered under section 216 of the CPC and seeks a chance to be sent back to the society
  - 3) The appellant is the sole bread winner of four siblings and a widowed mother who is also sickly
  - 4) The appellant is rehabilitated and reformed thus resourceful to society
  - 5) The appellant is a law abiding citizen and thus ready to comply with the rule of law
  - 6) The appellant is ready and willing to comply with all the terms and conditions the court shall deem fit to impose.
  - 7) He is a poor man and has no money for the appeal fee
6. The appellant contended that he was indeed found guilty and convicted and sentenced and must be punished so society can be protected. He is a first offender and did not plead guilty to the charges despite being found in possession of part of the stolen goods but he had only bought the goods from another person who was not before the court. He prays that the sentence be reduced to a lower sentence as he did not

know the property he was purchasing was stolen. The sentence imposed against him is harsh considering he is a first offender who never had any other criminal record in his life. The appellant is remorseful, repentant and reformed and is ready to be integrated back into society.

7. The appellant is only appealing against the sentence therefore it is imperative that the court set out the circumstances under which it can interfere with sentences on appeal. In S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

**“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”**

8. The 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. 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.”**

10. 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.

11. The appellant has cited the case of Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015 and submitted that if the mandatory death sentence was declared unconstitutional, the same impacts the minimum sentences and his case should benefit from the same. However, in the case of Simon Kipkurui Kimori v Republic [2019] eKLR the court held as follows;

**The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in S vs. Malgas 2001 (2) SA 1222 SCA 1235 paragraph 25 as follows:**

**“What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.”**

12. The essence of the decision is that the court should not merely follow the mandatory minimum sentences prescribed by the legislature in sentencing accused persons but should decide cases based on the circumstances.

13. As appreciated by the Supreme Court in Muruatetu Case (supra):

**“In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:**

**“Sentences are imposed to meet the following objectives:**

**1. Retribution: To punish the offender for his/her criminal conduct in a just manner.**

**2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**

**3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**

*4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.*

*5. Community protection: To protect the community by incapacitating the offender.*

*6. Denunciation: To communicate the community's condemnation of the criminal conduct."*

**The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."**

14. The appellant was not granted bond and was in custody from 2<sup>nd</sup> June 2017. 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.

15. In my considered opinion, bearing in mind the circumstances of the offence as well as the appellant's defence, I find that the only reason to interfere with the sentence would be to consider the time spent in remand.

Consequently the appeal fails. The appellant's sentence is however ordered to run from the time he was put in remand, on 29<sup>th</sup> of May 2017.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 8<sup>th</sup> day of SEPT. 2020**

**L. A. ACHODE**

**JUDGE**