REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 2 OF 2020

BENJAMIN OCHIENG OWUOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from sentence of Bondo Principal Magistrate's Court Criminal Case No 1084 of 2002

delivered on 20.12.2019. by Hon S. Mathenge, Resident Magistrate*)*

JUDGMENT

1. The appellant **BENJAMIN OCHIENG OWUOR** was charged with the offence of STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE. Particulars are that on 18th day of December 2019 at around unknown time at Nyagoko Sub-location in Rarieda Sub-County within Siaya County stole one Black Super Drum valued at Kshs. 1,800/= the property of ELMAH AKOMO ONYANGO. He also faced the alternative charge of HANDLING STOLEN GOODS CONTRARY TO SECTION 322(1)(2) OF PENAL CODE. Particulars are that BENJAMIN OCHIENG OWUOR: On the day of 18th December 2019 at 11.00 hours at Nyagoko s/location in Rarieda Sub County within Siaya County other than in the cause of stealing dishonestly retained one Super drum worthy Kshs. 1,800/= property of ELMAH AKOMO ONYANGO knowing or having reasons to believe it to be a stolen property.

2. In count 2, the appellant was also charged with STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE. It was alleged that on 18th day of December at unknown time at Nyagoko sub location in Rarieda Sub County within Siaya County stole one Super drum valued at Kshs. 1,800/= the property of RUSIA MUGA. He also faced an alternative count of HANDLING STOLEN GOODS CONTRARY TO SECTION 322(1)(2) OF PENAL CODE. It was alleged that BENJAMIN OCHIENG OWUOR: On the day of 18th December 2019 at 11100 hours at Nyagoko s/location in Rarieda Sub County within Siaya County other than in the cause of stealing dishonestly retained one Super drum worthy Kshs. 1,800/= property of RUSIA MUGA knowing or having reasons to believe it to be a stolen property.

3. The appellant pleaded guilty to all the main charges and he was convicted and sentenced to serve one-year imprisonment on each count, the sentences to run concurrently.

4. Aggrieved by the conviction and sentence imposed on him, the appellant filed this appeal through his counsel Mr Odongo Advocate vide his Petition of Appeal dated 23rd day of January 2020 setting out the following grounds of appeal:

i. The sentence imposed upon the Appellant was unduly, harsh and excessive.

ii. The Trial Magistrate erred in law and in fact in failing to take into account the mitigation presented by the Appellant was a first offender.

iii. The Trial Magistrate erred in law and in fact in finding that the plea was unequivocal.

5. The appellant prayed to this court to allow his appeal, set aside the custodial sentence and substitute it with a non-custodial sentence.

6. The appeal was canvassed by way of written submissions which were also highlighted orally. The Respondent made oral submissions opposing the appeal and urging the court to uphold the sentence imposed on the ground that the appellant committed the offence and that the trial court considered the mitigations before sentencing him.

7. In his written submissions which were adopted and highlighted by Mr Ochanyo advocate holding brief for Mr Odongo Counsel for the

appellant, it was submitted that the appellant only appeals against sentence imposed on him. What that means is that the appellant had now abandoned the ground of appeal challenging the plea which he had claimed was equivocal.

8. It was submitted that the one year prison term on each of the two counts of stealing which sentences are running concurrently was harsh as the appellant is a first offender and that he pleaded for forgiveness. Further, that **the stolen items stolen were recovered. It was submitted on behalf of the appellant that** although sentencing is in the discretion of the trial court, the court while guided by the **Sentencing Policy Guidelines** ought to have considered a non – custodial sentence as the most suitable in the circumstance since the Appellant herein had no criminal history and that there was no aggravating circumstance that would have rendered a non- custodial sentence as unsuitable.

9. The appellant's counsel urged that the trial court ought to have considered **Section 216 of the Criminal Procedure Code** asked for a pre-sentencing report to enable her determine the appropriate sentence. To that extent, it was submitted that she erred.

10. It was further submitted that the Appellant has served more than half the sentence and that he has learnt his lesson hence this court should allow the appeal and release him based on the period served.

Determination

11. I have considered the appellant's grounds of appeal and the written and oral submissions which only challenge the one year concurrent imprisonment sentence imposed on the appellant. I have also considered the respondent's opposition to the appeal herein.

