REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. E005 OF 2020

EVANS MOMANYI OMARIBA......................................APPELLANT

-VRS-

THE REPUBLIC..RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. B. M. Kimtai (Mr.) – PM Keroka dated and delivered on the 29th day of October 2020 in the original Keroka Principal Magistrate's Court Criminal Case No. E083 of 2020}

JUDGEMENT

The appellant herein was charged with the offence of willfully resisting arrest contrary to Section 103 (a) of the National Police Service Act of 2011. The particulars of the offence were that on 28th October 2020 at Keroka Township in Masaba North Sub-county within Nyamira County he willfully resisted arrest by No. 117295 PC Ali Faki and No. 257978 PC Geoffrey Kinyua, police officers who at the time of such resistance were acting in due execution of their duties.

When the accused was brought before the court he pleaded guilty to the charge and was sentenced to twelve (12) months imprisonment. Being aggrieved he preferred this appeal. The appeal is premised on the following grounds: -

> **"1. THAT the learned trial magistrate erred in law and in fact in convicting the appellant to 12 months' imprisonment without an option of a fine;**
>
> **2. THAT the learned trial magistrate erred in law and in fact in convicting the appellant when the trial magistrate failed to warn the appellant of the gravity of the offence and the consequences appurtenant thereto considering that he was unrepresented;**
>
> **3. THAT the learned trial magistrate erred in law and in fact I convicting the appellant when the plea was not an unequivocal admission of guilt; and**
>
> **4. THAT the learned trial magistrate erred in law and fact in convicting the appellant by relying on conjectures, suppositions and extraneous matter."**

The appeal is vehemently opposed. When Counsel for the parties appeared before me for directions they agreed to canvass the appeal by way of written submissions. The same were duly received.

Counsel for the appellant argued that the trial court ought to have explained the gravity of the offence to the appellant before calling upon him to plead. Counsel asserted that the charge was defective because while the offence under **Section 103 (a) of the National Police Act** contains an element of assault the same was missing from the charge read to the appellant. Counsel contended that the element of assault would have weighed heavily on the appellant's response to the charge and the omission was fatally prejudicial more so when considered together with the fact that the appellant was not represented. Counsel contended that the appellant's right to a fair trial was trampled upon. Citing the case of **Adan v Republic [1973] EA 445 at 446** Counsel submitted that the charge was not explained to the appellant as required. Counsel contended that it may be interpreted that the accused was pleading guilty to the offence of resisting arrest as contemplated under the **Penal Code** as opposed to that under **Section 103 (a) of the National Police Service Act.** Counsel further argued that the particulars of the offence in the charge sheet were totally different from those captured in the proceedings and this resulted in a very serious miscarriage of justice. Counsel also faulted the trial Magistrate for failing to consider the option of a fine although the law provided for one. Counsel submitted that this was not only unjust but also harsh and the appeal should be allowed.

Citing **Section 348 of the Criminal Procedure Code** Counsel for the respondent on his part pointed out that the appellant was convicted on his own plea of guilty and the only issue for determination is whether or not the sentence of twelve (12) months imprisonment was harsh and excessive. Counsel submitted that the appellant did not demonstrate that the court acted on a wrong principle, or ignored material factors, or

took into account irrelevant considerations or that the sentence is manifestly excessive. Counsel submitted that the sentence was not harsh or excessive but way too lenient and this court ought not to revise it downwards. Counsel cited the case of **Benard Kimani Gacheru** (citation not given) where the Court of Appeal 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 the 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 stated is shown to exist."***

Counsel also cited the case of **Alex Wamagui Waititu v Republic [2020] eKLR** where Kimaru J held: -

> ***"This court is of the view that the custodial sentence that was meted on the applicant took into consideration all relevant factors that should be taken by the trial court. The custodial sentence fitted the crime."***

Counsel argued that the trial court noted how such cases were on the rise and deserving of a deterrent sentence hence the subsequent term of imprisonment. Counsel contended that the trial court acted judiciously in sentencing the appellant and the sentence was fair and justifiable in the circumstances and this appeal should be dismissed.

If I understood Senior Prosecution Counsel Majale, his argument is that as the appellant pleaded guilty this appeal ought to be confined to the legality and extent of the sentence only and this court is precluded from considering the merit of the conviction. Counsel's argument flows from **Section 348 of the Criminal Procedure Code** which provides that: -

> ***"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 or legality of the sentence."***

The Court of Appeal considered the above provisions in the case of **Merali v Republic [1972] EA 47** and its finding was that: -

> **"Although by Section 348 (1) of the Criminal Procedure Code no appeal shall be allowed in the case of any person who has pleaded guilty and has been convicted on such a plea by a subordinate court, except as to the extent or legality of the sentence, this limitation applies only where the plea itself is freely given and is unequivocal."**

More recently in the case of **Wandete David Munyoki v Republic [2015] eKLR** the same court held: -

> **"It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in Ndede v R [1991] KLR 567, this court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there has been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty are not closed."**

Similarly, in the case of **Nyawa Mwajowa v Republic [2016] eKLR** the court observed:

