Muchoki v Republic (Criminal Appeal E104 of 2023)
[2024] KEHC 9831 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9831 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E104 OF 2023

JM OMIDO, J

JULY 30, 2024

BETWEEN

JOSPHAT MUNGAI MUCHOKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal from the judgement, conviction and sentence of Hon. J. Irura, Senior Principal Magistrate delivered on 11th September, 2023 in Kigumo SPMCC No. E1567 of 2021.)

JUDGMENT

1. The Appellant Josephat Mungai Muchoki was charged before the trial court with the offence of stealing contrary to Section 268(1) as read with Section 275 of the Penal Code, Cap 63 Laws of Kenya.

2. As is instructive from the charge sheet, the particulars of the offence were that on 28th of September, 2021 at Kenol Township in Murang'a South Subcounty within Murang'a County, the Appellant stole Ksh.161,000/- the property of Humphrey Mburu Kimani.

3. The Appellant denied the charge following which a trial was held in which the prosecution called four witnesses. In his defence, the Appellant tendered a sworn testimony. Upon conclusion of the trial, the Appellant was convicted and fined Ksh.200,000/- in default of which he was ordered to serve three years imprisonment.

4. The Appellant's instant appeal is predicated on the conviction and sentence of the trial court. He has presented the following grounds of appeal vide the Petition of Appeal dated 29th December, 2022 upon which he seeks to upset the convictions and sentences:

    a. The learned trial Magistrate erred in law and fact by convicting the Appellant with (sic) evidence that was not cogent to hold conviction (sic).

b. The learned trial Magistrate erred in both law and fact by basing the conviction on evidence marred with contradictions and inconsistencies.

c. The learned trial Magistrate erred in both law and fact by failing to take into account the Appellant's plausible defence which adequately negated the ingredients of stealing by servant.

d. The learned trial Magistrate erred in law and fact by imposing a default sentence that is not in line with Section 28 of the Penal Code.

5. The court directed that the appeal proceeds by way of written submissions and both parties filed their respective submissions. I have perused the Petition of Appeal, the submissions by the two sides and the record of the trial court in its entirety.

6. Having considered the grounds raised in the Petition of Appeal, although the grounds of appeal reproduced above are on both conviction and sentence, it is clear from the Appellant's submissions that his appeal is only against the sentence. His argument is that the sentence that was imposed by the trial court contravened Section 28 of the Penal Code and was excessive. The Appellant did not advance any position against the conviction.

7. As the present appeal is only in respect of the sentence, it is important for me to state that the circumstances under which an appellate court will interfere with the sentence of a trial court are limited.

8. The case that guides me in this regard is S. vs Malgas 2001 (1) SACR 469 (SCA in which the court observed as follows:

> " A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court....
>
> However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking" "startling" or "disturbingly inappropriate" similarly in Mokela vs The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:
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> "It is well established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

9. On the same issue, in the case of Ogolla s/o Owuor vs Republic [1954] EACA 270 the East Africa Court of Appeal stated as follows:

> " The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors."

10. There is also the Court of Appeal case of Benard Kimani Gacheru v R [2002] eKLR in which it was held that:

> " 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."

11. The question for determination is whether the Appellant's sentence violated Section 28 of the Penal Code and whether the same was harsh and excessive.From the Appellant's submissions, the attack on the sentence imposed by the trial court is two-pronged:

    a. That the sentence imposed by the trial court contravened the express provisions of Section 28(2) of the Penal Code, resulting in an alternative sentence of imprisonment that was excessive and unlawful.

    b. That the trial court did not consider the Appellant's mitigation when sentencing him, particularly that he was a first offender, resulting in a sentence that was harsh and excessive.

12. The penalty for the offence of stealing is to be found under Section 275 of the Penal Code. Let us read it:

    275. General punishment for theft -

    Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

13. From the above provision of the Penal Code, I will classify the offence of stealing as a misdemeanor. The general maximum penalty prescribed for it is three (3) years imprisonment, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided for.

14. I say so because under Section 4 of the Penal Code, "felony" is defined to mean an offence which is declared by law to be a felony or, if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more while "misdemeanor" is defined as any offence which is not a felony.

15. The Appellant complains that when sentencing him, the trial court went afoul of Section 28 of the Penal Code, which provides as follows:

    28. Fines

    (1) Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply –

        a. where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive;

b. in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court;

c. in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion -

i. direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also

ii. issue a warrant for the levy of the amount on the immovable and movable property of the offender by distress and sale under warrant:

Provided that if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue a distress warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under Section 32 or compensation under Section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale –

Amount Maximum period

Not exceeding Sh. 500 - 14 days

Exceeding Sh. 500 but not exceeding Sh. 2,500 - 1 month

Exceeding Sh. 2,500 but not exceeding Sh. 15,000 - 3 months

Exceeding Sh. 15,000 but not exceeding Sh. 50,000 - 6 months

Exceeding Sh. 50,000 - 12 months

(3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law

(Underlined emphasis above).

16. Under Section 26(3) of the Penal Code, a person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment with the exclusion of offences for which the law concerned provides for a minimum sentence of imprisonment, for which the sentencing court cannot substitute a fine for imprisonment.

17. In the instant case, while it is noteworthy that there is no option of a fine provided for the offence of theft under Section 275 of the Penal Code, the sentencing court retains the discretion under Section 26(3) of the Penal Code to sentence an offender to pay a fine in addition to or in substitution for imprisonment.

18. In the instant matter, the trial court, in line with Section 26(3) of the Penal Code, proceeded to sentence the Appellant to pay a fine of Kshs.200,000/= or in default thereof, serve a sentence of imprisonment of three (3) years.

