REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 10 OF 2019

(CORAM: F.M. GIKONYO J.)

(From the sentence of Hon. E. Nyongesa (S.R.M) in Narok

CMCR No.1283 of 2018 on 25TH January, 2019)

ROBERT KIRUI KIPRONO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Time spent in custody

[1]. The appellant was charged with three counts;

[2]. Count I: Entering a dwelling house with intent to commit a felony contrary to Section 305 (1) of the Penal Code. It was alleged that on 7th December 2018 at Lemek location in Narok West Sub- County within Narok county joint with another not before court entered the dwelling house of ORPOONDEI OLE KOROS with intent to commit a felony namely stealing therein.

[3]. Count II: Assault Causing actual bodily harm contrary to Section 251 of the Penal Code. It was alleged that on 7 th December 2018 at Lemek location in Narok West Sub- County within Narok County willfully and unlawfully assaulted ORPOONDEI OLE KOROS thereby occasioning him actual bodily harm.

[4]. Count III. Assault causing actual bodily harm contrary to Section 251 of the Penal Code. It was alleged that on 7th December 2018 at Lemek location in Narok West Sub- County within Narok County willfully and unlawfully assaulted NAISUAKA ENOLE KOROS thereby occasioning her actual bodily harm.

[5]. The appellant was convicted on his own plea of guilty and sentenced to serve 4 years' imprisonment in count I and fined Kshs. 40,000/= in each count II and III respectively.

[6]. The grounds of appeal herein are largely mitigation, except ground i) states the issue to be:

i. Whether the sentence awarded is highly excessive and punitive.

[7]. The mitigation offered, in his own words, are:

i) **That he is remorseful of the offence committed and have since been rehabilitated by the harsh conditions in both remand and prison environment.**

ii) That he is a young man, who is orphaned, used to live with his grandmother who was left without a helping hand.

iii) That may the court be pleased to note that he was a hard-working person used to work hard to sustain his mother's and he was a responsible person in society, may the court order that his sentence be remitted to a non-custodial sentence or

probation.

iv) That he prays to be present during hearing of this appeal.

v) That he is a first born in a family of two and his mother is epileptic and is not able to play an active role in upbringing and fending off the siblings a task that was squarely on his shoulders with his confinement in prison, the family is likely to suffer.

vi) That he earnestly prays that the sentence awarded therein be reviewed and a lesser sentence be considered.

vii) That in consideration of his life and that of his mother, he be awarded a suspended sentence so that he may amend a broken life.

[8]. Ultimately, he prayed that this appeal be allowed; conviction and sentence be set aside and quashed, or the remaining years be remitted to probation or a non-custodial sentence.

[9]. On 8/12/2021 the Appellant orally submitted to this court that his only prayer is for time spent in remand to be taken into account in the sentence.

[10]. Mr. Karanja, the prosecution counsel, urged the court to check the lower court record and find out whether time spent in custody was considered.

ANALYSIS AND DETERMINATION

[11]. Where a plea is unequivocal, no appeal against conviction shall be allowed, except on the extent or legality of the sentence (**Section 348 of the Criminal Procedure Code (cap 75),** and **Olel v Republic [1989] KLR 444**)

[12]. Section 348 of the Criminal Procedure Code 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 and legality of the sentence."

[13]. In the instant case the appellant has stated that he is only challenging the custodial sentence and therefore prays for a non-custodial sentence and time spent in custody to be taken account of.

Court's duty

[14]. Was the plea unequivocal?

[15]. For a plea to be unequivocal, it must be free from any coercion, threat, promise or inducement, and be the informed decision of the accused. Hence, the requirements of the law in section 207 of CPC, and the manner of taking plea set out in **Adan vs. Republic (1973) EA 445** to wit: -

i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands

ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

iv. If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

v. If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

[16]. The requirements in section 207 of the CPC, and the steps for taking plea set out in **Adan vs. Republic,** are real safeguards of fair trial to the accused who pleads guilty.

Applying the test

[17]. The appellant was arraigned before the Senior Principal Magistrate's Court at Narok on 10/12/2018. The record shows that the substance of the charge(s) and every element thereof was stated by the court to the appellant in the language that he understood; Kipsigis. On being asked whether he admits or denies the truth of the charge(s) he replied in Kiswahili '**I was taken to the place to drink alcohol''** for count I. for count II he stated '**True**' and for count III '**No**t **true'**.

[18]. Since the facts were intertwined, the prosecutor sought that a plea of not guilty be entered for the 2nd count and matter goes for hearing.

[19]. On 30/01/2019, the appellant made a request to change his plea. On 23/01/2019 the appellant changed his plea. He stated '**Yes, I wish to admit the charges'**

[20]. On 25/1/2019, the prosecutor then stated the facts thus:

> **"On the 7/12/18 at about midnight the complaints were sleeping in house when they heard movements outside. They woke up i.e., husband and wife, opened the door and went out. When they opened the door, they saw the suspect who started running away. At about 3.00 a.m., when one of the complainants in another house was asleep, she woke up and saw someone standing next to her bed. She started screaming and managed to get hold of the suspect until other members of family came to assist. As she held the person, they struggled and she got injured. In the process, her husband Orpondei Ole Koros came in. when the suspect saw the man come in, he had a Maasai sword which he used to cut the man on his fingers. Many people had come there, so, they arrested the suspect and tied him with a rope. They also disarmed the suspect; they called the area chief and an AP from a nearby police station. Accused was then taken to Mulot Police Station where he was re-arrested and the matter reported. P3 forms were issued to the complainant in 2nd count and his wife in count no. 3 for the man, there was a cut on fingers and a human bite on his wrist. A degree of injury- harm. He also had a swollen slip. The p3 form was filled on 8/12/2018 and there were treatment notes issued also. I wish to produce the p3 form and the treatment notes as exhibit no. 1 9a) and 1(b) respectively, as for the wife, i.e., complainant in count 3, she was also issued with p3 form on 8/12/2018 which showed she suffered mild neck pains, human bite on right hand and degree of injury 'harm'.**
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> **Treatment notes were also issued for tetanus treatment because of human bite. I wish to produce the p3 form and treatment notes as exhibit 2(a) and 2 (b) respectively. The Maasai sword which had been given to police officer is before court and I wish to produce it as exhibit no. 3.''**

