



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 63 & 65 OF 2019**

**JOSEPH WEKESA WANJALA.....1<sup>ST</sup> APPELLANT**

**FRED WAMALWA WEKESA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against sentence delivered by Hon. D. O. Onyango, SPM, on 22/5/19 in Criminal Case No. 1108 of 201 in the Senior Principal Magistrate's Court at Kimilili, Republic v.Fred Wamalwa Wekesa & Joseph Wekesa Wanjala)***

**JUDGEMENT ON SENTENCE**

1. The appellants have appealed against their sentence of twenty-five years' imprisonment in respect of the offence robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya.
2. The imposition of the above sentence follows a remittal order of this court (Sitati, J) in Bungoma High Court Criminal Appeal Nos. 34 and 35 of 2017, in which her ladyship confirmed the conviction of both appellants on a charge of capital robbery; but proceeded to set aside the death sentence. Her ladyship then proceeded to make the remittal order in the following terms: "2. *The appeal on sentence is allowed to the extent that the sentence of death is set aside pending re-hearing of sentence.*"
3. In this court the state has supported the sentence.
4. The appellants and the respondent filed their written submissions.
5. For convenience, I will determine the appeal of each appellant separately.
6. It is important to point out that the mitigation of both appellants is not typed and is in the handwritten notes of the learned Senior Principal Magistrate.

**Appeal of the first Appellant- Joseph Wekesa Wanjala**

7. The first appellant told the trial court in his re-sentencing hearing in mitigation that his parents died in 2007. And that he is the sole bread winner of his family. He also told the court that he has children and that his family is suffering.
8. In this court, the appellant has repeated the same matters in his mitigation, except for the following. He told the court that when his wife heard that he had been sentenced death by the trial court, she ran away from their matrimonial home; leaving their children with his aged mother. His mother and the children are suffering. He also has told this court due to the floods, his mother and children were moved to school where they are now living. He also has added that his children do not know how to wear masks. He therefore urged the court to release him so that he can join others in nation building.
9. The prosecution in its written submissions dated 26/05/2020 addressed the court in respect of matters that were in respect of the conviction of the appellant, which I find to be irrelevant. I have therefore ignored them. As regards mitigation, the prosecution has adopted the submission they made when the first appellant was convicted by the trial court. Its submission was that this appellant was a first offender.
10. In re-sentencing the first appellant, the trial court stated that it had considered the mitigation of the appellant and the nature of the offence. It then concluded that the appellant deserved a stiff sentence. As a result, it imposed a twenty-five years' imprisonment.
11. I have re-assessed the sentence imposed. I have found that the trial ignored the period the first appellant had been in custody. He has

been in custody since 26/6/2015, which translates to over five years to date. In the circumstances, I hereby give credit to the appellant for the period he has been in custody as required by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya. I am therefore entitled to interfere with the sentencing discretion of the trial court due this error that it committed.

12. After taking into account the circumstances of the case including the mitigating and aggravating factors, I hereby reduce the sentence to fifteen years' imprisonment, which will begin to run from the date of this judgement.

**The appeal of the second appellant- Fred Wamalwa Wekesa.**

13. This appellant in his oral submissions in this court, submitted by adopting as his mitigation what he has set out in his petition of appeal to this court. In his petition this appellant has stated that he left behind children of tender years'; who need the basic requirements of life namely education, food, clothes, security and health. He also has stated that his long term incarceration will lead to poverty, illiteracy to his children and poor morals.

14. He has therefore urged the court to reduce his sentence.

15. The prosecution stated that the second appellant like the first appellant was a first offender.

16. The trial court in its sentencing notes gave the same reasons as it did for the first appellant in sentencing this appellant. It then proceeded to impose a sentence of twenty-five years' imprisonment.

17. The trial court committed the same error in sentencing the second appellant to a term of twenty-five years' imprisonment.

18. After taking into account the circumstances of the case including the mitigating and aggravating factors, I hereby reduce the sentence to fifteen years' imprisonment, which will begin to run from the date of this judgement.

Judgment signed, dated and delivered at Narok this 6<sup>th</sup> day of October, 2020 through vide 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**