REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 106 OF 2018

JAMES NYAMAI NZAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the resentence of Hon. D. Orimba (SPM) in Kangundo Senior Principal Magistrate's Court Criminal Case No. 228 of 2006 delivered on 29/10/2018))

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JAMES NYAMAI NZAU.....ACCUSED

RULING

1. The Appellant herein, **JAMES NYAMAI NZAU** was charged before the Senior Principal Magistrate's Court at Kangundo with two counts of Robbery with Violence, contrary to section 296(2) of the Penal Code and the alternative charge of Handling Stolen property. He was convicted in respect of count 1 and sentenced to death and the other charge was left in abeyance. His appeal to the High Court was dismissed on 18th May, 2007

2. On 25.10.2018, the resentencing proceedings were undertaken before Hon. D. Orimba, SPM in which after hearing the mitigating circumstances and in the absence of presentence report sentenced the appellant to 30 years' imprisonment less the 13 years served on each count which were to run concurrently.

3. The appellant is aggrieved by the sentence and has lodged this appeal in which he raised the following supplementary grounds:

a. That the learned trial magistrate erred in law and fact by awarding disproportionate, harsh and excessive sentence despite the appellants being unrepresented.

b. That the learned trial magistrate erred in law by not enforcing the totality principle as laid under the sentencing guideline: that it is impossible to arrive at a just and proportionate sentence for multiple offences simply by adding together notional single sentence. It is necessary to address the offending behavior together with the factors personal to the offender as a whole.

c. That the learned trial magistrate erred in law and fact by failing to consider the facts, circumstances and any other mitigating factors of the case in their entirety before settling for any given sentence.

d. That the learned trial magistrate erred in law and fact by failing to call for the probation report, its authenticity not tested and it ought to have assisted the court in arriving at a sentence which was commensurate to the criminal responsibility in isolation of other independent mitigating factors i.e. a first offender, the age of the accused, remorsefulness among others.

e. That the learned trial magistrate erred in law and facts by failing to observe that Section 296(1) and 296(2) and 297(2) of the Penal Code are ambiguous and therefore non-compliance by relevant legislators and other policy makers is

discriminatory and discretionary contrary to article 27 of the Constitution of Kenya.

f. That the learned trial magistrate erred in law and facts by failing to invoke section 333(2) of the Criminal Procedure Code as amended so that the period of time spent in custody is taken into account as part of the time served

g. That the learned trial magistrate erred in law and fact by failing to consider the appellants' age and general life expectancy which falls within mitigating factors and there should be light at the end of the tunnel.

4. The appellant therefore prayed that the court considers the time served and award him remission.

5. According to the appellant he was resentenced to 30 years imprisonment and the first gravamen was that the trial court did not consider the time served in remand as per Section 333(2) of the Criminal Procedure Code Act.

6. He relied on the case of **Francis Karioko Muruatetu & Another v R (2017) eKLR** and argued that in as much as the court was justified to give a sentence other than a death sentence, the sentence ought to be proportional to the acts of the accused and further that the complainants were not seriously injured and the offenders did not use excessive force therefore the offence ought to be substituted as a Section 296(1) offence rather than aggravated robbery.

7. He therefore prayed that this court awards him an appropriate sentence commensurate with the offence committed and also consider that he demonstrated that he is reformed and changed person who is remorseful. The appellant urged the court to grant him remission under Section 46 of the Prisons Act.

8. On the part of the Respondent, it was submitted that the sentencing guidelines do not replace judicial discretion and therefore the 30 years was not excessive. The respondent sought for the dismissal of the application.

9. I have considered the submissions made before me in this appeal. The singular issue to be determined is whether the court may make a downward review of the resentence by the trial court as well as grant an order of remission. It is important to point out that the probation report being a report which is not subjected to cross-examination in order to determine its veracity, is just one of the tools the court may rely on in determining the appropriate sentence. It is therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the report and information from other sources such as from the parties themselves and the prison, the court is at liberty to decide which information to rely on in passing its sentence. To rely on the probation report as the gospel truth, in my view, amounts to abdication of the court's duty of adjudication to probation officers. While the report of the probation officer ought to be treated with great respect, it is another thing to accept it hook, line and sinker. It however ought not to be simply ignored unless there are good reasons for doing so.

