



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO E034 OF 2021

STANLEY KIPRONO BETT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon H. M. Nyaberi (CM) delivered at Winam

Chief Magistrate's Court in Criminal Case No E615 of 2021 on 26th July 2021)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code. He pleaded guilty to the charge. The Learned Trial Magistrate, Hon H. M Nyaberi, (CM) convicted him of the said charge and sentenced him to two (2) years imprisonment.
2. Being dissatisfied with the said Judgement, on 5th August 2021, the Appellant lodged the Appeal herein. His Petition of Appeal was dated 2nd August 2021. He relied on two (2) grounds of appeal challenging conviction. On 16th December 2021, he filed his Amended Petition of Appeal dated 14th December 2021 through his Advocates, M/S Emukule & Co Advocates. He set out three (3) grounds therein challenging sentence only.
3. He filed two sets of Written Submissions. His undated Written Submissions were filed on 13th October 2021 while those of his Advocates were dated 10th January 2021 and filed on 27th January 2021. The Respondent's Written Submissions were dated 8th November 2021 and filed on 9th November 2021.
4. This Judgment is based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

5. 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.
6. 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.
7. 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 was 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.
8. Ground of Appeal No (2) of his Petition of Appeal that was filed on 5th August 2021 was therefore immaterial as the same alluded to contradictions and inconsistencies during trial. This court did not also analyse the Ground of Appeal No (1) in his said Petition of Appeal to the effect that he was not accorded a fair trial contrary to the provisions of Article 50(2)(j) of the Constitution of Kenya, 2010 for the reason that he appeared to have abandoned that ground in his Written Submissions that he filed on 13th October 2021.

9. In addition, as pointed hereinabove, the Grounds of Appeal in his Amended Petition of Appeal that was filed on 14th December 2021 dealt with the issue of his sentence only. All the Grounds of Appeal in the said Amended Petition of Appeal were therefore dealt with together as they were related.

10. The Appellant submitted that it was trite law that when an appellant is convicted based on his unequivocal plea of guilt, an appeal only lies on the sentence meted out by the trial court. He urged the court to take note that he was charged with stealing property worth Kshs 1,000/= and submitted that although he was not excusing such actions, the said items were produced in court and must have been returned to the rightful owner, Rural Electrification Authority. He added that therefore there was restitution on the part of the Complainant.

11. He was categorical that he raised cogent points during his mitigation which the Trial Court acknowledged in its sentencing. He contended that he had pleaded for forgiveness and noted that he had a family that depended on him. He argued that to that end, the Trial Court should have taken into account the possibility of a non-custodial sentence since there were no aggravating circumstances in this occasion.

12. He urged the court to consider the Sentencing Guidelines, Gazette Notice No. 2970 in particular, Regulation 7.19 which provides that any trial court should always consider a non-custodial sentence taking into consideration the gravity of the offence. He pointed out that in the facts as read out by the Prosecution nothing was stated and/ or presented to court to establish that before, during and or after the commission of the offence, anyone was harmed and or deprived of any right whatsoever.

13. He contended that the Prosecution did not produce any records to show that he was a serial offender and consequently, as the Trial Court acknowledged that he was a first offender, the sentence meted out to him was therefore harsh and capricious.

14. He invoked Section 275 of the Penal Code and submitted that the said Section did not stipulate any mandatory sentence but instead give the judicial officer discretion on the sentencing. He added that the Trial Court was also under no obligation to impose a custodial sentence only but could also have imposed a fine. He argued that the Trial Court meted out a custodial sentence without an option of a fine despite the offence was for stealing of property worth Kshs 1,000/=.

15. In this regard, he relied on the case of **Tonny Kiprono Ngetich vs Republic [2019] eKLR** whilst referring to the case of **MK vs Republic [2015] eKLR** and **Daniel Kyalo Muema vs Republic [2009] eKLR where Mumbi J** (as she then was) stated that a person convicted of the offence of stealing was liable upon conviction, to a sentence of three (3) years imprisonment but that the provision did not impose a mandatory minimum sentence and the court has discretion to impose a lesser sentence or a fine.

16. He submitted that he was convicted and sentenced on 26th July 2021 and had since served six (6) months in prison. He pleaded with this court to vacate the orders of the Trial Court, uphold his Appeal and release him forthwith as he believed the time served was enough punishment for the crime he committed. He added that he was remorseful and had learnt his lesson regarding the offence he was charged.

17. On its part, the Respondent submitted that the Prosecution proved the case against the Appellant beyond reasonable doubt. It contended that the plea was unequivocal as provided by Section 207 of the Criminal Procedure Code.

18. It was categorical that the sentence imposed upon the Appellant herein by the Trial Court was lawful as provided for in the Penal Code and that the Trial Court considered the mitigating factors before sentencing. In this regard, it placed reliance on the case of **Gerald Ndoho Munjuga vs Republic [2016] eKLR** and the case of **Alister Anthony Pareira vs State of Maharashtra** (citation not given) where the common thread was that sentencing was a discretion of the trial court but that such discretion must be exercised judiciously and not capriciously. It urged this Court to dismiss the Appellant's Appeal for lack of merit and uphold the sentence.

19. Section 268 of the Penal Code Cap 63) Laws of Kenya) provides that:-

1. 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, any property, is said to steal that thing or property.

20. Section 275 of the Penal Code sets out the penalty for stealing. It provides that:-

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 (emphasis court).

21. Notably, the use of the word "**liable**", connotes that the trial court has discretion to impose a lesser sentence where the circumstances so dictate. This was the holding in the case of **Daniel Kyalo Muema vs Republic [2009] eKLR** where the Court of Appeal stated that the words "**shall be liable to**" did not in their ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court.

22. Guided by the above decision, a person convicted of the offence of stealing '**is liable**', upon conviction to a sentence of three (3) years imprisonment under Section 275 of the Penal Code. As the same does not stipulate a mandatory minimum sentence, the trial court has discretion to impose a lesser sentence or a fine.

23. In this case, the Appellant pleaded guilty to stealing property worth Kshs1,000/=. It was not clear from the proceedings whether the twenty eight (28) metal rods were returned to the Complainant. That notwithstanding, even if the said metal rods were returned to the Complainant and their value was low, it was not lost to the court that the theft of the same had serious consequences to the economy as their theft was likely to affect the entire community that relied on the said metal rods for their economic activities.

24. Bearing in mind that the Appellant breached the trust that had been bestowed upon him by his employer by stealing the very goods that he had been employed to protect from bad elements in the society, it was the considered opinion of this court that the sentence of two (2) years imprisonment was not excessive for such an offence.

25. However, this court took the view that as the Appellant pleaded guilty to offence at the first instance thus saving the court valuable time in going through the rigors of a full trial and he was a first offender, he ought to have benefitted from a lower sentence.

26. Notably, had been in custody since 26th July 2021, a period of about nine (9) months as at the time of writing this judgment. This court found the period he already served to have been sufficient punishment.

27. In the premises, Grounds of Appeal Nos (1), (2), (3) of the Amended Petition of Appeal dated 14th December 2021 were merited and the same be and are hereby allowed.

DISPOSITION

28. For the foregoing reasons, the upshot of this Court's decision was that the Appellant's Petition of Appeal lodged on 16th December 2021 was partly merited and the same be and is hereby allowed. Although the court upholds the conviction, it is hereby substitutes the sentence of two (2) years imprisonment with nine (9) months imprisonment that the Appellant has since served. It is hereby directed that the Appellant herein be and is hereby released from custody unless he be otherwise lawfully held.

29. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL 2022

J. KAMAU

JUDGE