



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 60 OF 2020

PETER NG'ANG'A NDIRANGU.....APPELLANT

VS.

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of the

Senior Principal Magistrate's Court at Kikuyu, G. Onsarigo,

SRM in the Criminal Case No. 1273 of 2018 dated 3rd January, 2019)

JUDGMENT

1. **PETER NGANGA NDIRANGU** was charged before Kikuyu Senior Principal Magistrate's Court with the offence of having suspected stolen property, contrary to **Section 323** of the Penal Code (PC).

2. At first, when he took plea, the appellant pleaded not guilty. On his subsequent court appearance, he requested to change his plea. On the charges being read and explained to him by the trial court, he pleaded guilty. When prosecution gave the facts of the case, the appellant confirmed the facts were correct. He was convicted on his own plea of guilt. It follows from the provisions of **Section 348** of Criminal Procedure Code that appellant's appeal can only be against his sentence, unless his conviction was unsafe. This is what was stated in the case of **SAMUEL KANYIRI WANJIRU VS. REPUBLIC (2020) eKLR** thus:-

"No appeal on plea of guilty, nor in petty cases. 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.

In Kisumu Criminal Appeal No.581 of 2010, ALEXANDER LIKOYE MALIKA VERSUS REPUBLIC (2015) eKLR the Court of Appeal made reference to this section and stated as follows:-

'May we by way of commentary only remind that there is ordinarily no appeal against conviction resulting from a plea of guilty-see section 348 of the Criminal Procedure Code which only permits an appeal regarding legality of sentence. A court may only interfere with a situation where an accused has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused to which he has pleaded disclosed no offence known to law. Also where upon admitted facts the appellant could not in law have been convicted of the offence charged...'

3. Appellant was sentenced to serve 5 years imprisonment.

4. **Section 323** of the Penal Code under which he was convicted provides:-

"Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained and who does not give an account to the satisfaction of the court of how he came by same is guilty of a misdemeanor."

5. Sentence for misdemeanour is provided under **Section 36** of the Penal Code. The sentence under that section, should not exceed 2 years imprisonment or fine of both.
6. Before the trial court sentenced the appellant, it requested the probation to provide a pre-sentencing report.
7. Probation report alluded to appellant giving inaccurate information on his family background but most importantly stated that appellant had been convicted and sentenced previously under a different name, from the one he was using.
8. The trial court, without making inquiry from the prosecution proceeded to rely on that adverse information on the appellant then sentenced him to 5 years imprisonment.
9. In the case **LAWRENCE GITAU KARANU VS. REPUBLIC (2020) eKLR** discussed when an appellate court would interfere with trial court's sentence thus:-

“I am guided by what was stated in the case of JOSIAH MUTUA MUTUNGA AND ANOTHER -V- REPUBLIC (2019) eKLR when the court considered an appeal on sentence. In that case the court stated:-

‘The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S VS. MALGAS 2001 (1) SACR 469 (SCA) at para 12 where 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 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 that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate” ’ ”

10. In my view, there is need to interfere with appellant's sentence for two reasons. Firstly, because appellant's sentence was contrary to Section 36 of the Penal Code. Secondly, is because the trial court based its sentence on unverified information of the probation report about appellant's previous conviction.

11. It is because of the above that I order as follows:-

(a) The trial court's sentence is hereby set aside.

(b) Peter Nganga Ndirangu is hereby sentenced to serve two years imprisonment which sentence shall run from 1st October, 2018.

(c) Since he has been in custody for over two years, I order he be released forthwith unless otherwise lawfully held.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 20TH DAY OF MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

Appellant:Present

Respondent:Miss Kathambi

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE