



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 31 OF 2019

BARAKA CHANGAWA MATAZA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Malindi by Hon Dr. J. Oseko (CM) delivered on 31st May 2018 in Criminal Case No. 16 of 2018)

CORAM: Hon. Justice Reuben Nyakundi

Appellant in person

Mr. Mwangi for the State

J U D G M E N T

This is an appeal against a sentence of nine (9) years imprisonment passed by the trial Court for the offence of Stealing from a person contrary to Section 279 (a) of the Penal Code.

The grounds on appeal were that the appellant is the main breadwinner of the family. The appellant contends that he is remorseful of the incident and finally that the sentence imposed was too harsh and excessive.

I have perused the record against the grounds of appeal outlined by the appellant. The key issue here is whether the appellant has discharged the burden of proof to warrant the appeals Court discretion to set aside the sentence or vary it with an alternative lesser sentence.

Determination

The Law on this area is well settled going by the decisions made by various Courts in the case of **Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993** the Court held:

“An appellate Court will only alter a sentence imposed by the trial Court if it is evident it acted on a wrong principle or overlooked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration.”(See Ogalo s/o Owuor v R {1954} 21 EACA 270)

From the Judgment of the trial Court, it is noted that mitigation of the appellant and the pre-sentence report were all taken into account before imposing the impugned sentence. The trial Magistrate did not stop there, the aggravating factors in the nature of previous convictions relevant to the charge in issue was canvassed in support of a stiffer sentence.

A casual look at the provisions of Section 279 (A) of the Penal Code stipulate the sentence for any criminal conduct arising thereto would attract a maximum sentence of fourteen (14) years imprisonment. It appears to the Court that the trial Magistrate was significantly influenced by the aggravating factors and previous conviction of the appellant relevant to the charge in which he was tried and convicted of in **CA No. 16 of 2018**. Therefore, in essence the only responsive factor in favor of the appellant is that entering a plea of guilty against the charge. The other features considered during sentencing were all non-responsive. It is important to bear in mind that the act of sentencing is purely a matter for the discretion of the trial Court and the reason for that being the fact of each case presenting peculiar circumstances on the commission of the offence and personal profile and antecedents of the offender.

In most cases where an appellate Court interferes with sentence, it must be shown that the trial Court flouted the principles of sentencing or took into account an irrelevant factor, ignored the relevant one, to permit an unfair and disproportionate sentence.

A close look at the record and findings made by the trial Magistrate is indicative of the appellant's family background, personal details and the likelihood of him reoffending if a lenient prison sentence or non-custodial sentence was imposed. At that time the Court therefore had to strike a balance between the rehabilitation of the appellant and the public interests issues to meet the sentencing objectives laid down in the statute and settled guidelines. The answer is, it becomes hard for the appellate Court to just interfere with an order on sentence made by the trial Court without reference to the guiding principles on the mandate and jurisdiction of the Court. This is the position held by the Court in **Bernard Kimani Gacheru v Republic {2002} eKLR:**

“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 sentence is heavy and that the Appellate Court might itself not have passed the sentence, these alone are not sufficient grounds for interfering with the discretions of the trial Court on sentence unless, anyone of the matters already states is shown to exist.”

In the case of **African Continents Bank v Nuamani {1991} NWLR 486**, the Court observed that:

“The exercise of Court’s discretion is said to be judicial if the Judge invokes the power in his capacity as a Judge Qua Law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys, the intellectual wisdom or produce intellectual capacity of the Judge. The exercise must be based on a sound and sensible Judgments with a view to doing justice to the parties.”

Thinking on the position of the Law above, in juxtaposition with the facts, I am of the view that there are no other new extenuating circumstances or evidence on record that the trial Learned Magistrate erred in Law or fact in imposing a nine (9) year custodial sentence. The sentence handed down is neither illegal nor manifestly excessive in the circumstances of the charge and the probation pre-sentence generated report which formed part of the collateral material taken into account during the sentencing hearing.

I therefore, find the appeal on sentence devoid of merit. As that is the finding of the Court, it renders the appeal dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the State
2. The appellant