Namachanja v Republic (Criminal Appeal E032 of 2020)
[2024] KEHC 2059 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2059 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E032 OF 2020

DK KEMEI, J

FEBRUARY 22, 2024

BETWEEN

AMOS CHUMA NAMACHANJA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction and sentence by Hon. T. Mwangi (SPM) in original Webuye Law Courts Criminal Case No. 778 of 2016 delivered on 18th October 2016)

JUDGMENT

1. The Appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. He pleaded guilty to the charge. The learned trial Magistrate, Hon H. T. Mwangi (SPM) convicted him of the said charge and sentenced him to thirty-nine (39) years imprisonment.

2. Being dissatisfied with the said Judgement, the Appellant lodged the undated Appeal herein on 25th February, 2020. He relied on four (4) grounds of appeal challenging sentence only as follows:

    a. That he pleaded guilty to the offence and prays for leniency.

    b. That he is sick and the only bread winner to his family.

    c. That the court be pleased to consider the least severe sentence as provided for in Article 50(2)(q) of the *Constitution*.

    d. That he is remorseful for the offence.

3. The appeal was canvassed by way of written submissions. However, it is only the Respondent who complied. The Appellant's claim of having filed submissions on 3.11.2023 is not correct as there are no submissions on record.

4. It is settled law that the duty of a first appellate Court is to evaluate afresh the evidence adduced before the trial Court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the Court therein held that the appellate Court was not bound by the findings of fact of the trial Court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

6. However, where an accused person has pleaded guilty to the charge, he cannot appeal on facts. In other words, he can only appeal against the sentence only. As the Appellant herein pleaded guilty and was convicted on his own plea of guilty, the only issue that this Court could determine is whether or not in the circumstances of this case, the sentence that was meted upon him by the trial court was lawful and/ or warranted.

7. Vide his grounds of appeal, the Appellant herein seeks leniency and consideration of the Court. Accordingly, he set forth the grounds that he is sick, the sole bread winner of his family including his siblings as they are orphans and that subject to the dints of Article 50(2) (q) of the *Constitution* of Kenya this Court to be pleased to issue a less severe sentence. He also indicated that he was remorseful for the offence.

8. On its part, the Respondent submitted that the sentence meted out by the trial Court, 39 years, was not harsh and excessive considering the circumstances of the offence. According to the Respondent, the Appellant herein killed his victim and stole his motor cycle registration number No. KMDN 308Q make TVS. In addition to killing the victim, the Appellant dumped his body inside a sugarcane plantation.

9. The Respondent was categorical that the offence of robbery with violence attracts a death sentence and that the imprisonment for 39 years herein was apt. In that regard, it submitted that sentencing is the discretion of the trial Court and that the same can only be interfered with if the same was not exercised judiciously. The court was urged to find no merit in the entire appeal and prayed for the dismissal of the appeal.

10. I have considered the submissions and the grounds of appeal as well as the record of the lower court. The punishment for robbery with violence is provided for in section 296(2) of the *Penal Code* that provides that in case of a conviction the offender shall be sentenced to death. In the instant case, the Court sentenced the Appellant to serve 39 years imprisonment. The decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR the Court held that the mandatory nature of the death sentence is unconstitutional. The Court has the discretion to impose a sentence other than death. Also, the Court has the discretion, however, to consider mitigating circumstances and impose an appropriate sentence.

11. In his mitigation before the trial Court, the Appellant stated that he is remorseful and a first offender.

12. In *James Kariuki Wagana vs Republic* [2018] eKLR, Prof. Ngugi J (as he was then) observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the Court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the Appellant used excessive force, nor did he "unnecessarily injure the Complainant during

the robbery" and was not armed during the robbery. He therefore reduced the Appellant's sentence of death to imprisonment for fifteen years from the date of conviction.

13. In the case before me, the Appellant robbed the victim, and in the course of the robbery caused his death. The facts were that the victim was well known to the Appellant herein as they hailed from the same area and on the Appellant requesting his rider services to enable him deliver goods at Nzoia Sugar Factory, the victim took his motorcycle registration No. KMDZ 308Q make TVS Star and rode with the Appellant as his pillion passenger. The victim never returned home prompting his family to file a missing person's report at the nearest police station. Investigations commenced and the Appellant herein confessed to killing the victim and dumping the body in a sugarcane plantation. The police recovered a body with multiple injuries and on post mortem it was established that the cause of death was cardio pulmonary arrest due to a deep cut wound.

14. From the foregoing, it is clear that the nature of the robbery and the level of violence unleashed on the victim does rise to the level of the heinous crime that merits the death penalty, but the trial Court exercising discretion deemed it fit to warrant long term imprisonment of 39 years. The Appellant caused the death of the victim. It is clear that the Appellant had planned to rob the deceased of his motorcycle and thereafter kill him. The victim therefore died a painful death. I find the sentence imposed by the trial court to be reasonable and hence I see no need to interfere with it. In the circumstances, I uphold the sentence of 39 years as issued by the trial Court. I bear in mind that the trial magistrate took into consideration the circumstances of the case and the Appellant's mitigation.

15. The upshot of this analysis is that the appeal lacks merit and is hereby dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF FEBRUARY 2024.

D. Kemei

Judge

In the presence of:

Amos Chuma Namachanja Appellant

Miss Kibet for Respondent

Kizito Court Assistant