Turere v Republic (Criminal Appeal 16 of 2016)
[2024] KECA 349 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 349 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 16 OF 2016

F SICHALE, FA OCHIENG & WK KORIR, JJA

MARCH 22, 2024

BETWEEN

SAILEL TURERE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya Naivasha (C. Meoli, J.) delivered on 13th May, 2016 in H.C.CR.A. No. 97 of 2015)

JUDGMENT

1. The matter before us is a second appeal following the appellant's conviction for the offence of causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on the 7th day of February 2012, in the Oloroito area in Narok North District, the appellant unlawfully did grievous harm to Suyanga Subasha.

2. The prosecution case was that the appellant went over to the home of the complainant, where he started to quarrel with the complainant about a parcel of land in respect to which the complainant had filed a suit. The appellant felt that the complainant had exceeded the acceptable limits, by challenging the appellant who had leased out to third parties, a portion of land that belonged to their father.

3. The appellant and the complainant were stepbrothers.

4. When the appellant confronted the complainant, he was with his son Tubula. Tubula held down the complainant when the appellant was assaulting the complainant, using a Maasai sword.

5. Following the attack, the complainant was admitted to the Tenwek Mission Hospital for a month.

6. PW2, Enok Kotikot was a Clinical Officer at the Narok District Hospital. He testified that he had examined the complainant and that thereafter, the complainant was admitted to both the Narok District Hospital and the Tenwek Mission Hospital.

7. PW2 told the court that the complainant had multiple cuts on the head. The deep cut on the right side required 8 stitches; the cut wound on the forehead required 7 stitches; the cut on the left side of the neck required 7 stitches; a deep cut on the right thumb required 5 stitches; a deep cut on the left wrist required 8 stitches; a deep cut on the lower left leg required 8 stitches.

8. It was his further evidence that the 4th and 5th fingers on the complainant's left hand had been completely amputated.

9. Furthermore, the complainant sustained bruises on the left side of the face and multiple cut wounds on both hips.

10. PW3 was a brother of the appellant. He phoned the police when he saw the complainant being assaulted. When the police officers arrived, the appellant was still armed with the Maasai sword. However, after being overcome, the appellant was arrested.

11. PW4 was a police officer attached to the Narok Police Station, at the material time. He corroborated the evidence of PW3, concerning the arrest of the appellant. It is PW4 who disarmed the appellant, who was then holding a Maasai sword which still had fresh blood stains.

12. When the appellant was put to his defence, he denied assaulting the complainant. However, he conceded that there was an existing tussle over a parcel of land that belonged to their late father.

13. After giving due consideration to the evidence, the learned trial Magistrate held that it was the appellant who had perpetrated the assault upon the complainant. The trial court dismissed the appellant's defence, which was to the effect that the complainant had been assaulted by unknown persons when the complainant was drunk.

14. Following the conviction of the appellant, the trial court sentenced him to life imprisonment.

15. Being dissatisfied with both the conviction and the sentence, the appellant lodged an appeal at the High Court.

16. On 13th May 2016, the High Court delivered its judgment, in which it dismissed the appeal in its entirety.

17. The learned Judge re-evaluated the evidence on record and concluded that there was a land dispute pitting the complainant against the appellant. However, the Judge was convinced that;

> "What seemed to have led to the particular assault was the appellant's displeasure that the complainant had ploughed land, possibly exceeding the limits of his boundary, onto the common parcel the appellant had supposedly hired out without authority, hence the existing case between the brothers."

18. Meanwhile as regards the sentence, the High Court noted that the offender, although a first offender, showed no remorse for the offence he had committed. Secondly, the court noted that the injuries that the complainant had sustained were so severe that it was a miracle that he survived.

19. Taking into account the fact that the offence was clearly pre- meditated, the High Court was convinced that life imprisonment was the appropriate sentence in the circumstance.

20. Following the rejection of his appeal by the High Court, the appellant lodged an appeal before this Court.

21. In his grounds of appeal, the appellant faulted the High Court for;

22. When the appeal came up for hearing on 27th November 2023, the appellant was unrepresented whilst Ms. Kisoo learned prosecution counsel represented the respondent.

23. This is a second appeal against conviction and sentence. By dint of Section 361 of the Criminal Procedure Code, a second appeal is confined to matters of law only. This Court restated as much in Karingo v Republic [1982] KLR 213 at p. 219;

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja - vs- R (1956) 17 EACA 146)"

24. When called upon to canvass the appeal, the appellant told this Court that he had been in prison for eleven years. During his stay in prison custody, he had transformed, and he was therefore requesting the court to give him a second chance in life.

25. The appellant stated that he was 73 years old, adding that during the period in jail, he had attained Grades 1, 2, and 3 in carpentry.

26. According to the appellant, his actions on the material day had been motivated by anger due to a case they had at home.

27. In light of the sentiments expressed by the appellant, the court inquired from him whether or not he was abandoning the appeal against conviction.

28. In response, the appellant said that he had committed the offence after he had taken alcohol.

29. The said answer led to a further question, as to whether or not the appellant was now conceding that his conviction was well- grounded. The appellant ultimately told this Court that he admits having committed the offence.

30. We have set out the proceedings extensively, as it is clear that the appellant expressly and clearly abandoned the appeal against conviction.