> ***"Before we consider the merits of this appeal, we wish to make two quick preliminary observations. Firstly, as a general rule, by dint of Section 348 of the Criminal Procedure Code, no appeal is allowed from a conviction arising from a plea of guilty. However, it is settled that the provision is not an absolute bar to all and sundry appeals challenging conviction from a plea of guilty. Where for example the appellant has pleaded guilty to a non-existent offence; where the facts admitted by the appellant do not disclose the offence; or where there are unusual circumstances surrounding the plea of guilty, the appellant is not precluded from appealing.*** **See Ndede v Republic (1991) KLR 567; John Muendo v Republic, Cr. App. No. 365 of 2011 and Kilingo Ngome v Republic, Cr. App. No. 69 of 2014 (Malindi)."**

The above decisions of the Court of Appeal clothe this court with jurisdiction to determine whether the conviction of the appellant herein was sound by considering whether the plea was unequivocal. It is my finding that the appellant herein is within his right to raise the issues touching on his conviction. However, before I get into the question whether the plea was unequivocal or not I shall first deal with the submission by Counsel for the appellant that the charge was defective. **Section 103 (a) of the National Police Service Act, 2011** states: -

> **"103. Assault in execution of duty**
>
> **Any person who –**
>
> > **(a) assaults, resists or willfully obstructs a police officer in the due execution of the police officer's duties;**
> >
> > **(b) Assaults, resists or willfully obstructs any person acting in aid of the police officer;**

(c) …….

(d) …….

Commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years, or to both."

A reading of this section discloses that assaulting, resisting or willfully obstructing a police officer in the due execution of the police officer's duties are all separate offences. The words in the section are to be read disjunctively hence the use of the word "or". The doing of any act denoted in the section whether it is assaulting, resisting or obstruction all constitute the offence known as Assault in execution of duty. I am not therefore persuaded that the charge was defective. The prosecution of the appellant for the charge under the **National Police Service Act** rather than the Penal Code was also not erroneous as **Section 63** of the **Interpretation and General Provisions Act** states that: -

"63. Where an act or omission constitutes an offence under two or more written laws, the offender shall, unless a contrary intention appears be liable to be prosecuted and punished under any of those laws, but shall not be liable to be punished twice for the same offence."

I now move to the question of whether the plea was unequivocal. The manner of recording a plea is provided in **Section 207 (1) and (2)** of the **Criminal Procedure Code** which state: -

"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary: Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded."

In the words of the Court of Appeal in the case of **Adan v Republic [1973] EA 445** the steps to be taken in recording pleas are as follows: -

"When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence, and when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused's reply must of course, be recorded."

Applying the above test to this case I am satisfied that the trial Magistrate followed the steps requisite in recording the plea. The record discloses that the substance of the charge and every element thereof were stated to the accused in Kiswahili language which he understood. Thereafter the facts were stated to him again in Kiswahili, as the language of interpretation was Kiswahili, and he admitted those facts. The facts as stated disclosed the offence of resisting arrest as provided in **Section 103 (a) of the Police Service Act.** I am satisfied therefore that his plea was unequivocal and that he was properly convicted.

Section 103 (a) of the **Police Service Act** provides a very stiff sentence for the offence defined as Assault in execution of duty. The section however gives the court a discretion to impose a fine, a term of imprisonment or both. In this case the trial Magistrate elected to impose a term of imprisonment without a fine. Apart from the statutes the courts are also guided by the **Sentencing Policy Guidelines.** In this case the relevant guideline is found in paragraph **11.5 of the Policy** which states: -

"11.5 Where the option of a fine is provided, the court must first consider it before proceeding to impose a custodial sentence. If, in the circumstances a fine is not a suitable sentence, then the court should expressly indicate so as it proceeds to impose the available option."

It is my finding that whereas the law considers resisting arrest a grave offence the trial Magistrate should have considered that the appellant was a first offender that he had pleaded guilty and that he was remorseful hence treated him with leniency by considering the option of a fine. In addition to **paragraph 11.5** of the **Sentencing Policy Guidelines** I am persuaded by the holding of PJ Otieno J in the case of Jackson **Konde Chalo v Republic [2018] eKLR** that: -

"7. The law and policy in sentencing in (sic) that where the law provide(sic) for a for a fine or imprisonment or both then unless the court for good reasons decides to give both, the accused has a right to be given an option of a fine. In <u>Annis Muhidin Nur v Republic, High Court Criminal Appeal No. 98 of 2001, Mwera J,</u> as he then was stated the relevant policy in sentencing, most appropriately;

Unless circumstances obtain which irresistibly [impede] a trial court from imposing a fine first where the law provides for a fine in default of (sic) a prison term, the option of a fine must be visited first. This is a sound and tested principle

in the art of sentencing….."

> **8. Accordingly, when the trial court opted to mete out an imprison (sic) sentence without the option of a fine, there was an error and thus an improper sentence which can only be viewed as too harsh. Harsh only to the extent that it denied the appellant his option of a fine."**

The case of the present appellant is no different and the trial court ought therefore to have considered the option of fine. It is instructive that the trial Magistrate did not give any explanation or expressly indicate why he did not find a fine suitable. It is my finding that the sentence of twelve (12) months imprisonment without an option of a fine whereas a fine was an option was harsh and excessive. The appellant was sentenced on 29th October 2020 and has therefore served five months of the sentence. The order that best commends itself to me therefore is to reduce the sentence to the one already served and order that the appellant having served the sentence shall be set at liberty forthwith unless otherwise lawfully held. The appeal succeeds to that extent only. It is so ordered.

JUDGEMENT SIGNED, DATED AND DELIVERED ELECTRONICALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 25TH DAY OF MARCH 2021.

E. N. MAINA

JUDGE