Makumbi v Republic (Criminal Appeal E017 of 2022)
[2023] KEHC 850 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEHC 850 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E017 OF 2022

LW GITARI, J

JANUARY 26, 2023

BETWEEN

PETER MUTHINI MAKUMBI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal by the appellant against his sentence in Marimanti Law Courts Criminal Case no E028 of 2021 following his conviction for the offence of stealing stock contrary to section 278 of the *Penal Code*. He denied the alleged offence and after full trial, he was found guilty and sentenced to serve seven (7) years imprisonment.

2. The particulars of the said offence were that on February 21, 2021 at Kiamuthare 'B' Village of Gakurungu location in Tharaka Couth Sub-County within Tharaka Nithi County, the appellant jointly with another not before court, stole two (2) goats valued at kshs 16,000/=, the property of one Tharethe Kairanya Magane.

3. The appeal was premised on the following amended grounds of appeal:

    a. That the learned trial magistrate erred in both law and facts by imposing a harsh sentence upon the appellant without considering that the appellant was a first offender.

    b. That the learned trial magistrate erred in both law and facts by imposing an excessive sentence upon the applicant without considering the border dispute.

    c. That the learned trial magistrate erred in both law and facts by imposing a harsh sentence without considering that the purpose of a sentence of imprisonment is not only for torment.

4. The appeal was disposed off by way of written submissions. Below is a summary of the respective submissions by the parties.

The appellant's submissions

5. The appellant submitted in support of the appeal vide his written submissions that were filed before this court together with his amended grounds of appeal on August 28, 2022. It was his submission that the imposed sentence of seven (7) years was excessive and harsh considering that he is young and energetic hence capable to contributing to the building of the nation. According to him, although the circumstances in which the subject offence occurred portrayed the appellant as unfit to the society, he was a first offender and was willing to reform and change. It was thus the appellant's submission that the appeal should succeed and the sentence imposed on him by the trial court be substituted with a lesser sentence.

The respondent's submissions

6. The respondent filed its written submissions dated September 21, 2022 on the even date. It was the respondent's submission that the appellant's conviction was safe and that the sentence meted against the appellant was lawful. The respondent relied on the case of *Arthur Muya Muriuki v Republic* [2015] eKLR in submitting that the trial court took into account all the relevant factors and applied all the right principles while sentencing the appellant. The respondent further relied on the case of *Ogolla s/o Owuor v R*, [1954] EACA 270 and submitted that the sentence meted against the appellant is not amenable to reduction and/or variation for the reason that the trial court acted on facts presented before it and the applicable provisions of the law when sentencing the appellant, and that as such, the sentence was suitable in the circumstances and should be upheld by this court. It therefore the prayer of the respondent that the present appeal lacks merit and should be dismissed in its entirety.

Issues for determination

7. From the grounds raised by the appellant in support of this appeal as well as the respective submissions of the parties, the main issue for determination is whether the sentence meted against the appellant by the trial court in this case is harsh and excessive and as such, whether the same should be reviewed.

Analysis

8. This is a first appeal. The law is well settled that the first appellate court has a duty to re-evaluate the evidence adduced before the trial court, analyse it and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to assess their demeanour. In *Kiilu & Another vs Republic* [2005] 1KLR 174 the Court of Appeal stated that:

> " 1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.
>
> 2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

See also *Okeno vs Republic* [1972] EA 32 on the same subject.

9. Guided by the above authorities, it follows that it is the duty of this court to reexamine the evidence that was adduced before the trial court and arrive at its own conclusion. The prosecution called a total of four (4) witnesses while the appellant testified as the sole witness in his defence. Below is a summary of their cases.

The prosecution's case

10. PW1 was Tharaka Kairanya Magane, an uncle to the accused by reason that the accused is a son of his sister. He recalled that on the material day at around 8.00 a.m., he was in church. He later received a call from his wife on his way home from church and was informed that two of his goats had been stolen from his homestead. The matter was then reported to *nyumba kumi* elders and the accused was consequently arrested for the alleged theft of PW1's goats. PW1 stated that the goats were however never recovered. According to him, one Eliud Makundi (PW2) and one Josphat Cino (PW3) were the ones who informed the Nyumba Kumi elders that they had seen the accused taking his goats. He further stated that the goats were worth kshs 16,000/=. On cross examination, PW1 stated that he was with the accused person tethering his 5 (five) goats before he left for church on the material day.

