IN THE COURT OF APPEAL

AT KISUMU

(CORAM: W. KARANJA, ASIKE-MAKHANDIA & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 145 OF 2014

BETWEEN

CHRISPINE ODHIAMBO OGEYA.............................APPELLANT

AND

REPUBLIC..RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kisumu (**Mwera & Mugo, JJ**) dated 2nd October, 2007*

in

HC. CR.A. NO. 74 of 2006)

****

JUDGMENT OF THE COURT

The appellant was accused 1 in the Senior Resident Magistrates Court at Maseno, where he and another were charged with two counts of attempted robbery contrary to **Section 297(2)** of the Penal Code. They also faced a charge laid under the Firearm Act for possessing ammunition without a firearm certificate.

It was alleged in count 1 that on 15th February, 2003 at Sira village, Ugunja Township Siaya, jointly while armed with an offensive weapon, namely a pistol, the appellant and his co-accused attempted to rob Chrispine Juma Okello of a bicycle worth Ksh. 4500 and they used violence on her during the a attempted robbery.

Count 2, also referring to the same place and date read that the pair attempted to rob Fredrick Onyango Otieno of his bicycle valued Ksh. 4000 and they used actual violence on the said Otieno. However, before the trial got underway, this count was withdrawn under **Section 87(a)** of the Criminal Procedure code.

The third charge stated that again on the same date, and place, the two were found in possession of ten rounds of ammunition without a firearm certificate. Evidence was led as regards the rest of the charges whereupon the learned trial magistrate rendered her verdict. The appellant was convicted of committing the offence as per count 1. He was sentenced to the mandatory death sentence.

His appeal to the High Court was dismissed by **Mwera** and **Mugo, JJ** in a judgment delivered on 2nd October, 2007.

Undeterred, the appellant filed this second and perhaps last appeal against the conviction and sentence imposed on him by the trial court and confirmed by the High Court. However, at the hearing of the appeal, the appellant through **Mr. Ariho**, learned Counsel abandoned the appeal on conviction. Instead he urged us to review the mandatory sentence of death imposed on him by the trial court in the light of the Supreme Court decision in **Francis Karioko Muruatetu & Anor vs Republic [2017] eKLR**. Counsel submitted that the appellant had been in custody since February, 2003 making it a period of 16 years. That he was remorseful and that the time that he has been behind bars, he has learnt to be a good citizen. He had learnt life skills that are beneficial to his wellbeing. He had changed his wayward ways and was a reformed person. He therefore sought the indulgence of this Court to review the sentence imposed downwards.

Mr. Gakoi, learned Senior Prosecution Counsel opted to leave the issue of sentence to Court.

This being a second appeal, the jurisdiction of this Court is limited to consideration of matters of law only. **Section 361** of the Criminal

Procedure Code provides that:

> ***"361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—***
>
> > ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
> >
> > ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."***

The predecessor of this Court in the case of **Chemagong v Republic [1984] KLR 213** on page 219 stated as follows:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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 s/o Karanja vs Republic 17 EACA 146. See also Karingo v R [1982] KLR 213".***

With the above in mind, we have considered the appeal, the submissions, the authorities cited and the law. This is an appeal against sentence. The appellant contends that the sentence of death that was meted out on him was manifestly harsh and excessive in the circumstances of the case. It is clear that the sentence imposed was the prescribed sentence for the offence of attempted robbery under **Section 297(2)** of the Penal Code at the time. The trial court noted that its hands were tied by the law which provided for a mandatory sentence for the offence. The High Court on appeal upheld the conviction and sentence on the same grounds.

The Supreme Court of Kenya in the case of **Francis Karioko Muruatetu & Anor** (supra) found that:

> ***"Section 204 of the Penal Code deprived the Court of the use of judicial discretion in a matter of life and death. Such law could only be regarded as harsh, unjust and unfair. The mandatory nature deprived the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listened to mitigating circumstances but had, nonetheless, to impose a set sentence, the sentence imposed failed to conform to the tenets of fair trial that accrued to accused persons under Article 25 of the Constitution which was an absolute right."***

The Supreme Court in the said case went ahead to outline some mitigating factors that should to be considered in resentencing as follows: -

> ***"[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:***
>
> > ***(a) age of the offender;***
> >
> > ***(b) being a first offender;***
> >
> > ***(c) whether the offender pleaded guilty;***
> >
> > ***(d) character and record of the offender;***
> >
> > ***(e) commission of the offence in response to gender-based violence;***
> >
> > ***(f) remorsefulness of the offender;***
> >
> > ***(g) the possibility of reform and social re-adaptation of the offender;***
> >
> > ***(h) any other factor that the Court considers relevant."***

Applying the foregoing to the instant appeal, we note that the appellant has been in custody for the last 16 years and expressed remorse at the time of sentencing. We have also taken into account the submissions by counsel for the appellant and also the fact that the offence committed was not aggravated.

All things considered, we would agree with counsel for the appellant that the sentence of death that was imposed on the appellant was certainly harsh and excessive in the circumstances and which calls for our interference.

In the end, we allow the appeal on sentence to the extent that the sentence of death is hereby set aside and substituted with a sentence of time already served. Accordingly, the appellant shall be set at liberty forthwith unless lawfully held.

Dated and delivered at Nairobi this 5th day of February, 2021.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

…………………………..

JUDGE OF APPEAL

F. SICHALE

………………………….

JUDGE OF APPEAL

I certify that this is a true

copy of original.

Signed

DEPUTY REGISTRAR