REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 6 OF 2017

JOHN KARANJA KIHARA……...…….....…..…….APPELLANT

VERSUS

REPUBLIC……..……...…….RESPONDENT

(Appeal against Sentence imposed in Criminal Case Number 135 of 2016 in the Principal Magistrate's Court at Mukurweini on 24.1.17 by Hon. V.O. CHIANDA (SRM))

JUDGMENT

The Trial

The Appellant herein **John Karanja Kihara** has filed this appeal against sentence on a charge of robbery contrary to section 296(1) of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence were that:-

> ***"On the 1st of May 2016 at Ikiraniro area in Mukurweini Sub-County within Nyeri County with others not before the court robbed Martin Kabuchi Gumo of his mobile phone make Nokia valued at Kshs. 3,500/- and cash Kshs. 2,800/-.***

The prosecution called a total of four (4) witnesses in support of their case. The brief facts were that at about 9.00 pm on 15th May 2016, the complainant Martin Kibuchi Gumo went to Keo Bar in company f his friend Wilson Maina. That they left the bar at about 1.00 am and when they reached a place called Ikiraniro, 5 men emerged from the thicket and ordered them to sit down. That he identified Karanja (appellant herein) and Fredrick among the 5 men because there was moonlight on the material night. That the men frisked him and robbed him of his mobile phone make Nokia valued at Kshs. 3,500/- and cash Kshs. 2,800/-. That the following day; the complainant reported the matter to Mihuti AP Post and accused was arrested and charged.

PW2 Wilson Maina Thuo who was in company of complainant on the material night said that when they were attacked by 5 men, he heard the complainant call out the names Karanja and Freddy. That he also managed to recognize the appellant because there was moonlight. He said he ran away and did not witness the robbery.

PW3 APC Joseph Maina arrested the appellant on 2.5.16 and handed him over to the police.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. On *24.1.17,* the learned trial magistrate delivered a judgment in which he convicted the appellant for a lesser offence of simple robbery contrary to section 296(1) of the Penal Code Cap 63 Laws of Kenya and after listening to his

mitigation, sentenced him to serve 14 years imprisonment.

The appeal

Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 2nd February 2017, the appellant set out 5 grounds of appeal. On 3rd May 2017, the appellant filed supplementary grounds of appeal which were word for word similar to the grounds of appeal to wit:-

> ***1. That the 14 years sentence imposed against him is harsh and excessive due to his health status***
>
> ***2. That he is a layman in law and was not represented by counsel in this capital offence yet it was his first time to be in a court of law***
>
> ***3. That the court be pleased to reduce the sentence as it deems fit***
>
> ***4. That he is most remorseful and if the sentence is reduced, it will enable him to join his family and society being not a threat to the complainant but only to keep peace***
>
> ***5. That he is the only son in his family, being the only breadwinner of his elderly parents***

During the hearing of the appeal, the appellant relied wholly on his supplementary grounds of appeal. Mr. Nyamache, Counsel for the state, in response thereto submitted that the appellant was sentenced to the minimum sentence for simple robbery and urged this court not to interfere with it.

The appellant is only appealing on the extent of the sentence. Section 296 of the Penal Code states:-

> ***(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***

The trial magistrate imposed a sentence of 14 years which is the maximum sentence for robbery.

Issues for Determination

The question for determination is whether the appellant was sentenced to a harsh and excessive sentence.

Determination

Generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty. (See ***Daniel Kyalo Muema vs Republic, Court of Appeal Criminal Appeal No. 479 of 2007 (Nairobi)***. This principle is contained in section 66 (1) of the Interpretation and General Provisions Act Cap 2, Laws of Kenya which provides:-

> *"**Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punished by a penalty not exceeding the penalty prescribed"***

The principle of law in Section 66 aforesaid is entrenched in Section 26 of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence or a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment. In particular, Section 26 (2) and (3) of the Penal Code provides:-

> ***(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.***
>
> ***(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or***

in substitution for imprisonment.

From the foregoing; I find that the sentence of 14 years prescribed under Section 292(1) of the Penal Code is not mandatory, and that in determining the sentence, the court has to consider the facts and circumstances of the particular case and in particular be guided by the principles governing the imposition of punishments.

Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously. (See Makhandia J (as he then was) in ***Simon Ndungu Murage vs Republic, Criminal appeal no. 275 of 2007, Nyeri)***. In ***Shadrack Kipchoge Kogo vs Republic Criminal Appeal No. 253 of 2003,*** the court of appeal stated:-

> ***"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"***

In ***Alister Anthony Pareiravs State of Maharashtra {2012}2 S.C.C 648***, the court held that:-

> ***"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"***

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered. (*See* ***Soman vs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India.)***

I have carefully considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and the mitigation by the appellant. Since the appellant is a first offender, due allowance in accordance with the authority of ***Josephine Arissol v R [1957] EA 447*** ought to have been given. As observed in ***Otieno v. R (1983) KLR 295*** by Porter, Ag. J. (citing *Josephine Arissol v R*, supra)

> ***"The general rule is that a maximum sentence should not be imposed on a first offender".***

There is no evidence on record that the appellant was not a first offender. This was a mitigating circumstance that warranted a more lenient penalty than would have been ordinarily imposed in its absence.

Decision

Accordingly and for the reasons set out above, in exercise of powers granted in Section 354 (3) (b) of the Criminal Procedure Code, I find that a lesser sentence would still meet the ends of justice. This court therefore hereby sets aside the sentence of 14 years passed on the appellant by the trial court and substitutes it thereof with a sentence of imprisonment for 4 years for the offence of robbery under section 296 (1) of the Penal Code. The sentence will run from *24.1.17,* the date of Judgment and sentence in the

trial Court.

DATED AND DELIVERED THIS 8TH DAY OF JUNE 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - **Kinoti**

Appellant **- Present in person**

For the State **- Mr. Nyamache**