[21]. The appellant is then recorded as having stated "**maelezo yote ni ya ukweli**" after which the court convicted him on his own plea of guilty.

[22]. Perusal of the record shows that Section 207 of the Criminal Procedure Code, as well as the step set out in the case of **Adan vs. Republic** (supra) was satisfied in the taking of the plea, and consequent conviction. The accused person admitted the truth of the charge, which was recorded as nearly as possible in the words used by the accused. And, the trial court accordingly convicted the accused.

[23]. Thus, the plea of guilty was unequivocal.

Of sentence

[24]. Was the sentence harsh or highly excessive? The sentence in question was; 4 years' imprisonment without an option of fine for count I; fine of Kshs. 40,000/= and Kshs. 40,000/= for count II and III, respectively.

[25]. Section 305 (1) of the Penal Code provides:

> **"Any person who enters or is in any building, tent or vessel used as a human dwelling with intent to commit a felony therein is guilty of a felony and is liable to imprisonment for five years."**

[26]. Section 251 of the Penal Code provides that a person who is guilty of the offence of assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years. The appellant was sentenced to pay a fine of Kshs. 40,000/= for count II and III.

[27]. Appropriate sentence depends on the facts and circumstances of each case, and *inter alia*, the court must consider the gravity of the crime, motive for the crime, nature of the offence, manner of commission of the crime, and other attendant circumstances. (**State of M.P. vs Bablu Natt {2009}2S.C.C 272** Para 13)

[28]. See also **Alister Anthony Pareira vs State of Maharashtra, [2012] 2 S.C.C** 648 Para 69 that: -

> **"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"**

[29]. The trial court noted that owing to the circumstances under which the offence was committed, there is need for a deterrence sentence. This is quite apt given the circumstances of the case and custodial sentence is justified.

[30]. However, as the respective submissions by parties and the record of appeal raise; time spent in custody to be taken into account in the sentence; the issue must be determined in order to make an overall impression whether the sentence is harsh or excessive. Thus: -

i. **Was the time spent in custody taken into account by the trial court in passing sentence?**

Applying the test

[31]. I have perused the records of the trial court and I have observed that the appellant herein was convicted in all the three counts. He was sentenced to serve four years in jail without an option of fine in count I. For count II and III, the appellant was fined Kshs. 40,000/= in each count, in default to serve 3 years in jail. The particularly relevant pronouncement by the trial court (Hon. E. Nyongesa (S.R.M)) is as follows: -

> **"Accused is convicted on his own plea of guilt and is hereby convicted accordingly, he is treated as a first offender, mitigation is noted owing to the circumstances under which the offence was committed, there is a need for a deterrence sentence for the 1st count. Accused is sentenced to serve four (4) years in jail without an option of fine. For the 2nd count, accused is fined Shs. 40,000/=. In default to serve 3 years in jail. For count no. 3. Accused is similarly fined Shs. 40,000/=. In default to serve 3 years in jail.''**

[32]. The trial court did not indicate whether it had considered the provisions of Section 333(2) of the CPC.

Of section 333(2) of CPC

[33]. The court is acutely aware that Section 333(2) of the Criminal Procedure Code is a matter of fair trial, and it serves to prevent a situation where a person may serve sentence which is not proportional to the offence, or is more severe than the sentence prescribed. See the explanation of this object in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) as follows:

> **"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."**

[34]. Whereas, the section does not state how the time spent in custody should be taken account of in the sentence, merely stating you have taken such period into account is not enough (**Ahamad Abolfathi Mohammed & Ano vs. R [2018] eKLR, and Bethwel Wilson Kibor vs. R [2009]).** It is suggested that the court must be seen to have given real-time effect of Section 333(2) of the Criminal Procedure Code in sentencing. Some posit that this may be achieved by stating clearly when the sentence commences as to capture the time spent in custody especially where the accused remained in custody since arrest. In other cases, it is suggested that courts should clearly state that the sentence includes the time spent in custody. There could be other suggestions, except, care should be taken in all instances not to impose a sentence which, in light of time spent in custody, would over-shoot the sentence prescribed, or be tantamount to imposition of the maximum sentence prescribed, unless the circumstances of the case are such that maximum sentence is justified.

[35]. Therefore, in the circumstances of this case, there is nothing to suggest that the appellant had the advantage of Section 333(2) of the CPC.

Conclusion and orders

[36]. The upshot is that the appeal succeeds with regard to the time spent in custody.

[37]. For clarity and interest of justice, the sentence for the appellant herein shall run from the date of arraignment in court; i.e. **10/12/2018.**

[38]. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 11TH DAY OF APRIL, 2022.

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F.M. GIKONYO

JUDGE

In the presence of:

1. **Mr. Karanja for DPP**
2. **The appellant**
3. **Mr. Kasaso -Court Assistant**