12. In my humble view, the main issue for determination in this appeal is whether I should interfere with the sentence imposed on the appellant for the dual charges of stealing contrary to section 275 of the Penal Code. It is worth noting that the punishment for stealing as charged, upon conviction, is a prison term not exceeding five (5) years. In the instant case, the appellant was convicted of the offence of sealing two super drums in each of the two counts and the value of the stolen properties is Kshs 1800/ each totalling Kshs 3600/-. The stolen properties were recovered in his possession.

13. The principles guiding interference with sentencing by the appellate Court were appropriately set out in **S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12** where it was held:

> **"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."**

14. Similarly, in **Mokela vs. The State (135/11) [2011] ZASCA 166**, 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."**

15. The Eastern Africa Court of Appeal which is the predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, pronounced itself on this issue thus:

> **"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."**

16. To this, Odunga J in **Josiah Mutua Mutunga & another v Republic [2019] eKLR** added a third criterion namely, ***"that the sentence is manifestly excessive in view of the circumstances of the case," citing*** (**R - v- Shershowsky (1912) CCA 28TLR 263)** and the case of **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** where the Court of Appeal stated:

> **"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"**

17. The Court of Appeal in Bernard **Kimani Gacheru vs. Republic [2002] eKLR restated that:**

> **"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."**

18. In this appeal against sentence only, and going by the submissions by counsel for the appellant, the appellant is asking for a more lenient sentence than that which was meted out on him by the trial court. The question is whether this court should interfere with the sentence imposed on the appellant by the grail court.

19. This court on appeal is not obliged to reduce the initial sentence imposed by the trial court as sentencing is in the discretion of the trial court. I must however examine all the circumstances of the case and make a determination on whether the appellant's incarceration has achieved the objective for which he was sentenced such as punishment, deterrence, public protection and rehabilitation. Thus, the court is not bound only by the appellant's conduct that led to his incarceration but also his conduct and circumstances since the said incarceration.

20. Ngugi, J in **Benson Ochieng & Another vs. Republic [2018] e KLR** observed as follows and I concur:

> **"Re-phrasing the Sentencing Guidelines, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:**
>
> **a. Circumstances Surrounding the Commission of the Offence: The factors here include:**
>
> **i. Was the Offender armed" The more dangerous the weapon, the higher the culpability and hence the higher the sentence.**
>
> **ii. Was the offender armed with a gun"**
>
> **iii. Was the gun an assault weapon such as AK47"**
>
> **iv. Did the offender use excessive, flagrant or gratuitous force"**
>
> **v. Was the offender part of an organized gang"**
>
> **vi. Were there multiple victims"**
>
> **vii. Did the offender repeatedly assault or attack the same victim"**
>
> **b. Circumstances Surrounding the Offender: The factors here include the following:**
>
> **i. The criminal history of the offender: being a first offender is a mitigating factor;**
>
> **ii. The remorse of the Applicant as expressed at the time of conviction;**
>
> **iii. The remorse of the Applicant presently;**
>
> **iv. Demonstrable evidence that the Applicant has reformed while in prison;**
>
> **v. Demonstrable capacity for rehabilitation;**
>
> **vi. Potential for re-integration with the community;**
>
> **vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.**
>
> **c. Circumstances Surrounding the Victim: The factors to be considered here include:**
>
> **i. The impact of the offence on the victims (if known or knowable);**
>
> **ii. Whether the victim got injured, and if so the extent of the injury;**
>
> **iii. Whether there were serious psychological effects on the victim;**
>
> **iv. The views of the victim(s) regarding the appropriate sentence;**

v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;

vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and

vii. Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."

21. In this case, I have considered the circumstances in which the offences were committed and the sentences meted. I find that the appellant is a first offender and the properties stolen were all valued at Kshs 3600. They were also recovered. The sentences imposed were lenient. They cannot be said to be harsh or excessive. The trial magistrate took into account the appellant's mitigation before sentencing him. Nonetheless, the appellant has served seven months of the concurrent twelve months imposed. The sentence is short term and the appellant has a few months to complete sentence. The appellant must have learnt his lessons of stealing people's property and now he can benefit from prison decongestion.

22. For the above reasons, I allow the appeal against sentence. I order that the appellant shall be released from prison to be reporting to the Officer Commanding Police Station of the nearest police station for the remainder term twice every month on Fridays and not to commit any offence in the next twelve months breach of which he shall be arrested and send back to prison to complete the remainder prison term.

23. Orders accordingly.

Dated, Signed and Delivered at Siaya this 29th Day of July 2020

R.E. ABURILI

JUDGE