10. The East Africa Court of Appeal in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

11. In the case of **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus:-

"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.

12. I have noted that the learned magistrate during the resentencing has not indicated when the sentence was to run. Section 333(2) of the Criminal Procedure Code provides that:

(2) Subject to the provisions of section 38 of the Penal Code 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.

13. It is therefore clear that the foregoing provision imposes an obligation on the trial court to take into account the period an accused has spent on remand in the determination of an appropriate sentence. Failure to comply with the foregoing provision renders the subsequent sentence a contravention of the law.

14. One of the grounds of appeal was on a point of law only as it was in respect of Section 333(2) of the Criminal Procedure Code and because the resentencing court did not take into account the period the appellant spent in remand and direct that the same run from the date of arrest, that is 30.11.2005 this court has the power to correct the anomaly.

15. One of the prayers by the appellant is that of remission and in this regard, I associate myself with the views of Korir, J in **Musa Wambani Makanda vs. Republic [2017] eKLR** that:

"The power to remit sentence as provided by Section 46 of the Prisons Act, Cap 90 is as follows:

"(1) **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 in no case shall -

(i) any remission granted result in the release of a prisoner until he has served one calendar month;

(ii) any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.

(2) For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period-

(a) spent in hospital through his own fault; or

(b) while undergoing confinement as a punishment in a separate cell.

(4) A prisoner may be deprived of remission -

(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;

(b) where the Cabinet Secretary for the time being responsible for Internal security considers that it is in the interests of public security or public order.

(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground.

16. The court in **Francis Opondo v Republic [2017] eKLR** stated that the power of remission lies with the prisons authorities and not the court, therefore the appellant ought to address his request to the prisons authorities and this court has no jurisdiction to grant the appellants' request for remission.

17. The third limb of the issues for consideration is whether or not the sentence should be revised downwards. **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."

18. The trial magistrate is vested with wide discretion which an appellate court can only 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, there is on record a probation officer's report that has indicated that the commission of the offence is attributed to poor upbringing and that the appellant is illiterate. The appellant is found to be 38 years old and reported to be of bad character and used to keep bad company. His family members give a good report and state that he is proven to have reformed. He has undergone mechanical training in 2013 and carpentry training and the probation officer left it to court to make a decision. From the record, no miscarriage of justice has occurred to the court so as to warrant interference with the sentence of 30 years and I find no illegality of principle when the learned magistrate sentenced the appellant to 30 years.

19. Be that as it may, the jurisprudential trends have seen sentences of between 30 and 25 years being handed over to persons who commit robbery with violence, and I do this with all caution because the appellant appealed against sentence only thus the court could not analyze the evidence that prompted the conviction. In **Raphael Mourice Muriu Ngoya & another v Republic [2019] eKLR,** the appellant was sentenced to 20 years on appeal for a similar offence; In **Leonard Kipkemoi v Republic [2018] eKLR,** the appellant was resentenced on appeal to 20 years imprisonment to run from the date of sentencing. In the appellant's circumstances the resentencing magistrate after imposing a sentence of 30 years on each count considered the period spent in custody as well as the time already served totaling 13 years ordered the appellant to serve the remainder of 17 years on each count from the date of resentencing. Going by the related cases on resentencing I am of the view that a sentence of twenty years imprisonment on each count would be appropriate in the circumstances. The complainants received slight injuries which were not life threatening and that the stolen car was recovered. Again the appellant appears to have reformed as he has been engaged in sensitization against crime dubbed ***''Crime Si Poa''*** while in prison and has also atoned for his sins.

20. In the result the appellant's appeal on sentence partly succeeds. The lower court's resentence of 30 years on each count is hereby set aside

and substituted with a sentence of 20 years imprisonment on each count which should run concurrently from the date of arrest namely 30.11.2005.

It is so ordered.

Dated and delivered at Machakos this 14th day of October, 2019.

D. K. Kemei

Judge