11. PW2 was Eliud Mukundi, a neighbour to both PW1 and the appellant herein. He recalled that on the material day at about noon, he was at the home of Josphat Cino, another of his neighbour. He alleged that he saw the appellant riding a motorcycle carrying one pillion passanger. That the appellant stopped his motorcycle by the road for about 10 (ten) minutes and that he later heard the appellant chasing away a girl who was herding goats nearby. He alleged that he was at a distance of about 50-100 metres from where the appellant was. That after a while, PW2 saw the appellant pulling 2 (two) goats on a leash and rode away with them with his accomplice holding the goats as they were on the motor cycle. According to him, the two goats that the appellant came pulling on a leash came from PW1's home. That the appellant was later arrested by Nyumba Kumi elders at around 9.00 p.m.

12. PW3 was Josphat Cino, also a neighbour of PW1 and the appellant. PW3 corroborated PW2's testimony that on the material day at about noon, he was with PW2 at PW3's home. That he also saw the accused arriving with a person who he didn't know while on a motorcycle. That the appellant chased away a girl who was herding goats nearby and went to PW1's home with his accomplice where they carried away 2 (two) goats and left on the same motorcycle. PW3 stated that PW1's son later went to him inquiring about the lost goats and he told him what he had witnesses. On cross examination, PW3 stated that he did not do anything when he allegedly witnessed the appellant carry the said goats and that he did not see the registration number of the motorcycle that they were allegedly using.

13. PW4 was P C Jotham Murithim, the investigating officer in this matter. He recalled that on the material day at about 8.00 p.m., he was on duty at Tunyai Police Station when the Appellant was brought to the station by Nyumba Kumi elders and he was booked in for the offence of stealing 2 (two) goats. PW4 then took over the investigations into the case, recorded witness statements and established that there were 2 (two) eye witnesses to the alleged case of theft. He stated that he finally arraigned the appellant in court and that the goats alleged to have been stolen were never recovered.

The defence case

14. As stated herein above, the appellant testified as the sole witness in his defence. He denied committing the alleged offence and contended that he was framed by PW1 over a boundary dispute. It was his case that the trial ought to consider his case and acquit him as in any case, the goats and photos of the goats were not produced as exhibits.

15. In his judgment, the learned trial magistrate found that-

> " It is now clear that the evidence on record that the accused person was positively identified/ recognized as he took away some of the goats he had earlier that day helped the complainant tether within his homestead and those goats were never recovered. The evidence on record is quite credible and has established all the ingredients of the instant offence. After evaluating all the evidence on record, I find that the same is in support of the offence of stealing stock as charged. The evidence on record is also as specific as charges and the information of the offence set out in the particulars of the offence provided in the charge sheet. The accused person has in his defence failed to cast doubt onto the prosecution case. The prosecution has therefore proved its case against the accused person beyond reasonable doubt."

This court has a duty to re-evaluate, re-consider the evidence and come up with its own independent finding, see *Okeno v Republic*, *supra*. The only reservation being that this court has to leave room for the fact that unlike the trial court it did not have the benefit of seeing the witnesses when they testified.

I have evaluated the evidence tendered before the trial magistrate. The two key witnesses were PW2 Eliud Mukundi and Josphat Cino (PW3). They gave an eye witness account that it is the appellant who took two goats from where PW1 had earlier that day tethered his goats and left them there as he went to church. The record shows that the testimonies of the two witnesses was not challenged during cross-examination. There is no reason to doubt their testimony. The testimony of PW2 corroborated that of PW3 in all the material particulars. I find that the prosecution had tendered sufficient evidence before trial magistrate. The appellant was charged with Stealing Stock contrary to section 278 of the Penal Code which provides as follows:

> " If the thing stolen is any of the following things, that is to say, a house a mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether goat, or pig or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years."

The definition of steal is given under section 268 of the *Penal Code*. It provides:-

> " A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof, of any property, is said to steal that thing or property."

