Nyamu v Republic (Criminal Appeal E013 of 2022)
[2023] KEHC 20746 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEHC 20746 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E013 OF 2022

MS SHARIFF, J

APRIL 25, 2023

BETWEEN

FRANCIS MARAUKO NYAMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(an appeal from the conviction and sentence by P.N.Maina CM in original Marimanti SPMC Crimial Case No. 423 of 220 delivered on 21/4/2021)

JUDGMENT

1. The appellant was charged in the subordinate court with the offence of housebreaking contrary to section 304(a) and stealing contrary to section 268 as read together with section 275 of the *Penal Code*. The particulars were that on 19/6/2020 at Marimanti Location in Tharaka South Sub County within Tharaka Nithi County jointly with others not before the court he broke and entered a building used as human dwelling by Esther Mikethi and stole therein items as per the inventory all valued at Kshs 24,000/- the property of the said Esther Mikethi.

2. He faced an alternative count of handling stolen goods contrary to section 322(1)(2) of the *Penal Code*. The particulars were that on the 27/6/2929 at Marimanti Location in Tharaka South Sub County within Tharaka Nithi County otherwise than in the course of stealing retained 5 iron sheets valued at Kshs 2,250/- knowing or having reason to believe them to be stolen property.

3. Upon arraignment, the appellant initially pleaded not guilty to the charges however in the course of trial, he changed his plea to that of guilty whereupon a plea of guilty was accordingly recorded.

4. Upon hearing the mitigation tendered, the court sentenced him to serve 7 years imprisonment. Aggrieved, the appellant preferred the instant appeal anchored on the following amended grounds;

    a. The appellant pleaded guilty.

b. The trial magistrate erred in law and fact by failing to take into account the appellant's dignity before imposing a harsh sentence.

c. The magistrate erred both in law and fact by failing to consider the appellant was qualified for a lenient sentence.

d. The learned trial magistrate erred by failing to consider that the appellant was constitutionally guaranteed to the benefit of the least severe punishment.

e. The learned trial magistrate erred both in law and fact by failing to onsider the appellant's mitigation factors as part of the trial.

5. Thereafter, parties were directed to file written submissions. Both parties complied.

6. The appellant in urging the court to consider a lenient sentence submits that this was not a case of an 'eye for an eye' and the imposition of the sentence is inconsistent with the purpose of sentencing. That the sentence has ruined his life by limiting his future prospects. He thus beeches the court to reconsider reviewing the sentence imposed.

7. The respondent raised 2 issues; whether the appellant having pleaded guilty is precluded from appealing against his conviction, and whether the sentence is harsh in the circumstances.

8. On the first issue, it is argued that under the provisions of Section 348 of the *Criminal Procedure Code*, an accused person convicted on his own plea of guilty cannot challenge the conviction unless the challenge goes to the extent or legality of the sentence. In support, the case of *Alexander Lukoye Malika v Republic* (2015) eKLR has been cited which established the exceptions that may entitle an accused to appeal despite plea of guilty having been entered. That in the circumstances of this appeal the appellant has not raised any of the exceptions set out in that case.

9. On the second issue, it is submitted that this court can only interfere with the trial court's sentence if the same is harsh and excessive in the circumstances. The records presented by the then prosecution showed that the appellant was not a first time offender coupled with the fact that the trial court called for and considered the pre-sentencing report which was not favourable for a non-custodial sentence. In this regard, the case of *Benard Kimani Gacheru v Republic* [2002] eKLR has been cited in support.

Analysis and determination

10. This being a first appeal, I am guided by the sentiments expressed in *Kiilu & another v Republic* [2005]1 KLR 174, where the duty was stated thus;

> 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.
>
> 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 hashad the advantage of hearing and seeing the witnesses.

11. Upon perusing the record, I note that the appellant was convicted on his own plea of guilty and this therefore brings into the fore the provisions of section 348 of the *Criminal Procedure Code* which provides;

> No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

12. From the grounds of appeal, the appellant acknowledges that he pleaded guilty and seeks the reconsideration of the sentence imposed. For a party to benefit from the exceptions provided by secton 348 of the *Criminal Procedure Code*, he has to show that the sentence meted out was not legal.

13. It is not lost to me following a line of authorites that sentencing is a prerogative vested in the trial magistrate as stated in the following authorities; in *Wanjema v Republic* [1971] EA 494 it was stated that:

> An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case.

14. In *Bernard Kimani Gacheru v Republic* [2002] eKLR it was held:

> .....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 states is shown to exist.

15. In this case, the appellant was charged with the offence of housebreaking contrary to section 304(a) of the *Penal Code* and stealing contrary to section 268 as read with section 275 of the *Penal Code*. The offence of housebreaking carries a prison term of 7 years while the offence of stealing carries a penalty of 3 years imprisonment.

16. The trial magistrate having considered the mitigation tendered and the fact that the appellant had previous records convicted him to 7 years and 3 years respectively and the sentences were to run concurrently.

17. In the circumstances, and having considered the matter with a view of arriving at my own independent conclusion, I do find no compelling reason has been given to warrant the setting aside of the sentence.

18. In the premises, I find no merit in the appeal which is hereby dismissed. The conviction is upheld and sentence is hereby confirmed.

DATED, DELIVERED AND SIGNED AT CHUKA THIS 25TH DAY OF APRIL 2023

MWANAISHA. S. SHARIFF

JUDGE