REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 88 OF 2019

GEORGE MATUI CHESANG.....1ST APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the sentence delivered by Hon. L.Kiniale, PM, on 19/6/2019 in Criminal Case No. 253 of 2017 in the Principal Magistrate's Court at Sirisia, Republic v George Matui Chesang, following a remittal order of the High Court (Sitati, J) directing a re-hearing on sentence dated 13/5/2013 in Bungoma High Court, criminal Appeal No. 124 of 2017)

JUDGEMENT ON SENTENCE

INTRODUCTION

1. The appellant has appealed against his sentence of death in respect of the offence robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya, following a re-hearing on sentence in accordance with the guidelines of the Supreme Court that are set out in *Francis Muruatetu & Another v Republic [2017] e-KLR.*

2. The state has supported the sentence.

3. The appellant has in his amended petition of appeal raised three (3) grounds in this court pursuant to the provisions of section 350 (V) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

The ground 1 of the appeal and the jurisdiction of this court.

4. In ground 1 the appellant has faulted the trial court in law and fact in failing to make a finding that the facts tendered and proved in court clearly indicated that that this was a case of assault contrary to section 251 of the Penal Code (Cap. 63) Laws of Kenya. He has submitted that stealing was not proved and the trial court should have invoked and made a finding under section 179 of the Criminal Procedure Code (Cap 75) Laws of Kenya. The provisions of this section are in relation to where a minor and cognate offence, which is not charged, but is proved in the course of the trial. The accused may be convicted of the minor and cognate offence, although he was not charged with the said minor and cognate offence.

5. The respondent has submitted that the appellant was positively recognized by the complainant as one of the robbers, since the offence was committed during broad day light. Furthermore, the complainant knew the appellant before the commission of this offence.

6. I have considered this ground of appeal and the submissions of the parties. As result, I find that the parties have overlooked the terms of the re-hearing on sentence. For the sake of clarity and doubt, I find it necessary to refer to the order of the High Court (Sitati,J) remitting the matter to the magisterial court for a re-hearing on sentence.

7. The remittal order of the High Court (Sitati,J) in Bungoma High Court in Criminal Appeal No. 124 OF 2017, George Matui Chesang v. Republic, was in the following terms:

> "16 In the light of all the above, I make the following final orders in this appeal: -
>
> a**)** The appellant's appeal on conviction be and is hereby dismissed.
>
> b) The appellant's appeal on sentence is allowed to the extent that the death sentence is set aside to pave way for sentence re-hearing before the appellant is sentenced by the trial court.

c) the case be and is hereby remitted to the Principal Magistrate's Court at Sirisia Law Courts for sentence re-hearing as soon as it is practicable to do so.

d) Until the appellant is produced before the Principal Magistrate, Sirisia Law Courts, he shall remain in custody.

17. It is so ordered."

8. It is clear from the above remittal order that the trial court was only allowed to re-sentence the appellant. And that is what the trial court did. After sentencing him to death, the appellant appealed against that sentence of death to this court.

9. Furthermore, the instant submissions of the parties before me are challenging the conviction of the appellant. This court is *functus officio* and has no jurisdiction to entertain the submissions in so far as they are challenging the conviction of the appellant. The reason being that that court (Sitati, J) differently constituted had already dismissed the appellant's appeal on conviction on 13/05/2013. It is settled law that the consent of the parties by way of submissions cannot confer jurisdiction upon this court. Jurisdiction can only be conferred by statute or the constitution and not by way of the consent of the parties.

10. In ground 2 the appellant has faulted both the High Court and the lower court in failing to find that it was impossible for the appellant to attack and rob the complainant, who was his neighbour. This ground and the submission based thereon are challenging the conviction of the appellant. The instant court has found that it is *functus officio* in relation to the issue of conviction. It therefore follows that it is moot or academic to consider this ground and the submission in relation to ground 2. I therefore dismiss this ground on the ground of mootness.

11. In the premise, the submissions of the parties in relation to the conviction of the appellant are irrelevant and are hereby dismissed.

Appeal Against sentence.

12. In ground 3 the appellant has faulted the trial court in law and fact in imposing the death penalty, which is unconstitutional, inhuman, manifestly excessive and degrading.

13. The Supreme Court in *Francis Muruatetu & Another v Republic, supra,* did not declare the death penalty unconstitutional. All that court did was to free the hands of the courts from being bound to impose the death penalty upon conviction for murder contrary to section 204 of the Penal Code. Following the decision in that case, the courts have extended that freedom from being bound by the statutory minimum sentences to non-murder cases. In an appropriate case, a court may still impose the statutory minimum sentence. It was not abolished by the Supreme Court. It therefore follows that the sentence of death is still constitutional.