Stealing is also defined in the *Black's Law Dictionary* (8th Edition) as follows:-

> " To take (personal property) illegally with the intention to keep it unlawfully."

The evidence against the appellant was cogent. It proves that it is the appellant who took the two goats the property of the complaint with an intention of permanently depriving the owner of them. Investigations were conducted, the appellant was arrested and charged. I find that the evidence adduced before the trial court supported the charge of stock theft. The evidence was consistent, irrefutable and well corroborated. It was sufficient to base a conviction for the offence charged.

16. I shall now delve to the sole issue herein, the same being whether the this court should interfere with the discretion of the trial court as regards sentencing.

17. As a first appellate court, this court should only disturb the sentence meted on the appellant if it is established that the sentence was illegal, or that in sentencing, the trial court failed to take into account relevant factors, or took into account irrelevant ones or that it applied the wrong legal principles. An

appellate court can also interfere with the sentence if, in its view, the sentence was harsh or manifestly excessive in the circumstances of the case. See: *Bernard Kimani Gacheru v Republic*, [2000] eKLR; *Macharia v Republic*, [2003] KLR 115.

In *Ogolla s/o v Republic* [1954] EACA 270 the court held;

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

As a general rule, sentencing is always at the discretion of the trial court. However, that discretion must be exercised judiciously in accordance with the law bearing in mind the objectives of sentencing as set out in the Sentencing Policy Guidelines, 2016 published by the Kenya Judiciary.

18. In his judgment, the learned trial magistrate identified three issues for determination. First, whether the 2 (two) goats alleged to have been stolen belonged to the complainant. Second, whether the accused stole or fraudulently took the said 2 (two) goats and finally, whether the appellant fraudulently converted the said goats to use of any other person save the complainant.

19. The appellant herein was charged with the offence of stock theft. Of relevance to this case is aection 268(1) of the Penal Code (*supra*).

The other main provision of relevance in this matter is Section 278 of the Penal Code

20. As stated herein above, sentencing remains the function of the trial court as long as it is in accordance with the law. The trial court noted that the appellant was a repeat offender and that was charged before the same court on May 27, 2019 with the offence of assault causing actual bodily harm vide Criminal Case no 581 of 2019 and was convicted of the same offence on May 10, 2021, and consequently sentenced to serve 3 years imprisonment. The trial court stated that it considered the nature and circumstances of the subject offence plus the mitigation of the appellant and found that the appellant took advantage of the trust bestowed on him by the complainant and stole from him. In sentencing the appellant, the trial court thus took into account the appellant's criminal record and prevalence of the subject offence in the jurisdiction of the said court.

21. I find it important at this point to restate the objectives of sentencing. These are captured in paragraph 4.1 of the Judiciary *Sentencing Guidelines*, 2016 as follows:-

    1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

    2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

    3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

    4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

    5. Community protection: To protect the community by incapacitating the offender.

    6. Denunciation: To communicate the community's condemnation of the criminal conduct."

The trial magistrate found that the stolen property was not recovered.

The jurisdiction of this court to reduce and or vary the sentence is under section 354 (3)(b) of the *Criminal Procedure Code* (cap 75 Laws of Kenya). It provides for the powers of the court on an appeal on sentence. It states-

> In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence."

As stated in the case of *Ogolla s/o Owuor v Republic* (supra) an appellate court will not interfere with sentence unless it is proved that the court acted on wrong principles or acted on wrong factors and further that the sentence is manifestly excessive in view of the circumstances of the case. I am well guided by these authorities.

I find that the sentence meted out on the appellant was within the provisions of the applicable law. The learned trial magistrate took into account relevant material factors and never acted on wrong principles. The maximum sentence provided under Section 278 of the Penal Code *supra* is fourteen (14) years. Considering all the circumstances of this case, a sentence of seven (7) out of possible sentence of fourteen (14) cannot be said to be manifestly excessive.

By the same breath, the sentence cannot be termed to be harsh.

In answer to the grounds of appeal in particular the first ground, the appellant is not candid as he was not a first offender. On the 2nd ground, no border dispute was alleged throughout the trial. Finally on the third ground, I have demonstrated that the sentence was not harsh.

Conclusion

The appeal is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 26TH DAY OF JANUARY 2023.

L W GITARI

JUDGE