REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 113 OF 2018

MUTHANGYA MUTEMBEI...APPLICANT

VERSUS

REPUBLIC...RESPONDENT

RULING

1. The applicant was charged and convicted with four counts of the offence of robbery with violence and one count of the offence of bar breaking at the Machakos **Chief Magistrate's court in Criminal Case number 428 of 2000**. He was sentenced to death and appealed to the High court and court of Appeal which appeal was dismissed by both courts and his conviction and sentence upheld. The same was later commuted to life sentence. He was resentenced by the magistrates court to 30 years imprisonment and has appealed to this court and averred that the court did not take into account section 333(2) of the Criminal Procedure Code.

2. The appeal was disposed of by way of written submissions. The appellant submitted that the sentence ought to run concurrently because the offenses were committed in one transaction. He cited the case of **Njoka v Republic (2001) KLR 175**. He also submitted that the court ought to consider mitigating circumstances and cited the case of **Francis Karioko Muruatetu & Another v R (2017) eKLR.**

3. Mr. Cliff Machogu, prosecution Counsel, conceded to the appeal and submitted that the 30 years imprisonment was excessive and suggested that the same ought to be reduced. He cited the case of **Michael Nasiai Sabatia v R (2017) eKLR**.

4. The issue for determination is whether the court may review the sentence passed.

5. The appeal seems to be hinged on a misapplication of article 50 (2) (q) of the Constitution that provides that every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing. Indeed the law had changed but after the appellant was convicted and sentenced by the high court, the sentence upheld on appeal and the appellant benefitted from resentencing in the trial court. This therefore is not a first or second appeal. However the appellant filed this appeal seeking to invoke the court's jurisdiction to revise the sentences imposed by the magistrate's court against him. In essence he seeks the court's leniency in exercising discretion and urges the court to allow him to serve the sentences concurrently and not consecutively.

6. The principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court were observed in the case of **Ogolla & S/O Owuor Vs. Republic [1954] EACA 270** where the court stated:

> **"The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in JAMES Vs. REPUBLIC [1950] EACA pg 147, it is evident that the judge has acted upon wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."**

7. The provisions of the law under which the appellant has been charged and convicted gives the following respective punishments:

> **"Count 1 to 4: Robbery with violence contrary to section 296 (2) if the Penal Code.**
>
> **The offender is liable to be sentenced to death.**

Count 5: Bar breaking and committing a felony contrary to Section 306(a) of the Penal Code.

The offender on conviction is liable to seven years imprisonment."

8. I note that the legality of the sentences imposed against the appellant had been addressed by the magistrate who resentenced the appellant and ordered the sentences to run consecutively. In this case the appellant was indicted with five distinct offences and one offence that was part of the same transaction that he pleaded not guilty. The learned magistrate was therefore bound by Section 14(1) of the Criminal Procedure Code to impose at least two sentences to run consecutively unless if she directed the same to run concurrently. From the record, the appellant had been charged with four distinct offences with every charge constituting independent transactions from the other. However Section 14(1) also allows the trial magistrate in exercise of discretion to authorize the sentences to run concurrently.

9. Where a trial judge or magistrate is faced with multiple charges or offences an appropriate decision on the aggravating and mitigating factors has to be borne in mind in each distinct sentence. Where an offender has been charged and convicted with two or more counts involving the same transaction in a charge sheet or information as provided under Section 135(1) and (2) of Criminal Procedure Code at the trial, the practice is to direct that the sentences should run concurrently.

10. The question to be addressed in this appeal in considering whether or not the sentence should run concurrently and not consecutively is whether the appellant committed more than one offence in the same transaction. If this was the case then the sentences imposed should run concurrently.

