



**Mwangi v Republic (Criminal Appeal 29 of 2018)  
[2024] KECA 505 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 505 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 29 OF 2018  
S OLE KANTAI, FA OCHIENG & WK KORIR, JJA  
APRIL 26, 2024**

**BETWEEN**

**JAMES MAINA MWANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Sentence and Conviction of the Judgment of the High Court of Kenya at Nakuru (Mabeya & Wendoh, JJ.) dated 8th April 2014 in HCCRA No. 2 of 2013)*

**JUDGMENT**

1. This is a second appeal from the judgment of the High Court of Kenya at Nakuru (Wendoh and Mabeya, JJ.) delivered on 8<sup>th</sup> April, 2014. The appellant Joseph Maina Mwangi was charged before the Magistrates Court at Narok with the offence of robbery with violence contrary to section 296 (2) of the Penal Code, an alternative charge of handling stolen goods contrary to section 322 of the said Code and there was a second count where he was charged with assault causing actual bodily harm contrary to section 251 of the said Code. After a trial where the prosecution called 8 witnesses and the appellant gave sworn testimony, the trial magistrate analyzed the evidence from both sides and acquitted the appellant on the charge of robbery with violence. There does not appear to be a finding in respect of count 2 of the charge (assault causing actual bodily harm). The appellant was convicted on the alternative charge of handling stolen goods and was sentenced to serve 5 years imprisonment. He appealed to the High Court stating in grounds of appeal that he had pleaded not guilty to the offence; that the magistrate had erred in law and fact in not finding that prosecution witness testimony was contradictory; that the prosecution evidence was fabricated; that his defence was not considered but was ignored; that the trial court erred in relying on evidence of the appellant being traced through mobile provider Safaricom when no evidence from that entity was called; that the trial court erred by not finding that he was fixed by police.



2. Proceedings in the High Court show that when the appeal came up for hearing before the 2 Judges on 14<sup>th</sup> October, 2018 the appellant indicated that he was ready to proceed and had filed written submissions. He further stated that he had expected to be given bond (presumably by the trial court).

3. State counsel Mr. Marete opposed the appeal on both conviction and sentence and gave reasons for taking that position. On sentence he is recorded as submitting that:

“5 years was lawful and court not to interfere.”

4. The appellant gave a reply after which the appeal was reserved for judgment on notice.

5. The Judges reviewed the evidence and made the following finding:

“Having been charged with violently robbing Kibet Collins at Pillar of Hope Development, the appellant should not have been charged with the offence of assaulting the said Kibet Collins because it amounts to duplication of the charges. We acquit the appellant of the charge of assault contrary to section 251 of the Penal Code.

In light of the overwhelming evidence, that a robbery was committed, we hereby quash the conviction on the alternative charge of handling stolen property and set aside the sentence. Instead, we convict the appellant of the main charge of robbery with violence contrary to section 296 (2) of the Penal Code and sentence him to death. It is so ordered.”

6. The appellant filed this appeal where 5 grounds of appeal are set out in the homemade Memorandum of Appeal. When the appeal came up for hearing before us on 8<sup>th</sup> April, 2024 Mr. Omutelema, Senior Assistant Director of Public Prosecutions conceded to the appeal after confirming that his office had not filed a cross-appeal at the High Court. We think he was right to do so.

7. As we have shown the appellant was convicted and sentenced on the alternative charge and when he appealed to the High Court the Office of Director of Public Prosecution did not cross-appeal at all. In fact that office supported the sentence of 5 years imprisonment and urged the Judges to uphold it.

8. Although the Criminal Procedure Code at, inter alia, section 354 donates power to the High Court to alter sentence by even enhancing it this Court has consistently held that an appellant before the High Court has right to be informed before the hearing of the appeal that he suffers the danger of having the sentence enhanced if the appeal fails. We stated as follows in J.J.W vs. Republic [2013] eKLR:

“In this appeal, the prosecution did not urge enhancement of sentence and did not file cross appeal to that effect. The court did not warn the appellant of that possibility or in any case there is no record of such a warning if any was issued, yet all of a sudden, in the judgment, the learned judge enhances the sentence from seven years to ten (10) years. The need for prior information to be given to the appellant in such a situation is to enable him to prepare and argue his side of the case as regards such intended enhancement. In this case, the enhancement of the appellant’s sentence to ten (10) years was done without affording him opportunity of persuading the court against such a proposal. We have perused the Memorandum of Appeal that was before the first appellate court and we note that save for a small part in passing, the appellant did not specifically appeal against sentence in that court and hence the need to inform him of the possibility of enhancing the sentence.

We agree with Mr. Abele that the enhanced sentence was unlawful. It calls for our interference. The appeal on conviction is dismissed. The appeal on sentence is allowed to the extent that the enhanced sentence of ten (10) years imprisonment is set aside and in its



place the original sentence awarded by the subordinate court of seven (7) years is reinstated with effect from the date the subordinate court awarded it.”

9. We also stated in the said case:

“We now consider the sentence and here we have difficulties in appreciating what the learned judge did and why he did it. As indicated above, we too feel the sentence that was pronounced upon the appellant and his colleague by the Senior Resident Magistrate was not commensurate with the nature of the offence committed and the antecedents of the appellant which were in any case not stated save that they were first offenders and had been in custody for two (2) years. We too think the circumstances of the case called for a more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Oftentimes this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.”

10. It will therefore be seen that the High Court should not have acted the way it did when it allowed the appeal on the alternative charge without first receiving a cross-appeal from the respondent and without warning the appellant of consequences that could follow prosecuting the appeal.
11. The appellant was not warned at all; he did not prepare himself on the robbery charge at the appeal level; he was thus not accorded a fair hearing. He was sentenced to death without any mitigation from him being taken or considered again contravening his fair trial rights.
12. The High Court had no power to do what it did. The respondent was right to concede the appeal. The appeal has merit and we allow it. We set aside the judgment of the High Court and all consequential orders and reinstate the conviction of the appellant on the alternative charge of handling stolen goods contrary to section 322 of the Penal Code and reinstate the sentence of 5 years imprisonment awarded by the trial magistrate on 21<sup>st</sup> December, 2012. In view of the fact that the sentence has already been served the appellant shall be set free forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL, 2024.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**W. KORIR**

..... **JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