31. In any event, as was held by the High Court, the evidence on record was sufficient proof that the appellant committed the offence.

32. We are satisfied that the High Court carried out a proper re- evaluation of the evidence on record. There are no contradictory pieces of evidence which the appellant drew to our attention; nor did this Court find any such alleged contradictory evidence.

33. We also find that the appellant failed to demonstrate that the case against him had been fabricated.

34. In the circumstances, we hold the considered view that the evidence adduced was so overwhelming against the appellant, that it was prudent of him to have abandoned the appeal against conviction. Accordingly, the appeal against conviction is dismissed.

35. As regards the sentence, the appellant urged this Court to set aside the life imprisonment because it was excessively harsh.

36. In response, Ms. Kisoo, learned Senior Prosecution Counsel submitted that the sentence was deserved, in the circumstances of this case.

37. The respondent drew our attention to the aggravating circumstances.

38. In a brief reply to the respondent's submissions, the appellant told the court that at the time he committed the offence, he was drunk.

39. We have taken note of the fact that the appellant was a step- brother of the complainant: they were close relatives.

40. The appellant felt annoyed that the complainant had challenged him over a parcel of land that had belonged to their late father. Whilst the complainant had taken action by filing a case in court, the appellant decided to take matters into his own hands. He approached the complainant, whilst in the company of his own son, Tubula.

41. Whilst the son held down the complainant, the appellant assaulted the complainant ruthlessly.

42. The injuries sustained by the complainant were so severe that the learned trial Magistrate expressed the view that it was a miracle that the complainant had survived. The court declined to interfere with the life sentence imposed by the trial court in the case of Ernest Maungo Simiyu v Republic, Criminal Appeal No. 80 of 2016 due to the severity of the harm caused and stated:

> " That said, the circumstances in which the offence in this matter was committed by the appellant deserves the severest of punishment. The medical evidence was that as a result of the defilement, DK developed hemorrhoids requiring surgical treatment. DK's mother testified that since the ordeal DK had become withdrawn. DK is scarred for life."

43. At the time when the High Court upheld the life sentence, the prevailing jurisprudence was that the said sentence was lawful, as it is what had been prescribed by statute. In the case of Francis Nkunja Tharamba v Republic [2012] eKLR, this court held thus:

> " ...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

44. However, the emergent jurisprudence in Kenya is that the sentence of life imprisonment is so indeterminate that when pronounced by a court, the convict would not know the duration of the sentence to which he was being subjected.

45. The Supreme Court noted in its directions in the case of Muruatetu & another v Republic; Katiba Institute & 4 Others (Amicus Curiae), Petition 15 & 16 of 2015 [2021] KESC 31 (KLR) that its directions had yet to be complied with:

> " We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment."

46. In the case of Musyimi Ndava v Republic [2019] eKLR, the court expressed itself thus:

> " In the instant appeal, there is nothing on record to show the trial court erred in the exercise of its discretion in meting out the 35-year term of imprisonment. There is also nothing on record to show the learned judge erred in upholding the sentence.
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> 38. As stated before, sentence is a question of fact and in a second appeal our jurisdiction is confined to matters of law. In David Munyao Mulela & Another vs Republic [2013] it was held that: -
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> > " The complaint on severity of sentence is misplaced firstly because it was not an unlawful sentence imposed and secondly the issue of severity of sentence cannot be before us as it is a matter of fact."
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> 38. In the case of M K M -v- Republic [2018] eKLR this Court faced with a similar "appeal" rendered itself thus: -
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> > " Indeed, we need to state quite categorically that the practice now seeming to gain traction and notoriety, of second appeals against severity of sentence only being presented as mitigation statements or the like, has no foundation in law, is contrary to statute and should stop. It is also worth recalling, that when all a person presents on a second appeal is a mitigation, there really is no appeal because an appeal under our Rules is based on a memorandum of appeal."
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> 38. Persuaded by the merit of the dicta of this Court as stated in M K M -v- Republic [2018] eKLR, the appellant's submission on the sentence meted to him has no merit.

38. In the final analysis, we find that the evidence against the appellant is overwhelming. This appeal has no merit and is hereby dismissed. We uphold the conviction of the appellant for the offence of causing grievous bodily harm contrary to Section 234 of the Penal Code as charged. We affirm and uphold the 35- year term of imprisonment meted on the appellant."

47. Similarly, in the case of Manyeso v Republic, Criminal Appeal 12 of 2021 [2023] KECA 827 (KLR) the court stated thus:

> Sentencing was at the discretion of the trial court. As the second appellate court the Court of Appeal could not interfere with the exercise of discretion unless it was shown that the court passed an illegal sentence.

48. The court went on to state that:

> "We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefore a sentence of 40 years in prison to run from the date of his conviction.
>
> .... We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

49. In this case, the attack on the complainant was premeditated.

That was an aggravating factor. The attack was on a blood brother and it was extremely vicious; that too was an aggravating factor.

50. The appellant's actions called for a stiff sentence. Therefore, although we hereby set aside the life sentence, due to its indeterminate nature, we substitute it with a sentence of imprisonment of 35 years. The sentence shall run from the time when the appellant was first convicted.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF MARCH, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR