REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 119 OF 2018

Consolidated With

CRIMINAL APPEAL NO. 122 OF 2018

THOMAS MUTINDA MUNEE.....1st APPELLANT

EUSTACE NDIRANGU KIBABA.....2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Sentence of Honourable Irene Kahuya (Senior Resident Magistrate in Machakos Chief Magistrate's Court Criminal Case No. 2506 of 2001 delivered on 13/11/2018)

JUDGEMENT

1. Both Appellants herein **THOMAS MUTINDA MUNEE** and **EUSTACE NDIRANGU KIBABA** had been charged, convicted and sentenced to death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code following a trial before the Chief Magistrate's Court at Machakos in **CM's Court Criminal Case No.2506 of 2001**. The particulars of the charge were that on the 13th day of October, 2001 at Mlolongo Trading Centre along Mombasa Road in Athi River jointly with others not before the court and while armed with pistols robbed **WILLY WAINAINA KAROKI** of motor vehicle registration number KAN 620 R Isuzu FNR valued at Kshs.5,600,000/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said **WILLY WAINAINA KAROKI.**

2. The Appellants later lodged a first appeal to the High Court which was dismissed. A second Appeal to the Court of Appeal was also dismissed.

3. The Appellants later lodged a petition for re-sentencing following the **Supreme Court's decision in Francis Karioki Muruatetu & Others =Vs= Republic [2017] eKLR**. The said petitions were duly heard and the matter was remitted to the trial court for the purposes of re-sentencing hearing. The trial court duly considered the mitigations by the Appellants herein and on the 13/11/2018 proceeded to re-sentence each of them to three (3) years imprisonment. This then precipitated the present appeal whereby the Appellants preferred the following grounds of appeal namely:-

> ***(i) That the learned trial magistrate disregarded Section 333(2) of the Criminal Procedure Code while re-sentencing the Appellants to serve three (3) years imprisonment.***
>
> ***(ii) That the learned trial magistrate disregarded the 17 years the Appellants have been in custody and hence denied them a chance to put into practice and earn a living from the skills acquired in prison.***
>
> ***(iii) That the Appellants having been arrested while young then the 17 years spent in custody should be enough punishment.***
>
> ***(iv) That the sentence should start from the date of arrest.***

4. The appeal was canvassed by way of oral submissions. The first Appellant submitted that the sentence should start from the date of arrest namely 30/10/2001. He went on to add that he has been in custody for the last 18 years and has undergone several courses in prison which could now come handy in the society upon his release. He also urged this court to consider the pre-sentence report. He submitted that he is entitled to remission under Section 46 of the Prisons Act.

5. The 2nd Appellant submitted that the period in custody was not considered by the trial court. He sought to be considered for remission and further that he is a first offender. He finally submitted that he has fully underwent rehabilitation in prison.

6. Mr. Machogu, learned counsel for the Respondent submitted that the trial magistrate made a ruling in which she did not specify as to when the sentence was to commence. He submitted that ordinarily the sentence should start from the date of conviction. As regards the 1st Appellant, learned counsel submitted that the probation officers report as well as the prison authorities is favourable towards an order of release since the 1st Appellant is the brain child of a drug awareness programme. It was the submission of learned counsel that a non-custodial sentence be metted out against the 1st Appellant. However as regards the 2nd Appellant, learned counsel objected to a non-custodial sentence on the grounds that he was not a first offender having been sentenced to imprisonment for three years for the offence of stealing.

7. I have considered all the submissions herein. It is not in dispute that the Appellants appeal is only on sentence. After a re-sentencing hearing by the lower court following the decision of the supreme court in **Francis Karioki Muruatetu and Another =Vs= Republic [2017] eKLR** the Appellants herein were each re-sentenced to serve three years imprisonment. They have now appealed to this court against the said sentences and have urged this court to interfere with the same. Indeed the Appellate Court is guided by certain principles regarding whether to interfere with sentences imposed by a trial court as was held by the court of Appeal in ***Bernard Kimani Gacheru =Vs= Republic*** as follows:-

> "***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 could 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 wrong principles. Even if the sentence is heavy and that 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 any one of the matters already stated is shown to exist."***

8. It is noted that the trial court received some reports by the Probation Officer regarding the Appellants and which reports appear to be favourable to both Appellants. The said reports revealed that the Appellants had undergone rehabilitation while in prison and were the ones spearheading anti drugs and crime awareness programme in prison. All these factors were duly considered by the trial magistrate when she re-sentenced the Appellants to serve three (3) years imprisonment. However, a most glaring omission by the Learned trial magistrate is that she did not specify as to when the sentences were to commence. In principle, sentences ought to commence from the date of conviction. The Appellants in the initial trial were convicted and sentenced on the 28/05/2002. Hence during the resentencing, the trial magistrate went into error by failing to state the time the sentences were to run. I can discern that the trial magistrate had intended to add three more years imprisonment to the period already in custody by the Appellants. This is where the learned trial magistrate fell into error and which therefore calls upon this court to interfere with the sentence which in normal parlance hangs without a definite date of commencement.

9. The reports by the Probation Officer regarding the two Appellants appear to be favourable. There is nothing adverse about the Appellants that has been pointed out. Again there is evidence from the Prison Department that the Appellants have fully underwent rehabilitation and the two are said to be the brain child of an anti-drug and crime awareness programme while in prison custody. It is also noted that the Appellants have been in prison custody since the 30/10/2001 to date making a total of about 18 years. The Appellants death sentences were later commuted to life imprisonment by the His Excellency the President under the Power of Mercy conferred under Article 133 of the Constitution. Again the circumstances in which the offence was committed merits mention. It transpired that the Appellants and the Complainant had conspired to fake a hijacking incident within Mlolongo town. They had the vehicle commandeered towards Langata while the crew were held behind the driver's seat and while on the way, they were stopped by traffic police who demanded to see the driver's licence. It was then that the lorry crew drew the attention of the police and which thereby led to the arrest of the Appellants. Hence the circumstances in which the offence was committed revealed that there were no injuries inflicted on the victim and the stolen lorry was recovered while intact. As the Appellants have already served 18 years in prison, the said period should be taken to be sufficient retribution on their part. They have atoned their sins somewhat and that they should now be given a chance to rejoin the society and embark on nation building as they have been fully rehabilitated.

10. Before coming to the determination of this matter, I need to address the issue raised by Learned Counsel for the Respondent which is that the 2nd Appellant has a previous conviction for an offence of stealing. The 2nd Appellant has countered this by claiming that he had been acquitted of the said charge. However none of the parties availed any documentary evidence. As the 2nd Appellant has vehemently denied the Respondent's assertions. I find that it was incumbent upon the Respondent to avail the requisite evidence. This was not availed. It is noted that the Appellants had been jointly charged with an offence of robbery with violence contrary to Section 296(2) of the Penal Code and both convicted. They have both served their sentences now running into 18 years. It would not be fair to allow the 1st Appellant's appeal and reject that of the 2nd Appellant as suggested by Learned Counsel for the Respondent. If the Respondent's submissions in that regard is to be accepted then it will amount to discriminating the 2nd Appellant. In any event the reports by the Probation Officer presented during the re-sentencing hearing are quite favourable. There was nothing adverse against the 2nd Appellant. Further the 2nd Appellant is entitled to equal benefit of the laws of the land.

11. In the result it is the finding of this court that the Appeal by both Appellants herein has merit. The same is allowed to the extent that the sentence imposed by the trial court during re-sentencing hearing is hereby set aside and substituted with an order that the sentence is reduced to the period already served. The Appellants are hereby set free forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 2nd day of May, 2019.

D. K. KEMEI

JUDGE