REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL 39 OF 2018

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. H.M. Ng'anga

(S.R.M) in Narok CMCR No. 1264 of 2017 on 12th October 2018)

KIMUTAI LANGAT.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Charge.

[1] The appellant was charged with preparation to commit a felony contrary to Section 308(2) of the Penal Code. It is alleged that on the 22nd day of October 2017 at lower Majengo estate in Narok North Sub County within Narok County being at his place of abode had with him articles for use in the course of burglary or stealing namely one toy pistol, steel cutter, a bolted rungu, one woolen hood and three torches.

[2] The appellant was convicted and sentenced to serve five years' imprisonment.

[3] Being dissatisfied with the said conviction and sentence he preferred an appeal as set out in his grounds of appeal:

i. The Appellant stated that he pleaded not guilty to the offence.

ii. That the trial magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt when the evidence as presented did not support the charge as drawn.

iii. That the learned trial magistrate erred in law and fact in convicting the Appellant under Section 308(2) of the Penal Code, without sufficient evidence and without making a specific finding as to whether the appellant in fact committed the offence the complainant on the date, time indicated in the charge sheet.

iv. That the learned trial magistrate erred in fact and in law in failing to consider glaring inconsistencies in the prosecution's evidence and in failing to consider the evidence as whole and especially for the defence.

v. That the learned trial magistrate completely misunderstood the case that was before him, misconceived the issues and as a result came to a wrong decision.

vi. That the learned trial magistrate erred in fact and in law in failing to take into consideration the defense put forward by the appellant, in shifting the burden of proof to the appellant and is failing to find for the appellant on parallel evidence.

vii. That the learned trial magistrate erred in law and in fact in convicting the appellant in the absence of compelling evidence from the prosecution.

viii. The trial magistrate erred in law and in fact by deviating from the evidence adduced by the prosecution as backed by the police and introducing extraneous facts and assumptions on which the complainant was not led during the examination in chief.

ix. The learned trial magistrate erred in law and in fact in principle in assuming an appellate jurisdiction with regard to the admissibility of evidence especially the toy gun and making adverse comments thereon when the issue was not available for review and /or appeal before him.

x. The trial magistrate erred in law by not appreciating and disregarding the evidence of the defence throughout the case.

xi. The learned trial magistrate erred in law and fact in wholly premising his finding and conviction on his own personal views and opinions which were neither supported by the evidence before him nor the applicable law.

xii. In whole, the finding and holding of the learned trial magistrate as contained in his judgment delivered on 12th October 2018 is inconsiderate erroneous, unlawful biased and untenable in law.

xiii. That he prays to be present during the hearing and final determination of this appeal.

xiv. That he prays to be supplied with the trial court proceedings and its judgment to enable him adduce better grounds of appeal.

[4] Ultimately, he prayed that this appeal be allowed; conviction and sentence be set aside and quashed, and an order for re trial.

[5] On 19/04/2021 the Appellant orally submitted to this court that his only prayer before this court is for time spent in prison to be taken into account.

Respondent's submission

[6] Ms. Torosi, the prosecution counsel, submitted for the state that, the appellant had a previous conviction in Narok criminal case no. 1799/2016 where he was sentenced to serve five years imprisonment.

[7] That the appellant is a repeat offender of almost similar cases that is preparation to commit a felony contrary to Section 308(2) and house breaking and stealing contrary to Section 304(1) as read with Section 279(b) of the Penal Code.

[8] That from the above aggravating circumstances, a deterrence measure is called for in order to discourage other potential offenders. She therefore urged that the sentence of five years remains. That the appellant should not be allowed in the circumstances to benefit from the doctrine in *Muruatetu* case. Therefore, the application for resentencing should be dismissed as it is unmeritorious.

[9] On 12/7/2021 the appellant stated that he had based his case on ***Muruatetu*** and was not aware of the latest directions in *Muruatetu*. This court directed that the appellant be supplied with the *Muruateu* directions.

ANALYSIS AND DETERMINATION

Court's duty

[10] As first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See **Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.**

[11] After carefully considering the submissions of the respective parties and the record of appeal, and the oral submission by the appellant to the effect that he has only one prayer before this court that he wishes to pursue. The main issue therefore that is left for this court to consider is:

1. Whether the time spent in custody was taken into account by the trial court.

[12] The request is founded on Section 333(2) of the Criminal Procedure Code which provides that: -

"Subject to the provisions of section 38 of the Penal Code (Cap. 63) Every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis mine)."

[13] Court's duty under, and the object of section 333(2) of the CPC has been explained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided that:

"The provision to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

[14] Clear judicial pronouncements have been of Section 333(2) of the Criminal Procedure Code; courts should give the section real-time effect in sentencing (see **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR.** (See also **Bethwel Wilson Kibor vs. Republic [2009] eKLR*).***

[15] I should think that, requirements in Section 333(2) of the CPC pertains to fair trial and justice; ensures that a person gets appropriate sentence. Thus, non-adherence with the section may result into the person serving a more severe sentence than is required in law which is a violation of the right to a less severe sentence enshrined in Article 50 (2)(p) of the Constitution.

[16] Similarly, failure to give full effect to section 333(2) of the CPC rattles the right to protection and benefit of law guaranteed under Article 27(1) & (2) of the Constitution which provides that:

> ***(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***
>
> ***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. [Underlining mine]***

[17] Daringly, I state, a sentence that does not give any effect to Section 333(2) of the CPC leaves the period served in custody unaccounted for, and may be impeached for being a deprivation of freedom arbitrarily or without a just cause contrary to Article 29(a) of the Constitution which provides that:

> ***Every person has the right to freedom and security of the person, which includes the right not to be—***
>
> ***(a) deprived of freedom arbitrarily or without just cause;***

[18] This school of thought bases its arguments on rights. Accordingly, it posits that a claim of violation of Section 333(2) of the CPC may found an application under Article 23(1) of the Constitution which provides that

> ***The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.***

[19] Thus, calling into action court's jurisdiction in Article 165(3)(b) of the Constitution which provides that:

> ***Subject to clause (5), the High Court shall have—***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***

[20] Accordingly, I will not consider this application on the basis of Muruatetu but on the basis of the Constitution and the law.

[21] In respect of the prayer that sentence do run from the date of arraignment in court; the record shows the date of accused's arraignment in court was 24/10/2017 while that of conviction was 12/10/2018. The record also shows that, the appellant was denied bond because he had escaped lawful custody in criminal case number Narok CMCCRC 1799 OF 2016 and was facing a charge of escaping from lawful custody in CRC 1263 OF 2017.

[22] At the time of conviction, the record shows that the appellant had been convicted of house breaking and stealing on 5.7.2018. The appellant was charged under section 308(2) of the Penal Code, and the relevant penalty clause is section 308(4) of the Penal Code which provides, that: -

> **(4) Any person guilty of a felony under subsection (2) or (3) is liable to imprisonment with hard labour for five years or, if he has previously been convicted of a felony relating to property, to such imprisonment for ten years.**

[23] In the circumstances of this case, the maximum sentence would have been 10 years. Therefore, I find the sentence of 5 years to be patently lenient and I take it to have taken account of the time spent in custody. Accordingly, I find that the sentence herein took account of the time spent in custody.

[24] In the upshot, I find the appeal to lack merit and is dismissed. Right of appeal 14 days.

[25] It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 26th DAY OF APRIL, 2022.

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F.M. GIKONYO

JUDGE

<u>In the presence of:</u>

1. Mr. Karanja for DPP

2. The appellant

3. **Mr. Kasaso -Court Assistant**