IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO ODEK. JJ.A)

CRIMINAL APPEAL NO. 20 OF 2015

BETWEEN

VINCENT JARED OGUTU .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu, (Ali-Aroni and H.K. Chemitei, JJ) dated 22nd November, 2011 in HCCRA NO. 89 OF 2010)

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JUDGMENT OF THE COURT

The appellant was charged in the Chief Magistrate's Court, Kisumu with two counts; the first being robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The particulars thereof were that on 25th December, 2009 at Riat market in Kisumu East district of the Nyanza province, jointly with others not before Court while armed with pangas and stones robbed **Charles Omondi Awuor** one video deck make Sony, one mobile phone make Nokia 1110, one radio cassette and two speakers all valued at Kshs. 20,000 and at or immediately before or immediately after the time of such robbery used actual violence on the said Charles Omondi Awour. On the second count, the appellant was charged with assault causing grievous bodily harm contrary to section 351 of the Penal Code with particulars being that on the same date and place, the appellant jointly with others not before Court unlawfully assaulted **Paul Osodo Oduor** thereby occasioning him actual bodily harm. The appellant denied both counts and soon thereafter the hearing of his case ensued. The prosecution in a bid to prove its case summoned a total of six witnesses.

The brief facts of the prosecution case were that: On 25th December, 2009 at around 8:00pm, Charles Omondi Awour *"the 1st complainant"* sent his brother Paul Osodo Oduor, *"the 2nd complainant"* to the kiosk to buy chips. After about five minutes he heard the 2nd complainant calling his name while crying. He responded to the distress call and found PW2 being beaten and cut with a panga by some people. He pushed them away and the 2nd complainant escaped to the house. The attackers followed him to the house and in the process robbed the 1st complainant of the items listed in the charge sheet and also poured hot porridge on him scalding him on the left side of the head and chest. The complainants were able to identify the attackers who included the appellant courtesy of the electricity light at the scene of crime. They had known the appellant for a long time. The complainants were subsequently treated for injuries suffered. In due course they were examined by **David Achieng Awuor (PW3)**, a clinical officer then based at Kisumu East District hospital who filled their respective P3 forms. He assessed the degree of injuries as harm. The appellant was then arrested and charged.

Put on his defence, the appellant chose to remain silent. The trial Court having evaluated and considered the evidence on record gave its verdict by a judgment delivered on 21st June, 2010 in which the appellant was found guilty on both counts and subsequently convicted. The appellant was then sentenced to death in in respect of count 1 and the sentence in count 2 of a fine of Kshs. 5,000 in default 3 months imprisonment was held in abeyance pending the execution of the sentence in count 1.

Aggrieved, the appellant filed an appeal before the High Court. The learned Judges**, (Ali-Aroni & Chemitei, JJ.)** upon re-evaluation of evidence found that the offence of robbery with violence was proved as the evidence linking the appellant to the crime was overwhelming and dismissed the appeal on conviction. However, they substituted the death sentence with a custodial sentence of 15 years imprisonment. The sentence in the second count was again held in abeyance.

Dissatisfied with the High Court decision, the appellant filed the present appeal challenging both conviction and sentence. When the appeal came up for hearing, **Mr. Taremwa,** learned counsel appeared for the appellant while **Mr. Ketoo,** senior prosecution counsel was present for the respondent. Mr. Taremwa abandoned the appeal on conviction and submitted on sentence only. Counsel submitted that this Court had

jurisdiction to review sentence as was held in the case of **Robert Mutashi Auda v Republic, CRA No. 247 of 2014.** That the appellant's mitigation was on record and was supplemented by a recommendation by the prison service letter dated 9th April, 2018 to the effect that the appellant had reformed and undertaken vocational training in carpentry and upholstery. Counsel urged us to consider the fact that the appellant was 18 years old at the time of commission of the offence. That the circumstances of the robbery were such that it did not warrant a death sentence. Lastly, counsel submitted that the appellant had been sufficiently punished for the years he has remained behind prison bars.

Opposing the appeal, Mr. Ketoo submitted that the appellant was in the company of eight people when they entered the 1st complainant's house after assaulting 2nd complainant. They beat up the 1st complainant while armed with a knife, stones and pangas and stole from him the items listed in the charge sheet. The appellant also poured hot porridge on the same complainant scalding him badly. Therefore, all the elements of robbery with violence were proved. The evidence with regard to assault on both complainant was credible and corroborated by medical documents tendered in evidence. The appellant's identification was one of recognition as he was well known to the victims and further that electricity light was on at the scene of crime which enabled the victims to recognize the appellant. That the first appellate court did not err at all in reducing the death sentence to 15 years prison sentence.

We have carefully considered the record of appeal, the oral and written submissions by counsel and the law. This being a second appeal, Section 361(1) of the Criminal Procedure Code stipulates that such an appeal to this Court can only be on matters of law.

Further, this Court does not normally interfere with the concurrent findings of facts of the two Courts below except where the said Courts 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. In ***Njoroge v Republic*** **(1982) KLR 388**, this Court at page 389 stated thus:

> **"..On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence..**'

Given that what is challenged in this appeal is the 15 year sentence imposed by the High Court, it is worth noting that sentence is essentially the exercise of discretion by the Courts and therefore, as a principle this Court will normally not interfere with exercise of discretion by the Court appealed from unless it is demonstrated that the Court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In **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 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.**

We note that for us to consider the possibility of interfering with the sentence handed down by the High Court, we will be called upon to enter into the arena of facts. We do not have such jurisdiction under section 361 (1) (a) and (b) of the Criminal Procedure Code to handle such an appeal since the main ground is the severity of the sentence. In any event the High court did not enhance the sentence to warrant our interference and or intervention. Those sections are in these terms:

> **"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." (**Emphasis ours).

The upshot is that the appeal lacks merit on account of want of jurisdiction and is therefore dismissed in its entirety.

Dated and delivered at Kisumu this 31st day of July, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.