



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NOS. 27 OF 2017 AND 47 OF 2017

APPELLATE SIDE

(Coram: Odunga, J)

JULIA WANGECHI GITHUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. These appeals revolve around three matters. The said matters are Criminal Case No. 1440 of 2012, Criminal Case No. 544 of 2012 and Criminal Case No. 658 of 2012.

2. In criminal case no. 544 of 2012, the Appellant herein together with another person were charged with the offence of Robbery with Violence Contrary to Section 295 as read with section 296(2) of the *Penal Code*. The particulars were that on the 6th June, 2012 at Primarosa Stage along Mombasa-Nairobi Highway, Athi River District within Machakos County, the Appellant jointly with others not before court robbed **Joseph Njoroge Kibathi** of items valued at Kshs 821,500/= and that at the time of the said robbery, they used actual violence to the said **Joseph Njoroge Kibathi**. There was an alternative charge of handling stolen goods contrary to section 322(1) as read with section 322(2) of the *Penal Code* arising from the same transaction. After hearing the case, the Petitioner was convicted of the alternative charge of handling stolen goods. She was on 11th June, 2014 sentenced to serve 5 years imprisonment. That decision is the subject of Criminal Appeal No. 27 of 2017.

3. In Criminal Case No. 1440 of 2012, the Appellant was charged with the offence of Stupefying in Order to Commit felony contrary to section 230 of the *Penal Code*, the particulars being that on the 24th September, 2012 along Mombasa-Nairobi Highway at Emali Trading Centre, within Makueni County, the Petitioner jointly with others not before the court with intent to commit a felony administered unknown stupefying or overpowering drug to **Daniel Waigwa Githinji** and stole from him items valued at Kshs 6,500/=. She also faced the charge of attempted theft of goods in transit contrary to section 279(c) as read with section 389 of the *Penal Code* the particulars being that on the same day at the same place she jointly with others not before court attempted to steal goods valued at Kshs 5,060,028.32 the property of Safina Traders Company Ltd. In Count three she faced the charge of stealing contrary to section 275 of the *Penal Code* the particulars being that on the same day at the same place at the same time she stole goods valued at Kshs 6.500/- the property of **Daniel Waigwa Githinji**. After hearing she was convicted in all the three counts and sentenced to serve 7 years, 3 years and 1 year in counts I, II and III respectively. The said sentences were directed to run concurrently. That decision is the subject of Criminal Appeal No 47 of 2017.

4. In criminal case no. 658 of 2012, the Petitioner was charged with two counts of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The particulars of the first count were that on 28th August, 2012 at Daystar Junction in Athi River District in Machakos County, jointly with others not before court robbed **Paul Mbugua** of items valued at Kshs 2,514,000/= and at the time of such robbery used actual violence to the said **Paul Mbugua Gichaga**. The particulars of the second count were that on the same day at the same place jointly with others not before court, she robbed **George Njuguna Mbugua** items worth Kshs 21,700/= and at the time of such robbery used actual violence to the said **George Njuguna Mbugua**. She was convicted of the said counts and sentenced to death for the first count while the sentence for the second was, as is the law in such matters, kept in abeyance. Aggrieved by the said decision, the Appellant appealed to this court vide Criminal Appeal No. 68 of 2016 and on hearing of the said appeal, **Nyamweya, J** upheld her conviction on both counts but set aside the death sentence imposed upon the Appellant and after considering her mitigation and her previous convictions sentenced her to serve 10 years for each count with the terms running concurrently taking into account the time the petitioner had spent in custody.

5. It was submitted on behalf of the Appellant by **Mr Swaka**, her learned counsel, that the sentences in Criminal Case No. 1440 of 2012 and 544 of 2012 were subject to remission and that in fact she has already been given remission in those cases. In criminal case No. 658 of 2012, though the Appellant was originally sentenced to death, the said sentence was reduced to 10 years imprisonment on appeal. Learned Counsel however appreciated that the said sentence is now also subject to remission.

6. It was however submitted that this court ought to review the said sentences and direct that the same be consolidated and be directed to run concurrently. While appreciating that the Appellant's death sentence was reduced on appeal, it was submitted that had the court been made aware of the existence of the other sentences, it would have directed that the same be consolidated and to run concurrently with the result that the Appellant would now have served her sentence. The Court was urged to consider the Appellant's medical condition and her good behaviour in making its decision.

7. In opposing the appeal, **Miss Mogoi**, learned prosecution counsel submitted that since the appellant's appeal in Criminal Appeal No. 68 of 2016 has already been determined in line with the decision in **Muruatetu Case**, this court is *functus officio*. As regards the other appeals, it was submitted that they were different offences committed at different places on different persons. To the learned prosecution counsel, the appellant is a habitual offender who is likely to commit more offences. It was her view that considering the number of years she was sentenced; mitigation must have been considered. In her view, no law has been cited that would justify the consolidation of the offences. She urged the court not to interfere and let the appellant serve the remainder of her sentences.

