



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NUMBER 121 OF 2018

PAUL SOBUTIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Original Conviction and Sentence in Eldoret Chief Magistrate's Court Criminal Case Number 972 of 2013 delivered on 23rd November 2018 by Hon. Obulutsa (Chief Magistrate)

RULING

1. The appellant was charged with **Robbery with Violence Contrary to Section 296 (2) of the Penal Code**. It was alleged that on 11th March 2013 at Eldoret Township Eldoret West District within Rift Valley Province jointly with others not before court he robbed Shadrack Kipchoge of cash Kshs. 1,500/=, wallet, all valued at Kshs. 1,650/= and at the time of the alleged robbery used actual violence to the said Shadrack Kipchoge.
2. On 24th April, 2014 the learned trial magistrate found him guilty as charged, convicted him and sentenced him to death accordingly.
3. The appellant filed an appeal, HCRA 72 of 2014 now reported as in **Paul Sobutia vs Republic [2018] eKLR** against the conviction and sentence. That appeal was heard and determined by *Mrima J.* The conviction was sustained, and in following *Muruatetu* the learned Judge remitted to the file to the trial court, the Chief Magistrate's Court at Eldoret for sentence rehearing. This gave the appellant the opportunity to exercise his full rights of appeal on the sentence.
4. On 23rd November 2018 the learned Chief Magistrate sentenced the appellant to twenty (20) years imprisonment.
5. Aggrieved by the new sentence he filed this appeal on 16th December 2018 on the following grounds;
 1. *THAT the learned magistrate erred in both law and fact by failing to put into consideration the provision of Section 333 (1) (2) of the Criminal Procedure Code Cap 75 Laws of Kenya.*
 2. *THAT the learned magistrate erred in both law and fact by sentencing the appellant to twenty years without noting that the appellant was not given an opportunity to address the court at the closure of the prosecution case.*
 3. *THAT the appellant herein was not given the opportunity to enjoy the fruit of fair trial by conducting an irregular trial and proceedings.*
 4. *THAT the trial learned magistrate failed to note that the evidence was not due to Section 107 and 108 of the Evidence Act.*
 5. *THAT the trial learned magistrate erred in law by failing to appreciate that Section 311, 79 of the Criminal Procedure Code and 165 of the Evidence Act was not complied with.*
 6. *THAT the trial learned magistrate erred grossly by sentencing the appellant to twenty years without noting that Section 307 of the Criminal Procedure Code was not complied with.*
6. At the hearing of the appeal he submitted that his death sentence was reduced to twenty (20) years imprisonment. However, by that time he had been on death row for over six (6) years. He faulted the sentencing court for not taking into consideration the period of time he had already spent in prison while on death row, pending he hearing and determination of his appeal. He submitted that this was in violation of

Section 333(1) of the Criminal Procedure Code. He urged this court to allow his application and direct that the 20-year imprisonment sentence runs from 2013, the date he was first arrested.

7. Mr. Masisa prosecuting counsel submitted that prosecution had no objection to the appellant's application, leaving it to the discretion of the court.

8. The issue is whether this application is merited.

9. I have carefully considered the record. It indicates that following the judgment of the High Court the matter was placed before the Chief Magistrate on 13th November, 2018. The appellant addressed the court. His plea was that the court, in resentencing him, to take into consideration the period he had been in prison custody.

10. The court record of 23rd November 2018 by the sentencing court states;

"The accused had been sentenced to death, and the court on appeal (sic) 20 years' imprisonment. Right of Appeal 14 days."

11. There is no mention as to whether the court took into consideration the appellant's mitigation. Neither is there any mention that the court took into consideration the period of time the appellant had been in custody.

12. The provisions of **Section 333 of the Criminal Procedure Code are couched in mandatory terms.**

"S. 333. Warrant in case of sentence of imprisonment

(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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. (emphasis added)

13. That means that the court has not only to take that into consideration but also to indicate that it has taken into consideration the period already spent in custody. In my view failure to do so calls for the conclusion that that was not done.

14. The appellant was arrested on 11th March 2013 and arraigned in court on 12th March 2013. He remained in custody till the end of his trial. Upon his conviction and sentence he remained in prison custody. By dint of the sentence rehearing, the appellant was facing a new sentence.

15. At **Paragraph 111** of its judgment in **Muruatetu** the Supreme Court stated:

"It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. (emphasis mine)."

16. The court was expected to conduct a sentence hearing but it is evident from the record that in meting out the sentence the court did not make reference to the guidelines in **Muruatetu** or the Sentencing Policy Guidelines, nor did it seek a pre-sentence report. There were no submissions by the prosecution.

17. The appellant was getting a brand new chance at a brand new sentence hence the proviso the **Section 333 of the Criminal Procedure Code** came into full view and ought to have been applied.

18. In his submissions he lay out the following "mitigation grounds of appeal"

1. THAT your Honour, I am a first offender and therefore pray for leniency as I have learned a lesson.

2. THAT your Honour, that I am now 40 years including the jail term awarded against me will have negative impact in my life hence I will have exhausted all my youthful in lawfully custody.

3. THAT I have learned to adhere by the law and I promise to be the community teacher and Kenya at large.

4. THAT I was the sole breadwinner of my younger family that depended on me in terms of their survival and basic needs.

5. THAT I pray that I be also awarded ¾ of the remission as any other prisoner who enjoys the same.

6. THAT I also pray that may the Hon. Court allow to lessen my sentence to a lesser sentence by reducing the sentence and awarding me the remission.

These he went on to expound, submitting that, given a chance he would be a useful member of the society having reformed while in prison custody, that his family needed him, and especially his children as his wife was suffering from mental illness.

Finally, that he too deserved remission on his sentence, from this he relied on **Bernard Wanjala (NRB) Criminal Case Number 313 of 2018.**

19. I have carefully considered the mitigation, and submissions. First, on the issue of remission for convicts of the offence of Robbery with Violence persons, that issue has been settled by this court, which declared the provisions of the **Prisons Act** that deny these prisoners their remission to be unconstitutional.

20. On the issue of the sentence, going by **Section 333 of the Criminal Procedure Code** it is clear that the appellant was indeed in custody before the new sentence. It was imperative upon the sentencing court to look into and apply the relevant law.

21. Regarding the other grounds of appeal, these were grounds dealt with in the appeal against conviction and sentence. They cannot be re-litigated in this appeal.

22. In the upshot the appeal regarding the sentence succeeds. I substitute the sentencing court's order of 23rd November, 2018 to read;

“The appellant is sentenced to serve twenty (20) years imprisonment to run from 11th March 2013.”

Dated, signed and delivered virtually this 9th November, 2020.

Mumbua T. Matheka

Judge

In the presence of:

CA Koech

Appellant

N/A for Prosecution though notified