



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 101 OF 2018

ROBERT MAKAU KASEVA..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

1. The Appellant was charged and convicted with one count of the offence of robbery with violence, one count of the offence of defilement with an alternative count of indecent assault on a female, one count of the offence of rape with an alternative count of indecent assault on a female at the Senior Principal Magistrates Court at Kangundo in Criminal Case number 1130 of 2004. He was sentenced to death and appealed to the high court which upheld the conviction and sentence in respect of count 1, conviction in respect of count 3 was sustained and given 25 years imprisonment and acquitted in respect of count 2. He was resented by the magistrate's court to 30 years imprisonment less 13 years served in respect of count 1, 15 years imprisonment in respect of count 2 and 10 years in respect of count 3 and the sentences were to be served concurrently. He appealed to this court and averred that he be awarded a remission to serve 1/3<sup>rd</sup> of the sentence and that the court take into account section 333(2) of the Criminal Procedure Code Act and that the 16 year sentence be reduced to the time served.

2. The appeal was disposed of by way of written submissions. The appellant submitted that the sentence ought to be reduced to the time served and that the sentence be remitted to 1/3<sup>rd</sup> of the sentence. He cited the case of **Robert Mutash Auda v Republic Court of Appeal Criminal Appeal 247 of 2014**. 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, vide undated and unsigned submissions filed on 30<sup>th</sup> May, 2019 conceded to the appeal and submitted that the 30 years imprisonment imposed upon resentencing was excessive and thus 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) (p) of the Constitution that provides that (2) Every accused person has the right to a fair trial, which includes the right— (p) 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 have his sentence remitted to 1/3<sup>rd</sup> and that he be sentenced to the time served.

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: Robbery with violence contrary to Section 296 (2) if the Penal Code.**

*The offender is liable to suffer death.*

**Count 2: Defilement of a girl under 16 years was provided for under Section 145(1) of the Penal Code and now Section 8(1) and (4) of the Sexual Offences Act.**

*The offender on conviction is liable to imprisonment to not less than 15 years*

**Count 3: Rape provided for under Section 140 of the Penal Code and now Section 3 of the Sexual Offences Act.**

*The offender on conviction is liable to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.”*

8. I note that the legality of the sentence imposed against the appellant in respect of count one had been addressed by the magistrate and also the resentencing magistrate reduced the sentence in respect of count three from 25 to 15 years and ordered the sentences to run concurrently. From the record, the appellant had been charged with three distinct offences and two alternative ones.

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 and therefore the magistrate’s decision was within the law.

10. The question to be addressed in this appeal in considering whether or not the sentence should be remitted will be dependent on whether the appellant was convicted and sentenced between 8<sup>th</sup> December, 2014 and 15<sup>th</sup> December, 2015 when remission of sentences had been removed from the Prisons Act and does not fall within the proviso that bars granting of remission to **“a prisoner sentenced to imprisonment for life or for an offence under Section 296(1) or 297(1) of the Penal Code (Cap. 63) or to be detained during the President’s pleasure.”**. Section 46(1) of the Prisons Act states:

***“Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences:***

***Provided that....”***

11. The facts of this matter are not disputed. By the Statute Law (Miscellaneous Amendments) Act, 2014 Section 46 of the Prisons Act which provided for remission of sentence was deleted. Section 46 was reinstated on 15<sup>th</sup> December, 2015 through the Statute Law (Miscellaneous Amendments) Act, 2015 thus bringing back remission of sentence to the Prisons Act. The appellant does not fall within the proviso to the aforementioned Act and therefore is entitled to remission. However, this court in **Francis Opondo v Republic [2017] eKLR** stated that the power of remission lies with the prisons authorities and not the court and therefore the appellant ought to address his request to the prisons authorities. The prison authorities are best placed to consider certain factors such as character, industry, discipline etc of prisoners.

12. On the issue of whether the appellant is entitled to reduction of sentence, **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 no miscarriage of justice has occurred so as to warrant interference with the sentences, that is 15 years imprisonment in respect of count 2 and 10 years in respect of count 3 and I find no illegality of principle when the learned magistrate sentenced the appellant to 15 years imprisonment in respect of count 2 and 10 years in respect of count 3. From the record the appellant is described as a person of questionable character in the probation report and is not ripe for immediate release and therefore the said report being independent, I am guided by the same in making the appropriate orders. 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 Appellant cannot be said to be a first offender just because his previous record was not established. Indeed the report by the Machakos County probation officer left no doubt that the appellant had been of questionable character and was part of a gang terrorizing villagers. In my view the sentences complained of were not excessive either taken individually or in aggregate. The appeal on sentence in respect of count 2 and 3 therefore fails.

15. Having considered the appeal, submissions by appellant and respondent's counsel and mitigating factors as stated by the appellant, I see no merit in interfering with sentences imposed against the appellant in count 2 and 3 save that the same shall continue to be served concurrently from the date of the arrest of the appellant namely 24/9/2004 and that the appellant address the issue of remission with the commissioner of prisons for consideration.

16. In the result the appeal succeeds only to the extent that the sentences shall commence from the date of arrest namely **24<sup>th</sup> September 2004**. Otherwise the appeal lacks merit and is dismissed.

Orders accordingly.

**Dated and delivered at Machakos this 16<sup>th</sup> day of September, 2019.**

**D.K. Kemei**

**Judge**