14. This is a first appeal and I am bound to consider whether or the death sentence was merited or not. In doing so, I have to bear in mind that sentencing is a matter for the discretion of the trial court. This court may interfere with the discretion of the lower court if the following factors are present. First, where it is shown that the trial court has taken into account an irrelevant factor or has ignored to take into account a relevant factor or matter. Second, where it is shown that the sentence imposed is so manifestly excessive or low to the extent that it amounts to a failure of justice.

15. The prosecution urged the court to take into account the following matters. First, the serious injuries and pain that was inflicted upon the complainant. Second, this was a well-orchestrated robbery that was committed during broad day light. Third, the appellant was part of a criminal gang that was notoriously known for terrorizing the entire Mt. Elgon community. Fourth, it urged the court to take judicial notice that the actions of the criminal gang required intervention of the National Government by ordering a state of emergency in Mt. Elgon. He therefore urged the court to impose a stiff sentence as a deterrent to others who were not arrested and that the befitting sentence was one of death which had to be imposed upon the appellant.

16. The prosecutor also informed the court that the appellant showed no remorse and that imposing any other sentence would be a mockery to the national security enforcement agencies, the public at large and the complainant who was subjected to untold suffering at the mercy of the appellant and his gang.

17. The appellant's mitigation was as follows. He told the court that he was an orphan with siblings who depended upon him. He also told the court that he had two wives. And that the eldest wife had ran away and got married elsewhere. He further told the court that the eldest daughter was in class 8 and due to the absence of the parents she got married. Finally, he told the court that while in prison he got involved in Bible studies and had enrolled in class.

18. In sentencing the appellant, the trial court took into account the following matters. First, the appellant was an orphan who had siblings that were depended upon him. He had two wives. The eldest wife ran away and got married elsewhere. His first born daughter was in class 8 and due to the absence of her parents, she got married.

19. Secondly, the appellant while in prison got himself involved in Bible studies and he also enrolled in class.

20. Thirdly, he pleaded for lenience.

21. Fourth, the court took into account the circumstances under which the offence was committed, which were as follows. First the appellant with others who were not in court while armed with pangas assaulted the complainant and robbed him in broad day light. The complainant was well known to the appellant and his accomplices. The court then stated that: "*I see no new reason to interfere with the death penalty and hereby proceed to sentence the accused to death by hanging*."

22. It is clear from the factors which the court took into account that it never bore in mind that the appellant was a first offender, which is a relevant and mitigating factor. The court also did not take into account that while in prison, the appellant had undertaken Bible studies and had enrolled in class. This is a clear indication that the appellant was in the process of reforming himself.

24. The court also did not take into account that the appellant had been in prison custody since 19/6/2019, which translates to about one year and six months; which period the trial court was mandatorily required to take into account in terms of section 333 (2) of the Criminal Procedure Code.

24. The court should have explicitly ignored what the prosecutor presented for sentencing purposes except for the following. That the appellant was a first offender. The attack upon the complainant was brutal and that the appellant and his accomplices inflicted serious injuries upon the complainant.

25. The rest of what he urged the court to take into account were uncalled for and were not part of the role of what the prosecutor is required to do at the pre-sentencing stage. Matters such as that the appellant deserved a death penalty, that the appellant was part of a criminal gang that was notoriously terrorizing the entire Mt. Elgon, that he deserved a deterrent sentence and that any other sentence would be a mockery to the national security agencies, public at large and the complainant, were irrelevant and were outside the mandate of the prosecutor. Additionally, they were very prejudicial and inadmissible. See Shiani ***v*** *Republic [1972] EA* 55**.** Additionally, the trial court did not explicitly ignore the prejudicial submissions of the prosecutor that were made during the pre-sentencing hearing.

26. In the premises, I find that the trial court erred in law in finding that "I see no new reason to interfere with the death penalty and hereby proceed to sentence the accused to death by hanging." In the circumstances, I am entitled to interfere with the sentencing discretion of the trial court by setting aside the death penalty and in its place I hereby impose a sentence of thirty-five (35) years' imprisonment, which sentence will begin to run from the date of this judgement.

Judgment signed, dated and delivered at Narok this 6th day of October, 2020 through video link conference in the presence of the appellant and Mr. Robert Oyiembo for the Respondent.

J. M. BWONWONG'A.

J U D G E

6/10/2020