



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 187 OF 2016

STEPHEN BARASA Alias BALOZI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made on

19/8/2016 by Hon C.N. Ouro RM in Webuye Cr. Case No. 875 of 2015)

J U D G M E N T

1 **Stephen Baraza Alias Balozi (the appellant)**, was charged, convicted and sentenced to a total of 18 years imprisonment on five counts.

2 On count I, he was charged with handling stolen goods contrary to **section 322 (1) (2) of the Penal Code**. The particulars of the offence were that on the 2/9/2014 at Wanainchi Area in Webuye Township in Bungoma East Sub- County within Bungoma County, otherwise than in the course of stealing, he dishonestly undertook the disposal of motorcycle Reg. No. KMDE 476W by himself for his own benefit knowing or having reason to believe it to be a stolen property.

3 On count II, he was charged with handling stolen goods contrary to **section 322 (1) (2) of the Penal Code**. It was alleged that on the aforesaid date, time and place, otherwise than in the course of stealing, he dishonestly retained and assisted the disposal of a number plate KMDF 327F by replacing it on motorcycle make Focin its original registration KMDE 476W.

4 On count III, he was charged with forgery contrary to **section 349 of the Penal Code**. Particulars thereof were that, on diverse dates between 6/1/14 and 2/9/14 in Webuye Township in Bungoma East Sub-County within Bungoma County with intent to defraud or deceive, he forged a certain cash sale receipt Serial No. 08855 of Tasha Enterprise (K) Ltd Kisumu purporting it to be a genuine and lawful receipt issued by the said Tasha Enterprises (K) Ltd Kisumu Branch.

5 On count IV, he was charged with making a document without authority contrary to **section 357 (a) of the Penal Code**. It was alleged that in the aforesaid period and place, with intent to deceive and defraud without lawful authority or excuse, he made a cash sale receipt serial number 0855 of Tasha Enterprises (K) Ltd Kisumu purporting it to be genuine and lawful receipt issued by the said shop for the sale of motorcycle reg. No. KMDF 372Z.

6 On count V, he was charged with uttering a document with intent to defraud or deceive contrary to **section 357 (b) of the Penal Code**. It was alleged that on the aforesaid date, time and place, with intent to deceive and defraud, he knowingly uttered a forged cash sale receipt of Serial No. 0855 to Patrick Sikuku Wafula whom he had sold a motorcycle KMDF 327F and the forged cash sale had been made by him without lawful authority.

7 Aggrieved by the said decision, the appellant preferred this appeal whose grounds he amended to only challenge the sentence. The grounds can be summarized into three that; **the trial court failed to consider that the sentence emanated from a single transaction and the sentences should have therefore run concurrently, the trial court failed to consider the time spent in remand according to the proviso to section 333 (1) of the Criminal Procedure Code and that his mitigation was not considered.**

8. In his submissions, the appellant reiterated his grounds of appeal, to wit, that the charges emanated from the same transaction, that the court ought to have considered the time he had spent in remand and that his mitigation should have been considered.

9. On its part, the respondent submitted that the transactions were distinguishable as they began way back in January, 2014 and were effected in June, 2014. It cited **section 14 of the Criminal Procedure Code** and submitted that the trial court was correct in finding that the sentence should run consecutively. The cases of **Peter Mbugua Kabui v. R (2016) eklr, Ogolla s/o Owuor v. R (1954) EACA, Shadrack Kipkoech Kogo v. R (Eldoret Criminal Appeal No. 253 of 2003), Benard Kimani Gacheru v. R (2002) eklr and Dahir Hussein v. R (2015) Eklr,**

were relied upon in support of those submissions.

10. Sentencing is in the discretion of the trial Court. An appellate Court cannot interfere with the sentence of the trial Court unless the same is illegal or irregular or the trial Court considered irrelevant material or failed to consider relevant matters. See **Ogolla s/o Owuor, (1954) EACA 270** and **Benard Kimani Gacheru v. R (2002) eklr.**

11. **Section 14 of the Criminal Procedure Code** provides on how sentencing is to be effected. When the offences are tried in the same trial and arise from a single transaction, the sentences should run concurrently. However, if the offences arise from a series of transactions and affect various victims, then the sentences should run consecutively notwithstanding that they are tried in the same trial.

12. In **BMN v Republic [2014] Eklr.**, the Court of Appeal in explaining the provisions of Section 14 of the Criminal Procedure Code held :-

“In Ondiek – v- R 1981 KLR 430, the learned Justices Simpson and Kneller then of the High Court stated that the practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances, the sentences imposed ought to run concurrently. In Nganga – v- R, 1981 KLR 530, learned Justices Trevelyan and Sachdeva then of the High Court held that concurrent sentences should be awarded for offences committed in one criminal transaction. In the case of Sawedi Mukasa s/o Abdulla Aligwaisa (1946) 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences.

As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”

13. In this case, it is clear that count I and II were committed at the same time but separate from counts III, IV and V that were committed at the same time. These were two separate and distinct transactions. In this regard, the appellant deserved a concurrent sentence with regard to counts I and II and equally a concurrent sentence with regard to counts III, IV and V. The two then should have run consecutively.

14. The appellant complained that the sentences were harsh and excessive. On count I and II, the maximum sentence provided for is 14 years on each count. The appellant was sentenced to 5 years on each of those counts. That in my view was not excessive.

15. On count III, the maximum sentence provided for in law is 3 years imprisonment. The trial Court sentenced the appellant to 5 years imprisonment. This was not only excessive but illegal. On count IV and V, the sentence provided for is seven years on each. The trial Court meted out 2 and 1 year, respectively. That was not excessive.

16. On totality of the counts, the sentence of 18 years was excessive. Further, the sentence in respect of count III was illegal. Further in ordering that all the sentences run consecutively instead of differentiating the sets as stated above, I hold the view that the sentence cannot stand. It was both harsh and excessive.

17. I have considered the mitigation of the appellant before the trial court. He prayed for leniency and stated that he had been in custody for one year and was the bread winner of his large family. Although the trial Court indicated that it had considered the mitigation before passing the sentence, there is nothing to show that it specifically considered the provisions of **section 333(2) of the CPC.**

18. Since the direction in **Section 333(2)** of the CPC is an express direction of the law, it cannot be presumed that the sentencing court took it into consideration. The sentencing court must expressly indicate that fact if an appellate Court has to hold that view. This never happened in the present case.

19. In the premises, I consider it necessary and imperative to interfere with the discretion of the trial Court in sentencing. I set aside the sentences imposed by the trial Court and substitute therefor with the following: -

a) **Count I - 5 years**

b) **Count II - 5 Years**

c) **Count III - 1 Year**

d) **Count IV - 1 years**

e) **Count V - 2 years**

20. Count I and II to run concurrently, count III, IV and V are to run concurrently from the date the sentences in count I and II terminate. In deference to **Section 333 (1)** of the CPC, the sentences in count I and II are to run from the first day the appellant was placed in custody, to wit, 21/8/2015.

DATED AND DELIVERED AT MERU THROUGH MICROSOFT TEAMS THIS 12TH DAY OF AUGUST, 2020.

A. MABEYA

JUDGE