Owino & another v Republic (Criminal Appeal E030 of 2021)
[2022] KEHC 14602 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14602 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E030 OF 2021

JM MATIVO, J

OCTOBER 31, 2022

BETWEEN

AUSTIN OTIENO OWINO ..... 1ST APPELLANT

ALLEX MAURICE ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of the appellant in VoI CR. E156 of 2021, delivered by C.Kithinji, PM on 19th July, 2021)

JUDGMENT

1. The appellants were charged in Criminal Case number Eo156 of 2021 at the Principal Magistrates Court, Voi with two counts of the offence of intentionally endangering safety of persons travelling by railway and handling suspected stolen property contrary to sections 233(b) and 322(1), (2) of *Penal Code* respectively.

2. It was alleged that on the night of February 10, 2021 at Ndii village, Ngolia sub-location of Voi sub-county within Taita-Taveta county, jointly with others not before court, they unlawfully endangered the safety of persons travelling by railway by vandalizing and stealing fencing materials namely two green metal gates, one light metal door, eight glass windows valued at Kshs 96,000/=and two light window frames valued at Kshs 20,000/= meant for securing Standard Gauge Railway line against any possible encroachment by persons and animals.

3. Aggrieved by the decision, they appealed against conviction and sentence. However, during the hearing of the appeal, they abandoned all the appeal against their conviction opting to challenge the sentences.

4. They submitted that the trial court ought to have considered their young age and the fact that they were first offenders imposing the sentence. They relied on the dictum in *Joseph Yusuf Mumo v R*[1] where the court took note of the appellant's young age and being a first offender and reduced the sentence. They also submitted that they were remorseful, and that while in prisons they have been of good behavior and they have since reformed and they are now ready to be reintegrated back to the society.

5. On his part, the 2nd appellant submitted that the trial magistrate while sentencing him did not consider and factor in the time he had spent in remand since he was arrested on February 15, 2021 and he was not released on bail/bond. The 1st appellant submitted that the trial magistrate did not consider his mitigation that he was an orphan and married with two children who depend on him.

6. Mr Sirima learned prosecutor submitted that section 233 of the *Penal Code* provides a life sentence in the event one is convicted. Whereas, section 322(1) (2) of the *Penal Code* provides for imprisonment not exceeding 14 years. However, in respect of the first count, the appellants were only sentenced to 4 years, and in respect of count 2 and 3, the appellants were sentenced to serve 2 years each and that both the sentences were to run consecutively. He argued that the said sentences were a slap on the appellant's wrists, since the offence was tantamount to an economic sabotage. He argued that a deterrent sentence would have been appropriate.

7. While praying for the appeal to be dismissed and sentence upheld, counsel submitted that the trial court considered the nature of the crime and the impact of the crime to the society. Consequently, he submitted that the sentences not harsh. To buttress his submission, he cited the finding in *Vitalis Okoth Omondi & 2 others v R* [2]where the court delved into the principles of sentencing and the considerations thereof.

8. The principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence have time without a number settled by our courts. The Court of Appeal in *Bernard Kimani Gacheru v Republic* [3]stated:-

> "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 states is shown to exist....(emphasis mine)"

9. In *S v Malgas*[4] it was held that:

> "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

1 CR APP 10 of 2010.

2 [2019] e KLR.

3 [2002] eKLR

4 2001 (1) SACR 469 (SCA) at para 12.

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 tht it can properly be described as "shocking", "startling" or "disturbingly inappropriate."

10. Also, in *Mokela v The State*[5] the Supreme Court of South Africa held:

> "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

11. I have perused the trial court's record and I note that the appellants were afforded an opportunity to mitigate. The trial court noted that the 1st appellant had a young family which depended on him for education and food and that his parents also depended on him. The 1st appellant also stated that he had a metal implant on his right leg and therefore he needed to go for check up every four months. The 2nd appellant stated that he was an orphan with a young family which fully depends on him and that his wife is not able to work.

12. on count 1 the appellants were convicted for intentionally endangering safety of persons travelling by railways under section 233(b) of the *Penal Code* which provides:-

233. Any person who, with intent to injure or to endanger the safety of any person travelling by any railway, whether a particular person or not –

(a) Places anything on the railway; or

(b) deals with the railway, or with anything whatever upon or near the railway, in such a manner as to affect or endanger the free and safe use of the railway or the safety of any such person; or (c) shoots or throws anything at, into or upon, or causes anything to come into contact with, any person or thing on the railway; or

(d) shows any light or signal, or in any way deals with any existing light or signal, upon or near the railway; or

(e) by any omission to do any act which it is his duty to do causes the safety of any such person to be endangered, is guilty of a felony and is liable to imprisonment for life.

322.(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so. (2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment for a term not exceeding fourteen years.

[5] (135/11) [2011] ZASCA 166,

13. The appellants are asking for a more lenient sentence than that which was meted out on them by the trial court. The question is whether this court should interfere with the sentence imposed on the appellant by the trial court. In *Charo Ngumbao Gugudu v Republic*[6] the Court of Appeal held that:-

> " It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged."

14. It is settled that law that this court on appeal 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. I have considered the circumstances in which the offences were committed and the sentences meted. The appellants were all first offenders. The trial court noted that count 1 was a serious offence by its very nature and the appellants were liable to imprisonment for life. However, the trial court took into account the appellants' mitigation before sentencing the appellants to serve four years imprisonment. With regard to count 3 and 4 the appellants were liable to imprisonment liable to imprisonment for a term not exceeding fourteen years. However, a lenient sentence of two years was meted by the trial court having considered the appellants' mitigation.

15. Having considered the material on record as well as the submissions made, I am not satisfied that this is a proper case for this court to interfere with the sentence. In my view the sentence imposed was very lenient and the appellants ought to count themselves lucky that they got away with such a light sentence.

16. As regards to the period the appellants spent in remand, section 333(2) of the *Criminal Procedure Code* provides that:-

> (2) Subject to the provisions of section 38 of the *Penal Code* 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.

17. In *Ahamad Abolfathi Mohammed & another v Republic*[7] the Court of Appeal held that:-

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the

6 [2011] e KLR

7 [2018] e KLR

proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012."

18. In this case the learned trial magistrate did not state when the sentence meted would commence. In my view it was prudent to indicate the same. The appellants were arrested on February 15, 2021 and they were sentenced on July 19, 2021.

19. Flowing from my discussion above, I find and hold that the appeal against conviction fails and the same is dismissed. As for the sentence, pursuant to section 333(2) of the *Criminal Procedure Code*, the appellants' sentence will run from February 15, 2021.

DATED AND SIGNED AT VOI THIS 25TH DAY OF OCTOBER 2022

JOHN M. MATIVO

JUDGE

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31STDAY OF OCTOBER 2022

OLGA SEWE

JUDGE