



IN THE COURT OF APPEAL

AT NAKURU

[CORAM: NAMBUYE, KIAGE & J. MOHAMMED J.J.A.]

CRIMINAL APPEAL NO. 289 OF 2009

BETWEEN

GKN..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya (M.A. Ang'awa & Mugo, JJ) dated 3rd December, 2008 in Kericho HC CRA. No. 27 of 2008)

JUDGMENT OF THE COURT

This is a second appeal arising from the Judgment of the High Court at Kericho in Criminal Appeal No. 27 of 2008 (**M. A. Ang'awa & M.G. Mugo, JJ**) dated 3rd December, 2009.

The brief background to the appeal is that, the appellant was arraigned jointly with another before the Senior Resident Magistrate's Court at Sotik in Criminal Case No. 1320 of 2008 with the offence of Robbery with Violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were that, on the 19th August, 2008 at [particulars withheld] Village in Bureti District within Rift Valley Province, jointly being armed with dangerous weapons namely, a whip and a *rungu* they robbed **Richard Wangai** of his mobile phone make Sendo valued at Kshs. 3,800 cash Kshs. 1600 one electrical torch valued at Kshs. 250/- and other assorted shop goods all valued at Ksh. 5,950.

On 1st September, 2008, the appellant and his co-accused appeared before the trial Magistrate for taking of plea. The charge was read to them in a language they understood and when asked whether they admitted or denied the charge, the appellant responded thus:

“It is true”

The trial Magistrate deferred the matter to 2nd September, 2008 for facts.

On 2nd September, 2008, the appellant and his Co-accused were reminded of the charge. The appellant is on record as having maintained his previous day's response to the charge namely:

“It is true”

The facts of the offence were narrated to which the appellant responded thus:

“Accused. The facts are correct.”

Following which the trial magistrate made an order as follows:

“Order: Accused 2 convicted on own plea.”

The prosecution had no previous criminal record of the appellant. In mitigation, the appellant had this to say:

“Aim: I will not repeat offence. I am 17 years old.”

Pursuant to which the trial Magistrate made orders as follows:

“Order: Mention on 5th September, 2008. A2 to be taken for age assessment.

The appellant appeared before the trial magistrate for sentencing on 9th September, 2008 when the trial Magistrate made orders as follows:

“Order: in view of report on age of accused, A2 is hereby sentenced to death being the mandatory sentence. Right of Appeal.”

The appellant was aggrieved and filed an appeal before the High Court raising several grounds. The appeal was canvassed through oral submissions by learned counsel for the respective parties. The State opposed appeal against conviction but conceded appeal against sentence. They were agreeable that the appellant was seventeen (17) years as at the time of his sentencing and recommended the death sentence to be set aside and substituted with one where he was to be held at the President’s pleasure.

The learned Judges of the 1st appellate court re-evaluated the record, considered it in light of the rival representations made before them and applying the applicable law rendered themselves as follows:

“.....under Section 348 of the Criminal Procedure Code,

a person who is convicted on a plea of guilty has no right of appeal against the conviction. He or she can only appeal against the sentence. Although the appellant stated that he was 17 years old during the trial, he was however sentenced to death on the basis that the court had satisfied itself that he was 19 years old. The court relied on a medical report dated 10th September, 2008 which stated that the above mentioned accused, Gilbert Ngetich is approximately 19 years. Given that the age shown on the said medical report was a mere approximation. We are of the view that, the appellant’s contention that he was 17 years was not properly reputed. His age having not been proved to have been over 18 years, we hereby find that he ought not to have been sentenced to death. In view of the fact that he pleaded guilty to the charge in a manner that rendered the plea unequivocal, we hereby uphold the conviction but set aside the death sentence. We order that he be held at the President’s pleasure”

Undeterred, the appellant is now before this Court on a second appeal initially raising six home grown grounds of appeal, subsequently condensed into two grounds by **Felix Ochieng Orege** Advocate on record for him. It is his complaint that the learned Judges erred in law:

- 1. In imposing a very harsh and improper sentence in the circumstances of the case.**
- 2. In failing to consider that appellant was a minor aged 17 years at the time of sentence.**

The appeal was canvassed through oral submissions.

Supporting the appeal, learned counsel **Kabalika**, for the appellant submitted that the prosecution admitted during the hearing of the appeal before the High Court that the appellant was under age at the time the offence was committed. That is why the State conceded the appeal on sentence and the learned Judges of the 1st Appellate court substituted the sentence of death handed down against him by the trial Court with one for him to be held at the President’s pleasure which sentence has subsequently been declared unconstitutional by both the High Court and this Court, and should therefore be set aside and the appellant be set at liberty.

To buttress the above submissions, the appellant has relied on the High Court decision in **Nairobi High Court Constitutional Petition No. 570 of 2015 A00 & 6 Others vs. the Attorney General & Another** 2017 eKLR, Nairobi High Court **Criminal Appeal No. 125 of 2016 KKD vs. Republic** [2018] eKLR and Kisumu Court of Appeal **Criminal Appeal No. 120 of 2013 Bruce Ochieng Shaban vs. Republic** [2019] eKLR to whose propositions/ principles we shall revert shortly. The state concedes the appeal.

This is a second appeal. Our mandate was succinctly set out in **Karani vs. R.** [2010] 1 KLR 73, wherein this Court expressed itself as follows:

“This is a second appeal. By dint of the provisions of Section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

Also, in **David Njoroge Vs. Republic.** [2011] eKLR, this Court stated that under **section 361** of the Criminal Procedure Code:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings (See also Chemagong Vs. Republic [1984] KLR 213.”

We have considered the record in light of the above mandate. There is only one issue for our determination namely; whether the sentence substituted by the 1st appellate court is unconstitutional and therefore unlawful and should therefore be interfered with as asserted by the appellant and conceded by the State.

The approach we take in determining the appeal herein and which we adopt as the current correct position in law is that taken by the Court in Kisumu,

Court of Appeal Criminal Appeal No. 120 of 2015. **Bruce Ochieng Shaban vs. Republic [2019] eKLR** for the holding *inter alia* that, detention at the President's pleasure for an unknown period not only erodes human dignity but is also an excessive sentence that warrants interference.

Applying the above threshold to the appellant's uncontroverted complaint herein, we find merit in the appeal against sentence. The appeal against sentence is accordingly allowed. The sentence substituted by the first appellate court is accordingly set aside. We order that the appellant to be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR