Awiti alias Dokia v Republic (Criminal Appeal E026 of 2021)
[2022] KEHC 13229 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13229 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E026 OF 2021

JN KAMAU, J

SEPTEMBER 27, 2022

BETWEEN

FRANCIS APOLLO AWITI ALIAS DOKIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon C.N Oruo (SRM) delivered at Maseno in Senior Resident Magistrate's Court in Criminal Case No E207 of 2021 on 18th June 2021)

JUDGMENT

Introduction

1. The Appellant herein was charged on two (2) Counts. Count I was in respect of the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the *Penal Code* Cap 63 (Laws of Kenya) while Count II was for the offence of handling suspected stolen property contrary to Section 322(2) of the *Penal Code.*

2. He initially pleaded not guilty. He subsequently pleaded guilty to the two (2) Counts whereupon, the Learned Trial Magistrate, Hon C.N Oruo (SRM) sentenced him to serve seven (7) years and five (5) years on Count I and Count II respectively. He directed that both sentences would run consecutively.

3. Being dissatisfied with the said Judgement, on 29th June 2021, he lodged the Appeal herein. His Petition of Appeal was undated. He set out three (3) grounds of appeal.

4. His undated Written Submissions were filed on 2nd March 2022 while those of the Respondent were dated 28th January 2022 and filed on 31st January 2022.

5. This Judgment is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

6. Having pleaded guilty to the two (2) counts as aforesaid, the Appellant only challenged the sentence that was imposed on him by the Trial Court.

7. In addressing the questions of appropriateness of the sentence that was imposed on him, this court considered the following limbs:-

    a. Whether the sentence that was meted upon the Appellant by the Learned Trial Magistrate was harsh, severe and excessive in the circumstances of the case warranting interference by the court;

    b. Whether the sentences that were meted upon the Appellant by the Learned Trial Magistrate ought to have run consecutively or concurrently; and

    c. Whether or not the Learned Trial Magistrate ought to have taken into account the provisions of Section 333(2) of the *Criminal Procedure Code* 75 (Laws of Kenya).

    Although all the Grounds of Appeal were related, this court nonetheless dealt with the same under the following distinct and separate heads.

I. Appropriateness Of The Sentence

9. The Appellant submitted that he was remorseful and was a law-abiding citizen. He urged the court to consider his mitigation and reduce his sentence.

10. On its part, the Respondent submitted that the plea was unequivocal as was provided by Section 207 of the *Criminal Procedure Code*.

11. It placed reliance on the case of *Gerald Ndoho Munjuga vs Republic* [2016] eKLR where the court held that the appellate court would be entitled to interfere with the sentence imposed by the trial court if it was demonstrated that the sentence imposed was not legal or was so harsh and excessive as to have amounted to miscarriage of justice or that the trial court acted upon wrong principles or if the trial court exercised its discretion capriciously.

12. It also referred to the case of Alister Anthony v State of Maharashtra (citation not given) where the court held that one of the prime objectives of the criminal law was 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 was done.

13. It contended that the Appellant's appeal was partially merited in as far as the sentence on Count II was concerned. It pointed out that Count II ought to have been an alternative count to the offence of breaking into a building and committing a felony and that having pleaded guilty to Count I, the Appellant ought not to have been convicted on Count II. To buttress its argument, it placed reliance on the case of Moses Alusa Imbitsa v Republic [2016] eKLR where the court quashed the sentence on the second limb. It urged this court to uphold conviction and sentence on Count I but quash the sentence on Count II.

14. According to the Charge Sheet, the particulars on Count I against the Appellant herein were as follows:-

> " On the 21st day of March 2021 at Maseno University Main Campus in Kisumu West Sub County within Kisumu County broke and entered a building namely office of Dr Stephen Obuya Wede and did steal one Lenovo laptop SN PFOS5 NEX and HP Mouse all valued

at Kshs 29,500 (sic) the property of Dr Stephen Obuya Wede (hereinafter referred to as the "Complainant")"

15. Count II read as follows:-

> " On the 21st day of March 2021 at Maseno University Main Campus in Kisumu West Sub County within Kisumu County you were found in possession of one mobile phone Make VIVI SN Y908SGS00A00 knowing or having reason to believe it to be stolen property."

16. Notably, Section 306 of the *Penal Code* Cap 63 (Laws of Kenya) provides as follows:

> " Any person who-
>
> a. breaks and enters a schoolhouse, shop, warehouse, store, office, counting house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or
>
> b. breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years (emphasis court)."

17. Section 322(2) of the *Penal Code* further provides as follows:

> " A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years (emphasis court)."

18. Whereas the offence of handling stolen property is more often than not preferred as an alternative charge to the offence of stealing contrary to Section 279 of the *Penal Code*, it is not always that it is an alternative charge and can be preferred as a main count depending on the circumstances of the case.

19. A perusal of the Charge Sheet showed that Count II was not in respect of the Lenovo laptop SN PFOS5 NEX and HP Mouse (hereinafter referred to as "" the laptop and mouse"). Rather, it was in respect of handling one mobile phone Make VIVI SN Y908SGS00A00 (hereinafter referred to as "the mobile phone") that the Appellant believed or knew to have been stolen. The Prosecution and the Learned Trial Magistrate could not therefore have been faulted for having preferred and/or considered the two (2) Counts separately respectively.

20. However, if the items in Count I and Count II were the same, then the prosecution ought to have preferred one (1) charge as the Respondent herein correctly submitted

21. Turning to the question of the sentence, it was clear that both offences did not prescribe a minimum mandatory sentence. The use of the word "liable" for the penalty that could be imposed on a convicted person was key. It did not connote a minimum mandatory sentence. Rather, the word "liable" implied that the number of years prescribed therein was the maximum. A trial court therefore has a discretion of imposing a sentence from between a day to maximum number of years prescribed therein for each of the two (2) offences.

22. Considering that the Appellant was on a one (1) year Probation for the offence of housebreaking in the case of Vihiga Criminal Case E048/2021 at the time he was charged with the aforesaid offences, he easily fell within the category of persons who could be termed as habitual offenders. Under such circumstances, the Learned Trial Magistrate therefore had a discretion to impose on him a stiffer sentence.

23. However, bearing in mind that the Appellant pleaded guilty and saved the court judicial time to hear the matter and further, the fact that the laptop and mobile phone were recovered and their monetary value appeared low, he ought to have benefited from a lesser sentence than what was prescribed. The sentences of seven (7) and (5) years in respect of Count I and Count II respectively were thus harsh and manifestly excessive. It was this court's considered view that a sentence of one and half (1 ½) years imprisonment would have sufficed for each Count.

24. Having said so, this court noted that there was no complainant in Count II. It was not clear if the mobile phone belonged to the Complainant herein. The charge merely stated that the Appellant was found with a mobile phone knowing or having reason it to be stolen property. The fact that he had a phone did not automatically imply that the same was stolen.

25. The onus was on the Prosecution to have amended the Charge to indicate who the complainant in Count II was and indicated the value of the said mobile phone. There can never be a charge without a complainant. The value of goods also guides a court on the sentence to mete out against a convicted person. To that extent, the Charge Sheet in respect of Count II was defective and ought not to have been the basis of convicting the Appellant herein on Count II.

26. Going further, this court noted that on 6th June 2021, the Appellant only pleaded to Count I whereupon the Prosecution sought for a mention on 8th June 2021 for the reading of facts. On the said date of 8th June 2021, the facts that were read to him were only in respect of Count I. There was nothing in the proceedings that showed that he pleaded to Count II and/or that facts in respect of Count II were read out to him. The plea in respect of Count II could neither be said to have been equivocal and/or unequivocal.

27. The direction of the proceedings in respect of Count II would only have been determined upon the Appellant taking the plea. If he would have pleaded guilty to the same, then he could have been convicted on his own plea of guilty. However, if he would have pleaded not guilty, the matter would have had proceeded to trial. The proceedings of plea taking in respect of Count II were irregular and could not stand the test applied to regularity of proceedings for taking plea.

28. In the circumstances foregoing, the Learned Trial Magistrate erred in having convicted the Appellant on Count II as he did not plead to the same. For all purposes and intent, the sentence on respect of Count II was therefore illegal, unlawful and had no legal basis.

II. Running Of The Sentence

29. Having found that the Appellant ought not to have been convicted on Count II, the issue of how the sentence was to run had ideally been rendered moot. Even so, this court considered the Appellant's submissions that his sentence run concurrently to enable it pronounce itself on how the sentences ought to have run in the event he would have been convicted on both Counts.

30. To support his arguments, the Appellant relied on the case of *Josiah Mutua Mutunga & Cosmas Musyoki Musila v Republic Criminal Appeal No 99 of 2018* (eKLR citation not given) where the court ordered the appellant's sentence which was running consecutively to run concurrently.

31. He also placed reliance on the case of *Peter Mbugua Kabui v Republic* [2016] eKLR where the Court of Appeal held that as a general principle, the practice was that if an accused person committed a series of offences at the same time in a single act and/or transaction, a concurrent sentence should be given.

32. The Respondent did not address this issue as it had already submitted that the Appellant ought not to have been charged with the offence of handling stolen property having been charged with the offence of breaking into a building and committing a felony.

33. Notably, Section 14 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) provides as follows:-

> " 1. Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

34. As has been stated hereinabove in the case of *Peter Mbugua Kabui vs Republic* (Supra), if an accused person committed a series of offences at the same time in a single act and/or transaction, the sentences ought to run concurrently. If the sentences are in respect of different offences, the sentences ought to run consecutively.

35. As there was ambiguity whether the offences relating to the mobile phone and the laptop arose out of the same transaction, the Learned Trial Magistrate misapplied the law and erred when he directed that the sentences he imposed on the Appellant herein ought to run consecutively.

III. Period Of Imprisonment

36. The Respondent did not submit on this issue. On the other hand, the Petitioner pointed out that he was arrested on 21st March 2021. He therefore urged this court to consider Section 333(2) of the Criminal Procedure Code. In this respect, he referred to the case of Alister Anthony Perreira v State of Maharashtra [2012] where the Supreme Court of India ordered the sentence to run from the date of arrest.

37. A perusal of the Charge Sheet showed that the Appellant was arrested on 21st March 2021. He was arraigned in court on 24th March 2021 and convicted on 18th June 2021. It was evident from the proceedings that the Learned Trial Magistrate did not consider the period the Appellant remained in custody in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

38. The said Section 332(2) of the Criminal Procedure Code stipulates 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."

39. The requirement under with Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR.

Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines (under) provide that: -

"The proviso 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."

40. The Learned Trial Magistrate therefore ought to have taken into account the period between 21st March 2021 and 18th June 2021 in accordance with Section 333(2) of the Criminal Procedure Code while sentencing the Appellant herein.

Disposition

41. In the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 29th June 2021 was merited and the same be and is hereby allowed. The effect of this is that the Appellant's conviction in respect of Count I be and is hereby upheld as the same was lawful and fitting. However, the sentences that were meted upon him on Count I and Count II be and are hereby set aside as the same were not lawful and fitting.

42. It is hereby directed that the Appellant be and is hereby sentenced to one a half (1½) years imprisonment on Count I and the same to run from 21st March 2021. Taking into account the remission of his sentence, it was clear to this court that the Appellant had since completed his sentence.

43. It is therefore hereby directed that the Appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

44. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF SEPTEMBER 2022

J. KAMAU

JUDGE