



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 118 OF 2019

RAYMOND MURURU KABARUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction and sentence of the Principal Magistrate's Court at Tigania in Cr. Case 1887 of 2017 delivered on 5th July 2019 by Hon Sogomo, PM]

JUDGMENT

[1] The appellant was convicted and sentenced on 6/12/2018 for imprisonment for 5 years and 3 years for the respective counts of killing an animal and injuring an animal c/s 338 of the Penal Code. The appeal is really from the sentence as the accused pleaded guilty to the charge. See section 348 of the Criminal Procedure Code. The charge was in this court's view properly drawn within the objective of a charge under section 134 of the Criminal Procedure Code. Additionally, the appellant had preferred a revision, a jurisdiction which arises where no appeal is available or preferred. The present appeal arose from the determination of the trial court on the sentence when the matter was upon the revision sent back for resentencing.

[2] Upon the revision application to the High Court, Gikonyo, J. remanded the matter to the trial court for resentencing and upon resentencing proceedings the trial court reaffirmed the sentences stating that "the mind of this court remains unaltered" and ruled that "the 2nd accused is sentenced to serve 5 years and 3 years imprisonment with hard labour in Counts I and II respectively." This was on 5/7/2019.

[3] The trial court did not clarify that the sentences were to run from the date of the initial sentencing on 6/12/2018. The trial court did not also consider the provisions of section 37 of the Penal Code which calls on a trial court when sentencing in a situation where an accused has previously been convicted for another offence to direct whether sentences should run concurrently and failure to do so means that the offender serves the imprisonment terms for the offences one after the other in order of conviction. Consequently, the appellant herein would have to serve a total of 8 years for the two offences in Count I and II.

[4] At the resentencing hearing, the appellant was shown to have had 4 previous convictions as follows:

"5/7/2019

Prosecution:

I have 3 physical files dating back to 2013 to show previous criminal convictions for the 2nd accused. In Cr. 250 of 2017 offender was convicted for theft and fined ksh.20,00/- in default 6 months imprisonment on 7/3/2017 and he served at kangeta G.K Prison.

In Cr. 1776 of 2013 the offender was convicted on 17/1/2014 and committed to Shiruk Borstal Institution.

In Cr. 590 of 2018 offender served 5 months imprisonment for escape from custody.

In Cr. 48 of 2009 the offender was also convicted and the file was referred to Nkubu Law Court for sentencing.

2nd accused states in Mitigation:

I ask for leniency and to be given a chance to complete my education."

[5] The trial court considered that the offender, appellant herein, was a recidivist and ruled as follows:

“Sentence

On account of a miscellany of a prior conviction against the 2nd accused this court regards him as a menace to the society and a pointer that he is unlikely to benefit from a non-custodial sentence owing to his recidivist disposition. The mid of this court remains unaltered.”

[6] However, even with the previous convictions the trial court’s sentence of a total of 8 years for the offences of killing animal and injuring an animal (with no intention of disrespecting animal rights) c/s 338 of the Penal Code for the two offences which happened, according to the facts of the case, on the same day and as part of the same transaction is excessive.

[7] The trial court should have ordered that the sentences in the two offences part of the same transaction be served concurrently. That is the counsel of Odero v. R (1984) KLR 61; Ondieki v. R (1981) KLR 430 and Nganga v. R (1981) KLR 530. In **Ondiek v. Republic**, (1981) KLR 430 it was held that-

*“The practice is that **where someone commits more than one offence at the same time and in the same transaction**, save in very exceptional circumstances, to impose concurrent sentences: **Republic v Sawedi Mukasa s/o Abdulla Alingwansa** [1946] 13 EACA 97 (CA-K).”*

[8] Indeed, in **Nga’ng’a v. Republic** (1981) KLR 530 the court considered that “*Concurrent sentences should have been awarded for this one criminal transaction. **It is true that the appellant has a bad record but that is beside the point.***” The appellant in this case may have had four previous convictions but this should not prejudice him with regard to the mode of execution of sentences in this case.

[9] In addition, the trial court in resentencing on 5/7/2019 ought to have indicated that sentences were to run from the date of the first sentence before the revision of the High Court. There was no evidence of continuous pre-trial detention under section 333(2) of the Criminal Procedure Code, as the appellant was serving a 5 months sentence for escape from custody.

[10] Significantly, the trial court did not give credit to the appellant on account of his plea of guilty as held in **Wanjema v. R** (1971) EA 493,494.

[11] Taking all these factors into consideration this court feels justified to interfere with the sentencing discretion of the trial court to reduce the sentences in Counts I and II to imprisonment terms of 4 years and 2 years, respectively. The court further orders that the two sentences be served concurrently as the two offences were part of the same transaction and that the sentences commence on 6/12/2018 the date of the first sentencing of the trial court.

ORDERS

[12] As the appellant has been in custody since 6/12/2018 and has, therefore, served 2 years and almost 11 months in prison, he has already served the sentences of 4 years and 2 years concurrent sentences in full, with remission of one third of the sentences.

[13] There shall, therefore, be an order for the immediate release from custody of the appellant unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF OCTOBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

APPELLANT IN PERSON.

MS. NANDWA, PROSECUTION COUNSEL FOR THE RESPONDENT.