Lodip v Republic (Criminal Appeal 6 of 2016)
[2023] KECA 1389 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1389 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 6 OF 2016

K M'INOTI, F SICHALE & FA OCHIENG, JJA

NOVEMBER 24, 2023

BETWEEN

ESMITH LOLIMA LODIP ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Nakuru (M.A. Odero & A. Ndungu, J.) dated 23rd February, 2016 in H.C.CR.A. No. 221 of 2014)

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to section 295 as read with Section 296 (2) of the *Penal Code*. The particulars of the offence were that: on February 27, 2014 at Baragoi Sub-location within Samburu North Sub-county within Samburu County, jointly with others not before court, being armed with a dangerous weapon, a rifle, robbed Douglas Lekisat of 23 goats and 12 sheep valued at Kshs. 210,000/-.

2. The appellant denied the charges and trial ensued soon thereafter. The prosecution called six witnesses who testified as follows:

3. PW1 was the complainant. He said that he was at the river drawing water for his sheep and goats on 27th February, 2014 at about 10 am when two young men, armed with rifles, accosted him. One of the men pointed a rifle at him and they ordered him to leave. He moved aside but not far away. The two men took his livestock and led them away. The complainant immediately went to report the incident at the Baragoi police station. The police later brought him two goats and 11 sheep. The complainant informed the court that he was thereafter called by the police to attend an identification parade where he positively identified the appellant as one of the men who had robbed him. The complainant also informed the court that he knew the appellant, as he was his friend.

4. PW2 was the appellant's father. He informed the court that he was in his homestead in Nachola on February 27, 2014 when he saw the appellant return home with three goats in tow. When he questioned the appellant as to where the goats came from, the appellant only insisted that the goats were his. He told the court that sometime later, some Turkana men came to his home looking for stolen goats, and he released the three goats to them. Lochomin, one of the men, identified the goats and they were taken to the chief. PW2 was arrested but he was later on released; and his son, who is the appellant herein, was later arrested.

5. PW3 was the Assistant Chief. He informed the court that he did not know the appellant. He only received information from members of the public that that there was a robbery on February 27, 2014. After conducting his investigations, he was given four names including the appellant's name. 15 goats were recovered and they were positively identified by members of the public.

6. PW4 was the arresting officer. He informed the court that he and Cpl Mativo were instructed by the CID Officer to look for the appellant on March 9, 2014. They proceeded to Nachola village where they found the appellant in his house with a lady named Regina. They arrested the appellant and escorted him to the police station.

7. PW5 conducted an identification parade on March 9, 2014. The complainant was able to identify the appellant at the parade.

8. PW6 was the Investigating Officer. He told the court that he was instructed to investigate this matter by the DCIO on March 9, 2014. He corroborated the testimonies of the other witnesses.

9. Put to his defence, the appellant denied having robbed the complainant of his livestock at gunpoint.

10. At the end of the trial, the appellant was found guilty of the lesser charge of handling stolen property. He was convicted and sentenced to 14 years' imprisonment.

11. Aggrieved by the judgment, the appellant appealed to the High Court against his conviction and sentence.

12. The first issue that was raised by the appellant was that the trial magistrate lacked jurisdiction to hear and determine the case. The learned Judges of the High Court held that the argument that the acting Senior Resident Magistrate did not have the jurisdiction to hear and determine the case, because the charge was of a felony, had no basis. The appointment of the trial magistrate, in an acting capacity, clothed her with the jurisdiction of a Senior Resident Magistrate, which included the jurisdiction to hear and determine felony charges.

13. On the issue of identification, the learned Judges noted that since the incident occurred at 10 am, it was in broad daylight. The complainant saw the faces of the men who robbed him, and they even spoke to him. He had ample time and opportunity to see the robbers. The court was satisfied that the complainant clearly saw what was happening, including the persons who robbed him. The court further noted that the complainant positively identified the appellant during the identification parade. However, the court found the identification parade to be superfluous as the complainant had testified that the appellant was well known to him. The learned Judges held that even though there was only one eye-witness, his evidence regarding identification was water-tight and there was no risk of mistaken identity.

14. The learned Judges observed that the complainant's testimony that the police only returned two goats and 11 sheep was not a material inconsistency, which could cast doubt on the evidence of recovery. The court was of the view that the doctrine of recent possession applied as PW2 had no reason or motive to be against his son; and his evidence was clear, that the appellant arrived home with the goats

barely 7 hours after the robbery. The learned Judges also observed that the appellant gave no plausible explanation as to how he came into the possession of the stolen goats.

15. The learned Judges found the appellant's defence to be a mere denial, and that his witness knew nothing about the incident. The court therefore, upheld the decision of the trial court, to dismiss the defence.

16. The learned Judges were of the view that the trial court erred when it acquitted the appellant of the charge of robbery with violence. The court observed that there were two robbers, both of whom were armed with guns, which they used to threaten the complainant into obeying their orders; and that therefore, the fact that the complainant was not injured during the robbery did not take the incident outside the ambit of section 296(2) of the *Penal Code*.

17. Consequently, the learned Judges set aside the conviction of the appellant for the offence of handling stolen property and imposed a conviction for the charge of robbery with violence. The appellant was then sentenced to death.

18. Dissatisfied with the judgment on both conviction and sentence, the appellant lodged the current appeal. He raised five grounds of appeal to wit; that the learned Judges erred in law in:

> " a) Failing to note that the appellant was not served with trial records, contrary to Article 50 of the *Constitution*.
>
> b. Upholding the appellant's conviction and enhancing the sentence by relying on the flawed evidence of identification through recognition.
>
> c. Failing to note that the evidence adduced did not satisfy the burden proof.
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> d. Failing to see that the conviction hinged on the weakness of the defence rather than on the strength of the prosecution case.
>
> e. Upholding the appellant's conviction yet the trial court had misdirected itself in dismissing the appellant's defence and failing to evaluate the whole evidence."

