



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 106 OF 2012.

FREDRICK ODHIAMBO OGUTU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 105 of 2011 delivered by Hon. M. Muya, CM on 23RD March, 2012).

JUDGMENT

Background

The Appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 7th January, 2011 at around 1630hrs at Majengo Pumwani within Nairobi Area Province, jointly with others not before the court, while armed with dangerous weapons, namely knives robbed Timothy Muchiri irungu of his mobile phone make Nokia 3310 valued at Kshs. 3,000 and cash Kshs. 800 all valued at kshs. 3,800 and at or immediately before or immediately after the time of such robbery used actual violence on him.

The Appellant was arraigned in court and trial carried out at the conclusion of which he was convicted for a lesser offence of robbery contrary to Section 296(1) of the Penal Code. He was sentenced to seven years imprisonment.

Being aggrieved by the decision of the court he decided to file the appeal at hand.

EVIDENCE.

The prosecution's case was that on 7th January, 2011 the Appellant and others not before the court accosted the complainant in a bid to rob him. The Appellant got hold of the complainant's neck as the others ransacked his stuff. Some injuries were inflicted on the complainant's upper lip during the robbery as evidenced by the police doctor. This was at the height of the 'pigwa ngeta'(meaning, strangulating the neck to immobilize the victim) spree. After they robbed him, they tried to make their escape but the complainant was quick enough and he got hold of the Appellant from behind by his belt strap. He had already raised an alarm at this point and members of the public helped him apprehend the Appellant. Officers from the nearby District Commissioner's office were alerted to the commotion and went to the scene where they arrested the Appellant.

SUBMISSIONS.

The Appellant's Petition of Appeal dated 12th April, 2012 stated that he was pursuing an appeal only on the sentence that had been meted out by the trial court. It set out the following grounds of appeal:

- 1. That he was remorseful for the offence and given that he was a first offender he asked the court to consider allowing him to carry out the sentence by community service order.**
- 2. That he was a father of two with a wife who was unemployed and his incarceration would cause his family to suffer.**
- 3. That the trial court had not taken into consideration his mitigation.**

During submissions in court he stated that during his time in jail he had reformed and learnt new skills that would make him a better member of the society given that he was only 32 years old. He also asked the court to consider that he had been remanded during his trial.

Ms. Sigei, for the State, opposed the appeal given that the offence was serious, the complainant had suffered injuries and the Appellant had been positively identified. She further stated that the sentence was legal and lenient since the 7 years that were handed out fell short of the maximum possible 14 years jail term.

DETERMINATION

This court has considered the submissions and the evidence before the trial court. The court is further guided by the Judiciary Sentencing Policy Guidelines. The guidelines set out the objectives for sentencing to include retribution, deterrence and rehabilitation amongst others. The most applicable amongst these are deterrence and rehabilitation. The Appellant stated in his submissions that he had reformed and even learnt new skills in jail. The State did not question those submissions. Learning new skills to me are partly the epitome of rehabilitation. Learning a skill is a basic necessity in gaining a trade and the court acquiesces that the Appellant's previous trade, garbage collector, was not one that inspires deterrence. The learning of a skill therefore, does appear as both rehabilitative and a possible deterrence in the future.

This court must then look at the time the Appellant has served in jail cumulatively, that is, in remand and since sentencing. The court is guided in this by Section 333(2) of the Criminal Procedure Code as buttressed by para. 7.1, 7.10 and 7.11 of the Judiciary Sentencing Guidelines. Section 333(2) states:

“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.” (emphasis mine).

I consider the fact that the Appellant has been in custody since he took plea on 10th January, 2011. This was a period of 1 year 2 months until his conviction on 23rd March, 2012. Since his conviction he has been in jail for 4 years 3 months. This brings the total period to 5 years 5 months. The trial court in its decision did not state that it had taken into account the time served as a condition for the sentence. The period spent in remand should be part of the sentence effectively making the time left to serve as 1 year 7 months.

The Appellant alluded that the trial court did not take into account his mitigation when sentencing him. Under para.23 of the Judiciary Sentencing Policy Guidelines the trial court is tasked to consider both the aggravating and mitigating factors. In the present case, there were two aggravating factors, namely; commission of the offence by a gang and the flagrant use of violence. The counter mitigating factors were; that the degree of harm was minimal, the Appellant was a first offender and that the Appellant was remorseful. Given that there are factors going either way the court seeks guidance under para.23.9.4

which states as follows:

“23.9.4. Presence of both aggravating and mitigating circumstances: Where both exist, the court should weigh the aggravating and mitigating circumstances and where mitigating circumstances outweigh the aggravating ones, then the court should proceed as if there is a single mitigating circumstance. Where aggravating circumstances outweigh the mitigating circumstances, then the court should proceed as if there is a single aggravating circumstance.”

In this case, on weighing all the aggravating and mitigating circumstances it is clear that the mitigating factors outweigh the aggravating ones. This persuades me then to consider the appeal in favour of the Appellant. And in so doing will further seek refuge in Section 354(3)(b) of the Criminal Procedure Code which provides thus:

“in an appeal against sentence,[High Court may] increase or reduce the sentence or alter the nature of the sentence;”

Accordingly, having considered the time served and the time remaining and taking into consideration of the mitigating factors hereby finds that the Appellant has served sufficient punishment. The appeal thus succeeds. I order that he be and is hereby set free unless otherwise lawfully held.

Dated and Delivered at Nairobi This 11th Day of July, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.
2. Miss Sigei for the Respondent.