19. It in now the argument of the Appellant that under Section 28(2) of the Penal Code, the moment the trial Magistrate exercised her discretion and settled on a sentence of a fine of Ksh.200,000/-, it was not available to her to impose a default sentence of imprisonment of three years as the law provides under the said Section that the maximum default custodial sentence where the fine exceeds Ksh.50,000/- is 12 months imprisonment.

20. To buttress his point, the Appellant relied on the High Court authority of *Gathii v Republic (Criminal Appeal 11 of 2018*) [2022] KEHC 16544 in which my sister C.W. Githua stated as follows:

> " As stated earlier, in this case, the Appellant was sentenced to pay a fine of Ksh.500,000/= in each of the five counts in default to serve sentences ranging from 2-3 years imprisonment. This clearly ran afoul of Section 28 of the Penal Code for the reason stated above. The trial court should have followed the law and ought to have imposed a default sentence of 12 months imprisonment in lieu of payment of the fine imposed in each count."

21. No doubt, as I have stated above, under Section 275 of the Penal Code, the maximum custodial prison sentence that the court can impose upon an offender upon conviction on a charge of stealing is three years imprisonment.

22. Although the above Section does not provide for an alternative of a fine, we have seen that the trial or sentencing court has the discretion to consider imposing a fine under Section 26(3) of the same statute as the offence is not one in respect of which a minimum sentence of imprisonment is provided, which the trial court did in the instant case.

23. Although a trial court is not under any obligation or legal duty to impose a sentence of a fine for the offence of theft, as the same is discretionary under Section 26(3), once it is minded and decides to exercise that discretion to impose a fine, the default sentence of imprisonment must fall within the scale under Section 28 of the statute, particularly regarding the maximum default sentence that is provided thereunder.

24. Section 28(2) of the Penal Code envisages a situation where the sentencing court may impose a fine exceeding Ksh.50,000/-. In fact, under Section 28(1)(a), where a fine is imposed under any law, then in the absence of express provisions to the fine in that law, where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive. In such a situation where the fine exceeds Ksh.50,000/-, the corresponding default sentence of imprisonment shall not exceed the maximum that the scale provides, which is 12 months imprisonment.

25. With the foregoing settled in this appeal, I agree with the Appellant that the learned trial Magistrate erred in the stand she took on the default sentence of imprisonment, which as I have said, should not have exceeded the term of 12 months provided four under Section 28(2) of the Penal Code.

26. The second issue that the Appellant proffers on the sentence is that his mitigation was not considered, particularly the fact that he was said to be a first offender.

27. I will reproduce the proceedings of the trial court that were taken on 11th September, 2023 that followed the Appellant's conviction. The record reads as follows:

Prosecutor:

I have no previous record in respect of the accused person.

Accused in mitigation:

I have a family that depends on me. I seek for leniency.

Court:

Mitigation considered. Accused person is fined Ksh.200,000/- in default 3 years imprisonment.

28. What the record presents is that the Appellant, who had no previous record(s) of conviction sought for the court's leniency, stating that he is a family man. The lower court record bears it that the learned trial Magistrate considered the Appellant's mitigation but despite the Appellant being a first offender and seeking the court's mercy, the court still went ahead to impose the maximum sentence of three years as a default sentence.

29. I will proceed to consult case law on the issue.

30. In the case of Arissol v R [1957] EA the East African Court of Appeal when considering the sentence stated:

> " It is unusual to impose the maximum sentence on a first offender and it would be wrong to depart from that rule because on the evidence she might have been convicted of a graver offence. We cannot feel satisfied that these matters were sufficiently considered by the learned Chief Justice and have therefore decided to allow the appeal ..."

31. Gedeon Ngugi Magondo v Republic [2007] eKLR the court observed as follows:

> " In addition, there are the mitigating factors that the appellant was a first offender and he pleaded guilty, thus saving the court's time. In my view, if the learned magistrate would have taken into account all the above relevant factors, he would not have imposed the sentence of 3 years imprisonment. For that reason I will interfere with the exercise of discretion of the learned magistrate. Learned State Counsel has conceded to the appeal on sentence and, in my view, rightly so."

32. There is also the case of Richard Ombati Kerage v Republic [2008] eKLR in which the court held as follows:

> " As regards the appeal against sentence, the appellant was a first offender and was a fairly young man although his age could not be verified. He only said that he was eighteen years' old. A trial court should not sentence a first offender to the maximum sentence provided by the law unless there are exceptional circumstances that justify the same."

33. The above authorities avail the jurisprudence that the court ought to properly consider the mitigation that an offender offers and that a maximum sentence should not be imposed upon a first offender, unless there are exceptional circumstances that would warrant the same, which must be recorded.

34. In my view, had the Appellant's mitigation and particularly the position that he was a first offender been properly considered by the trial court, the maximum default sentence that was imposed would not have resulted.

35. It is therefore my finding that the sentence of the trial court was manifestly harsh and excessive and it is within my powers as an appellate court that I interfere with the same.

36. In the premises, the appeal against sentence will be allowed to the extent that the default sentence of 3 years' imprisonment will be set aside and a period of 12 months imprisonment will be substituted in its place, in line with my findings above that the maximum default sentence where the fine exceeds Ksh.50,000/- is 12 months imprisonment. For avoidance of doubt, the fine of Ksh.200,000/- stands.

37. The default sentence of 12 months imprisonment shall run from 11th September, 2023, being the date that the trial court sentenced the Appellant.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 30TH DAY OF JULY, 2024.

JOE M. OMIDO

JUDGE

Appellant: Present, virtually.

Prosecution Counsel: Ms. Gakumu.

Court Assistant: Ms. Njoroge.