8. In his rejoinder, **Mr Swaka** submitted that this being a court of law has jurisdiction to exercise powers on issues before it. It was his submission that Case No. 658 of 2012 was independently dealt with and that had it been brought to the court's attention that there existed other cases in which the appellant was convicted, the court would have considered the same. While admitting that the offences, parties and sentences in all the three cases were different, he nevertheless submitted that there was a common denominator in all those cases, the appellant. It was his case that this court has the discretion to order appropriate sentences taking into consideration the fact that the appellant has reformed and ought not to be overly punished, maimed or destroyed. It was further submitted that the appellant is sickly hence there were mitigating factors that merit review. He however conceded that the issue of remission has already been addressed by this court's decision. He however submitted that the 10 years having been remitted, that is sufficient punishment for the other two offences. In learned counsel's view, this court has the power to direct the sentence be only one for all the three offences.

Determination

9. I have considered the issues raised hereinabove. This appeal raises a rather novel issue. The issue in a nutshell is whether a person convicted of different offences, on different dates against different persons ought to have the sentences meted in all the three cases consolidated with the result that the convict ends up serving only one sentence such as in cases where the sentences are directed to run concurrently.

10. Section 14 of the **Criminal Procedure Code** provides for circumstances in which a court can direct sentences to run concurrently or consecutively. Section 14 provides in part as follows:-

“(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(3) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences:-

a. of imprisonment which amount in the aggregate to more than fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or

b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.”

11. Section 7 (1) of the **Criminal Procedure Code** stipulates that:-

a. a subordinate court of the first class held by a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.

b. a resident magistrate may pass any sentence authorized..... or under the Sexual Offences Act.

See also the High Court decision in **Ali Abdi Shabura –v- Republic- H.C.CRA No. 90 of 2007**.

12. In the case of **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97**, the then Court of Appeal for Eastern Africa in a judgment read by **Sir Joseph Sheridan** stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

13. The Court of Appeal in **Peter Mbugua Kabui vs. Republic [2016] eKLR** expressed itself on the matter as hereunder:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a

consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totalling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful? We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same.”

14. It therefore follows that concurrent sentences are only meted where an accused person commits a series of offences at the same time in a single act/transaction. However, where separate and distinct offences are committed in different criminal transactions, even if the counts were to be in one charge sheet and one trial, there is no illegality in meting out a consecutive term of imprisonment. In these appeals not only are the offences separate and distinct, they were committed in different criminal transactions against different victims and the appellant was charged in different cases and convicted separately. Apart from that Criminal Appeal No. 68 of 2016 has been determined. In order for me to consolidate the sentence therein with the sentences in Criminal Appeal Nos. 47 of 2017 and 27 of 2017, I would, of necessity, have to recall the decision in Criminal Appeal No. 68 of 2016 and vary it. That appeal is properly not before me and I have no power to deal with it, having been dealt with by a court of concurrent jurisdiction. In other words, I am *functus officio* in so far as that appeal is concerned.

15. The doctrine of *functus officio* is one of the expressions in law on the principle of finality and according to *Black's Law Dictionary*, Ninth Edition it is defines as: -

“[having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

16. The Court of Appeal in **Telkom Kenya Limited vs. John Ochanda (Suing on his Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR** held that: -

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

17. I agree with the position adopted by the Supreme Court decision in **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** where the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, *“The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832* to the effect that:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

18. In this case, no law has been cited to me that would justify departing from the legal position set out above.

19. It was suggested that in her decision in Criminal Appeal No. 68 of 2016, **Nyamweya, J’s** mind was not drawn to the other existing convictions and sentences. In her judgement, the learned judge expressed herself *inter alia* as follows:

“After considering the appellant (sic) mitigation and considering that the Appellant has previous convictions, I sentence the Appellant to serve 10 years imprisonment for conviction for count I of robbery with violence, and 10 years imprisonment for conviction for count II of robbery with violence, which terms of imprisonment shall run concurrently.”

20. It is therefore clear that the learned judge was well aware of the existence of the other convictions and in meting out the sentence took them into account.

21. Regarding the other issues raised such as the health of the appellant, section 46(5) of the *Prisons Act* provides as follows:

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.

22. Therefore, nothing prevents the appellant from petitioning the Commissioner General of Prisons to exercise his powers pursuant to the above provisions if she feels that her status constitutes special grounds for further remission over and above that contemplated under section 46(1) of the Act. That, however, is not a matter for this court as it involves the discretionary powers of the Commissioner General of Prisons.

23. It is therefore my finding that these consolidated appeals lack merit and they are hereby dismissed.

24. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 1st day of October, 2019

G.V. ODUNGA

JUDGE

In the presence of:

Mr Musungu for Mr Swaka for the Appellant

Miss Mogoi for the Respondent

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