19. When the appeal came up for hearing, Ms. Kabalika, learned counsel appeared for the appellant whereas Ms. Kisoo, learned prosecution counsel was present for the respondent. Counsel relied on their respective written submissions.

20. The appellant opted to submit on the mandatory death sentence imposed by the learned Judges. It was the appellant's view that the mandatory death sentence was excessive and that it violated the tenets of the appellant's rights under Article 25 of the *Constitution*. Citing the case of *William Okungu Kittiny v Republic* [2018] eKLR, the appellant pointed out that section 296(2) of the *Penal Code* deprived the court the use of judicial discretion in the matter of life and death. The appellant was of the view that the death sentence should be reserved for the highest and most heinous levels of robbery with violence. He was of the considered view that he did not use excessive force nor did he unnecessarily injure the complainant during the robbery; he was also not armed. He urged that the sentence be reduced to 15 years' imprisonment from the date of conviction; and in the alternative, that we should remit the matter back to the trial court for resentencing.

21. Counsel for the respondent submitted that the death penalty in robbery with violence cases is a lawful sentence, as the right to life is not an absolute right under Article 25 of the *Constitution*. Counsel urged the court to consider the aggravating circumstances; because the appellant was armed with rifle, and

even if he did not harm the complainant, there was the threat of use of violence by shooting. Counsel called upon the court to consider the serious nature of the offence as it was a capital offence.

22. The respondent urged the court to take judicial notice of the rampant cases of livestock theft and use of illegal firearms in Baragoi area, and submitted that upholding the death sentence will serve as a deterrent. Counsel noted that during the trial, the appellant did not display any remorse for committing the offence or for the loss he had occasioned the complainant, who had lost his livestock. Counsel urged the Court to uphold the death sentence and dismiss the appeal in its entirety.

23. We have carefully considered the record of appeal, submissions by counsel, authorities cited and the law. The main issue for determination is whether the death sentence imposed by the High Court was excessive in the circumstances of this case.

24. This being a second appeal, we are legally constrained to consider only issues of law raised in the appeal and not to consider matters of fact which had been determined by the trial court and the first appellate court. This is by dint of section 361(1)(a) of the *Criminal Procedure Code*. This position was reiterated in the case of *M'Riungu v Republic* [1983] KLR 455 where the court stated thus:

> " Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law."

25. It is common ground that the appellant was charged with the offence of robbery with violence. At the end of the trial, the trial court convicted the appellant for the charge of handling stolen property, and sentenced him to 14 years' imprisonment. Upon lodging an appeal before the High Court, the appellant was found guilty of the offence of robbery with violence and he was accordingly convicted and his sentence enhanced to death as provided for by the law. This prompted the appellant to file the appeal herein. He abandoned his appeal on conviction and only submitted on the perceived excessiveness of the mandatory nature of the death sentence.

26. The appellant has challenged the death sentence imposed by the High Court. It is trite that the process of sentencing is essentially the exercise of discretion by the courts. As a principle, this Court will generally not interfere with exercise of discretion of the court from which an appeal arises, unless it is demonstrated that the court acted on wrong principles; ignored material factors; took into account irrelevant considerations; or on the whole, that the sentence was manifestly excessive. In the case of *Bernard Kimani Gacheru v Republic*, Cr App No. 188 of 2000 this Court stated thus:

> " It is now settled law, following several authorities by this Court and by the High Court, that the 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 factor, 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."

27. The High Court enhanced the sentence of the appellant from 14 years' imprisonment to death. We find that this warrants our interference. We so find because the learned Judges did not give the appellant an opportunity for mitigation. They imposed the death sentence simply because it was the prescribed mandatory sentence. By so doing, the High Court failed to take into account the circumstances prevailing in this particular case. We appreciate the fact that the material time was in tandem with the decision which the High Court handed down. Subsequent thereto, the Supreme Court birthed new jurisprudence on the issue of mandatory sentences, as prescribed by the legislature.

28. The Supreme Court in the case of *Francis Muruatetu & another v Republic* [2017] eKLR held that:

> "Consequently, we find that section 204 of the penal code is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

29. Section 296(2) of the *Penal Code* provides that the offender convicted for robbery with violence in circumstances stipulated therein; "shall be sentenced to death."

30. In the case of *William Okungu Kittiny v Republic* (*supra*), this court held that:

> "From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies *Mutatis Mutandis* to section 296 (2) and 297 (2) of the *Penal Code*. Thus, the sentence of death under section 296 (2) and 297(2) of the *Penal code* is a discretionary maximum punishment."

31. As was held in the *William Okungu Kittiny's case* (*supra*), the decision of the Supreme Court in the *Muruatetu's case* (*supra*) had an immediate and binding effect on all other courts. However, that decision did not prohibit courts from ordering sentence re-hearing in any matter pending before those courts. It is trite that this Court has jurisdiction to direct a sentence re- hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed. We find no reason to delay the re-sentencing by directing that it be done by the trial court, when this Court can carry out that task forthwith.

32. Even though the Supreme Court did not outlaw the death sentence, we are of the view that in the circumstances of this case, the death sentence was excessive. In mitigation, the appellant said that he had a pregnant wife at home and school- going children who depended on him, and that he worked as a casual labourer at a local quarry. The appellant has been in custody for 9 years.

33. For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside and in substitution thereof the appellant is sentenced to 15 years' imprisonment to take effect from 3rd September, 2014 when the appellant was sentenced.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF NOVEMBER, 2023.

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR