Elia v Republic (Criminal Appeal E098 of 2021)
[2024] KECA 986 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 986 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E098 OF 2021

MA WARSAME, LA ACHODE & WK KORIR, JJA

JULY 26, 2024

BETWEEN

KEVIN ELIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence of the High Court at Kapenguria (Sitati.J) delivered on 17th July 2019 in HCCRA No. 6 of 2019)

JUDGMENT

1. By this second appeal Kevin Elia, the appellant is seeking to have a second bite at the cherry, against the judgment of Sitati. J dated 17th July 2019 in Kapenguria High Court. He was charged in the Magistrate court at Kapenguria with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars being that on 21st August 2017 at Kishaunet area within West Pokot County, the appellant robbed John Lotulim of one motorcycle registration number KMDR 191F make HOJUE, valued at kshs.116,000 and immediately before the time of such robbery wounded the said John Lotulim.

2. The appellant denied the charge and the matter was set down for hearing, during which the State presented six witnesses to urge their case. At the close of the prosecution case, the appellant was put on his defence. He denied the charges in a sworn statement and did not present any witnesses.

3. A chronicle of the prosecution case is that on the material day at around 9 p.m., the appellant approached John Lotulim (PW1), a motorbike rider, at the stage within Town -Makutano and requested to be taken to Kishaunet. Upon reaching Kishaunet, the appellant requested PW1 to take him to Kamito instead. It was on the way to Kamito that the appellant struck PW1 on the back causing him to fall off the bike, injure his head and lose consciousness. He regained consciousness an hour later after he was rescued by another motor bike rider and found that his motor bike had been stolen. He

reported the matter at Makutano Police station and was later treated by Danson Itole (PW4), at the hospital. The appellant was arrested on 23rd August 2017 while in possession of the motorbike. He was charged with the current offence.

4. Put on his defence, the appellant denied the allegations. He stated that on the day of his arrest he was a pillion passenger on the subject motorbike. He gave the rider Kshs. 1,000, and the rider went to look for change to give him his balance. As he was waiting for his balance, he was attacked by a crowd claiming that the motorbike was stolen. He was then arrested.

5. Upon considering the evidence, Hon. Adet (SRM) found the appellant guilty as charged and sentenced him to death as by law provided. Aggrieved by the judgment, the appellant filed an appeal on both conviction and sentence in the superior court. Upon considering the appeal before her, the learned Judge found that the conviction was safe. However, she set aside the sentence of death and in lieu thereof, sentenced the appellant to imprisonment for thirty (30) years. The sentence would run from the date he was sentenced by the trial court.

6. Still dissatisfied by the judgment, the appellant filed the instant appeal on both conviction and sentence. However, in his written submissions dated 21st June 2024, filed through the firm of M/S Oyaro & Associates Advocates, he intimated that he had abandoned his appeal on conviction and submitted only on sentence. During the plenary hearing on 24th June 2024, learned counsel Mr. Oyaro appeared for the appellant and reiterated that the appeal on conviction had been abandoned.

7. In his submissions the appellant posited that the injuries inflicted on the complainant were not of such an escalated nature as to warrant the imposition of a sentence of 30 years imprisonment. He argued that a lighter sentence commensurate with the injuries and with a view of advancing the objectives of sentencing under the Judiciary Sentencing Policy Guidelines, should be meted on him. He urged this Court to be persuaded by the High Court decisions in Paul Njoroge Ndugu v Republic (2021) eKLR and James Kariuki Wagana vs Republic (2018) eKLR. It was also urged that the period of sentence should run from the date of the arrest, that is 23rd August 2017 as provided for under Section 333 (2) of the Criminal Procedure Code.

8. In rebuttal, Senior Principal Prosecution Counsel, Mr. Majale filed written submissions dated 19th June 2024 for the respondent on both conviction and sentence, but we shall only consider the response with regard to submissions on sentence. The learned State Counsel conceded that a sentence of 30 years imprisonment was harsh and excessive. He urged the Court to consider the circumstances under which the offence was committed, the seriousness of the offence of robbery with violence and the injuries sustained by the victim.

9. We have considered the record of appeal and the rival submissions before us. This being the second appellate Court, our duty is as held in Karingo v Republic (1982) KLR 213 as follows:

> " 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 they are 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 Karori S/O Karanja versus Republic (1956 17 EALA 146)."

10. The singular issue for consideration before us is whether the sentence meted upon the appellant is lawful, and whether it complies with Section 333(2) of the Criminal Procedure Code. This Court in Bernard Kimani Gacheru v Republic (2002) eKLR stated that:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material fact, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist"

11. As observed in Bernard Kimani Gacheru (supra), severity of sentence is a matter of fact and can only be interfered with in the circumstances indicated in the decision. In this appeal the Judge considered the sentence meted on the appellant by the trial court and held as follows:

> " 42. At the time of sentencing by the trial court, the appellant was treated as a first offender since the prosecution did not have his previous records. In mitigation the appellant expressed no remorse. The court was only told that he had been in custody for quite some time and that he had learnt a lot. He also asked for a lenient sentence. The above notwithstanding, the Supreme Court jurisdiction in the Muruatetu case (supra) dictates that this court interferes with the trial's court' death sentence upon the appellant.
>
> 43. Accordingly, I would set aside the sentence of death and in lieu thereof, sentence the appellant to imprisonment for 30 (thirty) years from the date he was sentenced by the trial court."

12. We note that the learned judge, considered the sentence meted on the appellant in the trial court, and observed that it was not in tandem with the emerging jurisprudence before she sentenced him to 30 years imprisonment. We are therefore, satisfied that the sentence imposed on the appellant is lawful and we find no reason to interfere with it.

13. We however, note that the learned Judge ordered the sentence to run from the date that the appellant was sentenced by the trial court. Section 333 (2) of the Criminal Procedure Code provides that:

> " Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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."

14. We accordingly, uphold the sentence of 30 years imprisonment meted upon the appellant by the superior court and order that it shall commence in accordance with the law, from the date when the appellant was arrested, that is the 23rd of August 2017.

DATED AND DELIVERED IN NAIROBI THIS 26TH DAY OF JULY, 2024.

M. WARSAME

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR