



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 46 OF 2012

DISHON OSORO OMBAYI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence by the Senior Resident Magistrate's Court at Keroka, Hon. J. Were in Criminal Case No. 74 of 2012 dated 19th April, 2012)

1. The appellant was charged with two other persons before the Senior Resident Magistrate's Court at Keroka with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code, Chapter 63 Laws of Kenya. The particulars of the offence were that, on 26th December, 2011 at Riensune Village in Borabu District within Nyamira County while armed with knives, machetes and pangas they jointly with others who were not before court robbed one, Nicholas Kibagendi Akunga of Kshs. 3650.00 in cash, Mobile phone Nokia C-629, DVD make, L.G and M-Pesa cash amounting to Kshs. 3580.00 all valued at Kshs. 19,000.00 and immediately before the time of such robbery threatened to use actual violence upon the said Nicholas Kibagendi Akunga. The appellant pleaded not guilty to the charge when he was arraigned in court on 18th January, 2012. On 1st February, 2012, the appellant requested the trial court to have the charge read to him again which request the trial court granted. After the charge was read to him, the appellant pleaded guilty. The trial court convicted the appellant on his own plea of guilty and set down the matter for sentencing on 7th February, 2012 so as to await probation officer's report on the appellant. On 7th February, 2012, the probation officer's report was not ready and the sentencing of the appellant was postponed to 9th February, 2012. On 9th February, 2012, the trial court after perusing the probation officers report warned the appellant that the offence with which he was charged carried a death sentence and asked him to confirm whether he wished to maintain his plea of guilty. The appellant confirmed to the trial court that he wished to maintain his plea of guilty. The trial court after considering the nature of the offence that was committed by the appellant and the appellant's mitigation, sentenced the appellant to serve 7 years imprisonment.
2. The appellant has now preferred an appeal against his conviction and sentence. In his undated petition of appeal filed in court on 17th February, 2012, the appellant put forward the following grounds of appeal;
 - a. **That he was convicted and sentence to seven (7) years imprisonment on his own plea of guilty through his ignorance on matters of law;**
 - b. **That he was a pupil in class 7 at Katenyi primary school and as such he should be given a non-custodial sentence so that he may continue with education;**
 - c. **That he is remorseful and regret having come into conflict with the law and that being a**

young man with a future ahead of him, his incarceration would affect his future life.

3. When the appeal came up for hearing before us on 15th October, 2013, the appellant appeared in person while Mr. Majale appeared for the state. The appellant informed the court that he wished to pursue his appeal only as against the sentence. He submitted that at the time of his arrest he was a student and that he was sentenced to serve 7 years imprisonment. He urged the court to reduce the sentence. He told the court that he was aware that he had pleaded guilty before the trial court and reiterated that his appeal was limited to sentence only. He submitted that he wished to go back to school and that he has no parents but one of his uncles had promised to assist him.
4. Mr. Majale for the state opposed the appeal. He submitted that the appellant was found guilty and convicted on his own plea of guilty and sentenced to serve 7 years imprisonment for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. He submitted that having pleaded guilty to the charge; the appellant could only appeal on the legality of the sentence that was passed against him. Mr. Majale submitted that the sentence of seven (7) years imprisonment for an offence of robbery with violence contrary to **section 296 (2)** of the Penal Code was too lenient. He submitted that a non-custodial sentence that was sought by the appellant would not suffice considering the gravity of the offence. Mr. Majale urged us to enhance the appellant's sentence to the minimum provided for under **section 296 (2)** of the Penal Code, namely, death sentence. When we pointed out to him the fact that he should have notified us as a matter of good practice at the beginning of the hearing of the appeal that he intended to apply for the enhancement of the sentence so that we warn appellant of the possibility of the sentence being enhanced if he continued with the appeal, Mr. Majale abandoned his quest for the enhancement of the sentence and urged us to dismiss the appeal.
5. We have considered the charge that was preferred against the appellant, the proceedings and judgment of the trial court that is the subject of this appeal and the submissions made by the appellant and the state counsel. The appellant was charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. A conviction under this section carries a mandatory death sentence. Although, the appellant pleaded guilty to the offence as charged, the trial court sentenced the appellant to serve seven (7) years imprisonment. The appellant has argued before us that having regard to his personal circumstances, the sentence imposed against him was excessive and that the trial court should have considered a non-custodial sentence. The appellant argued that he is a young man and as such should have been given a chance to continue with his education. The probation report on the appellant that was presented to the trial court before the appellant was sentenced indicated that the appellant was 19 years old and that he was a class 7 drop out. Since the appellant was not a child, there was no prohibition against sentencing him to death or to serve a prison term. We agree with Mr. Majale that the trial court was lenient to the appellant. The appellant having pleaded guilty to an offence of robbery with violence under **section 296(2)** of the Penal Code was liable to be sentenced to death. We would not have hesitated to substitute the sentence of seven (7) years that was imposed against the appellant with a death sentence if Mr. Majale had pressed on with his application for enhancement of sentence. Due to the foregoing, we find no merit in the appellant's appeal. The same is hereby dismissed in its entirety.

Delivered, Dated and Signed at KISII this 30th Day of December 2013

E.N.MAINA

S. OKONG'O

JUDGE

JUDGE

In the presence of:

..... for the Appellant

.....for the State

..... Court Clerk

E.N.MAINA

JUDGE

S. OKONG'O

JUDGE