REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO.E007 OF 2020

IAN KIVOI MWASIGWA ....APPELLANT

VERSUS

REPUBLIC...................................RESPONDENT

(Being an appeal from the conviction and sentence by D. Wangeci in Voi

Criminal case No.938 of 2018 delivered on 5th December 2018)

JUDGEMENT

1. The appellant was charged and convicted of the offences of **Stealing contrary to Section 279(d) of the Penal Code (count one) and Stealing contrary to Section 275 of the Penal Code (count two)**. Particulars of the offence in respect of count 1 were that, on the night of 15th and 16th day of November 2018 at Ndii Railways Sub-Station in Voi Sub County within Taita Taveta County with others not before court jointly stole assortment of Railways metal valued at Kshs 15,000/= property of Kenya Railways Cooperation(KRC). Particulars for count 2 were that on the night of 19th and 20th day of November 2018 at Mburia Village in Voi Sub County within Taita Taveta County with others not before court jointly stole steel water pipes valued at Kshs 45,000/= the property of Mburia Water Project.

2. In respect of count two, particulars were that on the night of 19th and 20th day of November 2018, at Mbuna village in Voi Sub County within Taita Taveta County with others not before court jointly stole steel water pipes valued at Kshs 45, 000 the property of Mburia water project.

3. Prosecution called six witnesses and then closed its case. The appellant gave unsworn testimony denying the offence. The trial court convicted the appellant on both counts and sentenced him to 5 years imprisonment on the first count and 2 years imprisonment for count two. The court directed that the offences to run consecutively.

4. The appellant feeling aggrieved filed this appeal citing the following grounds:

> **a) That, the learned magistrate erred in law and fact in this case yet failed to find the investigation done were shoddy (sic).**
>
> **b) That the learned magistrate erred in law and fact when he relied on insufficient evidence to convict in the present case.**
>
> **c) That the learned magistrate erred in law and fact when he relied on defective charge sheet and could not have based a safe conviction.**
>
> **d) That the learned magistrate erred in law and facts when he declined to adequately consider my defense statement.**

5. He urged the court to allow the appeal, quash the conviction and set aside the sentence.

6. The appeal was canvassed by way of written submissions. The appellant filed written submissions on 6th June 2021. However, he did not submit on the grounds of appeal relating to conviction and instead raised mitigation in relation to the sentence imposed and urged the court to grant a more lenient sentence or non-custodial sentence to enable him handle the problems facing his family as the eldest son.

7. Ms Mukangu Counsel for the state filed written submissions dated 5th July, 2021 submitting that the appellant was given minimal sentences out of a possible sentence of 14 years. Learned counsel submitted that although the High Court has jurisdiction to review sentences, it should follow guiding principles as were clearly set out in the case of **S V Malgas 2001(1) SACR 469(SCA) at Para 12 and in Mokela v The State (135/11) [2011] ZASCA 166** where the court stated that an appellate court cannot in the absence of material misdirection by the trial court approach the question of sentence as if it were a trial court**.**

8. Counsel further submitted that the sentence by the lower court was given after the trial court had heard the testimonies of the prosecution witnesses and the unsworn evidence by the appellant. That taking all factors into consideration, the sentence was lenient. In counsel's opinion, the sentence cannot be said to have been shocking, startling or disturbingly inappropriate to require interruption by the high court.

9. To buttress her position, counsel relied on the holding in the case of **R v Shershowsky(1912)CCA 28TLR263 and Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No.253 of 2003** where the Court of Appeal held that sentencing is a discretion of the trial court which the appellate court should be slow at interfering with unless there is an apparent misdirection in sentencing by the trial court.

10. Counsel further submitted that the sentence given by the trial court is sufficient and in tandem with the crime committed taking into account that he stole from two institutions in a span of a week. That by stealing from the government the appellant effectively acted against public interest and that the mitigation given in his submissions does introduce new facts that do not speak on the legality of the sentence imposed.

11. In conclusion, counsel submitted that the sentences set out are sufficient for the offences committed and that they will deter the applicant who has not demonstrated remorse or an understanding of the effects of his action.

12. I have considered the appeal herein and rival submissions of the parties. The only issue rendering itself for consideration is whether this court should interfere with the sentence of the trial court.

13. Although the appellant filed an appeal against both conviction and sentence, he later abandoned the appeal against conviction and instead chose to argue the same on reduction or review of sentence only. It is trite that under section 354(3) of the Criminal procedure court an appellate court has jurisdiction to increase or reduce or alter the nature of the sentence imposed by a trial court. However, these powers are discretionary based on legally recognized principles both in law, judicial precedents and guiding policies.

14. **The 2016 Judiciary of Kenya Sentencing Policy Guidelines** lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

> **"Sentences are imposed to meet the following objectives:**
>
> **Retribution: To punish the offender for his/her criminal conduct in a just manner.**
>
> **Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**
>
> **Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
>
> **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.**
>
> **Community protection: To protect the community by incapacitating the offender.**
>
> **Denunciation: To communicate the community's condemnation of the criminal conduct."**

15. However, the same policy does further provide that a sentencing court must also take into account the following factors; sentence must be commensurate to the seriousness of the offence committed, not manifestly excessive, take into account age of the offender, mitigation, circumstances under which offence was committed, accused's past conduct and the victim's view among other factors.

16. In the case of **Dorris Mwende Baini v Republic [2021] eKLR the court** stated that the principles guiding interference with sentencing by the appellate Court were properly set out in **S vs. Malgas (sura)** at para 12 where it was held:

> **"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"**

17. Similarly, in the **case of Dorris Mwende Baini v Republic (supra) the court** quoted the holding in the case of **Bernard Kimani Gacheru vs. Republic [2002] eKLR** where the court of appeal restated 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."***

18. The reasons advanced by the appellant in his quest for a lenient or non-custodial sentence are that; his family back home is facing problems; his release is meant to enable him tackle the problems facing his family as the eldest son; his mother is a widow and not in good health and, that his relatives are fighting over their land which his father left hence affecting the health of his mother.

19. It is clear from the record that the appellant did not advance the mitigation being given now before the trial court. In his mitigation before the trial court, he simply denied committing the offence. It therefore follows that there was no persuasive mitigation tendered to attract sufficient leniency.

20. However, the appellant is a first offender with no previous criminal record. Although the offences committed are felonies, the sentences meted out were to some extent excessive considering the value of what was stolen. Had the court considered the seriousness of the offence vis a vis the value of what was stolen, I am sure the sentence would have been lesser.

21. To give 5yrs imprisonment sentence for stealing property worth Kshs15,000 was in my view excessive. To that extent and in exercise of powers conferred upon this court under section 354 of the Criminal Procedure Code, the sentence meted in both counts is hereby reduced to the period already served. Accordingly, the accused shall be set free forthwith unless otherwise lawfully held.

22. Right of appeal 14 days

DATED, SIGNED AND DELIVERED IN VOI THIS 27TH DAY OF JANUARY 2022

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J.N.ONYIEGO

JUDGE