The Court of Appeal has defined the phrase ***'same transaction rule'*** in the case of **REPUBLIC v SAIDI NSABUGA S/O JUMA & ANOTHER [1941] EACA** and revisited it again in **NATHAN v REPUBLIC [1965] EA 777** where the court stated as follows:

> **"If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction."**

11. The one transaction rule requires that where two or more offences are committed in the course of a single transaction the sentencing court should consider an order for concurrent instead of consecutive sentences. In applying the above principle to the instant case, one has to be satisfied that the offences committed fall under the sequence of a single transaction. In my view the issue of whether or not the appellant committed a series of offences which were distinct at various times and locations with different complainants is a thin line. The offences seem to flow from each other because the appellant went from shop to shop within Wetaa market as he was robbing the different complainants and it may appear to constitute a single transaction connected with each other. The learned magistrate ordered consecutive sentences and exercised discretion and ordered for 10 years imprisonment on each.

12. Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:

> "*Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

13. The trial magistrate is vested with wide discretion which only an appellate court can interfere with, if it occasioned a failure of justice, and justice will apply both ways to the victim and to the accused. In the instant appeal I find that a miscarriage of justice has occurred warranting this court to interfere with the sentences since they ought to run concurrently as opposed to consecutive. The offences that the appellant was charged with under the Penal Code carry a death penalty that was declared unconstitutional and the magistrate who handled the resentencing sentenced the appellant to ten (10) years imprisonment instead of life imprisonment as provided for this offence. From the record the appellant is described as a master schemer in the probation report and is not ripe for immediate release and therefore the said report being independent, I am guided by the said post sentence report. However due to the fact that the sentences are supposed to run concurrently the said report must be tempered with the present circumstances namely that the appellant might have to be released if the sentences are found to have been served. I am fortified by the provisions of Section 12 of the Criminal Procedure Code where it provides:

> **"Any court may pass a lawful sentence combining any of the sentences which it is authorized by the law to pass."**

14. The principles to be followed in ordering for concurrent sentences were elucidated in the case of **NGIBUINI v REPUBLIC [1987] KLR**. In the instant case the appellant was tried in respect of counts where the complainants were neither the same nor did the offences arise out of the same transactions. The trial court sentenced the appellant to death for the four counts and the court of appeal observed that death is only once and formed the opinion that the sentence be for one of the counts whereas the other sentences to run in abeyance. The resentencing court seemed not to have addressed itself on the issue of whether the offences formed a series of offences of a similar character and ordered that the sentences to run concurrently in substitution of an earlier order of consecutive sentence.

In scholarly text on principles of sentencing **D.A.THOMAS (HAREMANN 2ND EDITION [1979] pg 53** articulated the rational of one transaction rule as follows:

> **"The essence of one – transaction rule appears to be that consecutive sentences are in appropriate when all the offences taken together constitute a single invasion of the same legally protected interest. The principle applies where two or more offences arise from the same facts……………..but the fact that the two offences are connected simultaneously or close together in time does not necessarily mean that they amount to a single transaction."**

15. In this appeal the appellant cannot be said to be a first offender because his previous record is unknown save that the post sentence report alludes to a criminal past. My view is that the sentences complained of were not excessive either taken individually or in aggregate. However having noted that the offences took place at the same time save for different complainants, it is proper that the sentences should run concurrently. Already the death sentence had been commuted to life and the guiding principles in the Supreme Court case of Francis Karioko Muruatetu (2017) eKLR mandates this court to interfere with the sentence herein since the appellant has already served a substantial portion of it. The circumstances of the case as well as the post sentence report and backed by the fact that the prison authorities vide their letter dated 18th March 2019 which confirmed that the appellant has a clean record as he has not offended against prison discipline merits consideration by this court. This then calls for the need for rehabilitation and restorative justice. The appellant is deemed to have already atoned for his sins and should now be allowed to join the society. The lower court order that the sentences run consecutively is hereby substituted with an order that the sentences of ten years each do run concurrently.

16. Having considered the appeal, submissions by appellant and respondent's counsel and mitigating factors as stated by the appellant, I find merit in the appeal. Consequently the appeal is allowed. The trial court's sentence (upon resentencing) is hereby set aside and substituted with an order that the sentences of ten years each do run concurrently. As the appellant has already served the sentences, he is set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 11th day of July, 2019.

D.K.KEMEI

JUDGE