REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.16 OF 2019

PAUL ODHIAMBO ASANYA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Paul Odhiambo Asanya, was convicted of the charge of **robbery with violence** contrary to **Section 292(2)** of the **Penal Code.** The trial court held that the Prosecution had established, to the required standard of proof, that the Applicant on 17th December 2010, at Mbagathi Road in Langata within Nairobi County, jointly with others not before court, robbed Maxison Mutua (the Complainant) of his properties listed in the charge sheet, all valued at Ksh 45,600/- and in the course of the robbery wounded the complainant. The Appellant was sentenced to suffer death in a manner provided by the law. His appeals to both the High Court and the Court of Appeal were dismissed. That would have been the end of the matter but for the window opened by the Supreme Court's decision of **Francis Kariuko Muruatetu vs Republic [2017] eKLR.** In the decision, the Supreme Court declared mandatory death sentences unconstitutional. The Supreme Court further directed those affected by such sentences to present their mitigations before the trial court with a view to being resentenced.

The Applicant took advantage of this direction and presented his mitigation in a resentence hearing before the **Nairobi Chief Magistrate's Court Resentencing Misc. Application No.18 of 2018 Paul Odhiambo Asanya vs Republic.** The Applicant upon presenting his mitigation pleaded with the court to find that the period that he had been in lawful custody at the time (eight years) was sufficient punishment for the crime that he had committed. At the material part of her ruling, the trial magistrate held thus:

> *"19.Odhiambo the Applicant in this case in company of another not only stole Maxison's property, he was also brutally violent towards the victim. It was not mere assault. They beat him with stones and other blunt objects and left him for death despite pleas for assistance. The doctor classified the injuries sustained by the victim as grievous harm.*
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> *20. The Court has no doubt having heard the victim that the victim still suffers not only physically but psychologically over the violence Odhiambo meted out. Odhiambo's conduct was not simple robbery which at most attracts 14 years imprisonment but violent robbery where the maximum sentence is death.*
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> ...
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> *22. Having considered the brutality the victim suffered in Odhiambo's hands, the court is not persuaded that 8 years in prison is not retributive enough as the Applicant pleaded to warrant his sentence being reduced to the time served."*

The Trial Magistrate (Hon. T. N. Sinkiyian-Senior Resident Magistrate) then set aside the death sentence that was imposed on the Applicant and substituted it with a sentence of twenty-five (25) years imprisonment with effect from 2nd August 2011 when the Applicant was convicted.

Aggrieved by the sentence, the Applicant made application before this Court for review of the re-sentence essentially on the grounds that the period of approximately one year that he was in remand custody prior to his conviction was not taken into account and secondly, that this Court should relook into the custodial sentence that was meted on him. What the Applicant is seeking from this Court is interference of the sentencing discretion of the trial court. A resentence discretion is a sentence discretion just like any other sentence discretion. In **Bernard Kimani Gacheru vs Republic [2002] eKLR** the Court of Appeal stated thus:

> *"It is now settled law, following several authorities by this Court and 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 Appellant court will not easily interfere with the sentence unless their sentence is manifestly excessive in the circumstance of the case or that the trial*

court overlooked some material facts or took into account some wrong material or acted on the 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 sentences unless anyone of the matters already stated is shown to exist."

In the present application, this court did not discern any breach of principle or abuse of discretion to warrant this court's interfering with the exercise of sentencing discretion by the trial court. In accordance with the Supreme Court's decision in **Muruatetu (supra)**, the Trial Magistrate took into consideration all the relevant factors including severity of the offence, the effect the crime had on the victim and the mitigation of the Applicant. The custodial sentence meted on the Applicant was neither harsh nor excessive. Indeed, as correctly observed by the Trial Magistrate, the victim was severely injured to the extent that the doctor assessed the degree of the injury he sustained to be grievous harm.

As regards to the Applicant's complaint the trial court did not take into account the period the applicant was in remand custody prior to his conviction, upon evaluating the entire facts of the case, this court formed the considered opinion that that period was in fact taken into account.

The upshot of the above reasons is that the Applicant's application lacks merit and it is hereby dismissed.

It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF OCTOBER 2020

HON L. KIMARU

JUDGE