



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 15 OF 2020.

JULIUS KIPLIMO MIBEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the sentence of the Honourable Principal Magistrate Hon. N. Wairimu delivered on 27th of January 2020 in Eldoret CM's Court Criminal Case No. 92 of 2020.)

JUDGMENT

1. The appellant was charged with one count of **house breaking contrary to Section 304(1) (b) and stealing contrary to Section 279(b) of the Penal Code**. The particulars being that on the 15th of August 2018 at Kamagut Village in Soya Sub – County within Uasin Gishu County, broke and entered in the building used as the dwelling house by **Salina Jekurgat Lagat** and stole cash Kshs. 10,000/= and phone itel valued at Kshs. 1,150/= all valued at Kshs. 11,250/= the property of the said **Salina Jekurgat Lagat**.

2. The substance of the charge and every element were read to the appellant on 9th of January 2020 in Kiswahili, a language he told the Court he understands and he pleaded guilty to the charge.

3. The facts of the charge as per record were that on 15th August 2016 the complainant **Selina Jekurgat Lagat** was at home in the kitchen when she met the appellant coming from her bedroom while carrying her ITEL phone worth Kshs. 1,150/= and her purse which had Kshs. 10,000/= in it. On being asked by the Complainant what he was doing, the appellant pushed her prompting her to raise alarm. The appellant went into the forest and they were unable to arrest him. The matter was reported at Soy Police Station and the Chief of Kamagut led members of public to arrest the appellant. The phone was not recovered. The receipt was produced as exhibit 1. The accused is also charged with the offence of **failing to attend Court in Criminal No. 3476 of 2018**.

4. In response to the facts, the appellant responded “*ni ukweli*” in Kiswahili meaning “it is true”. In mitigation the appellant stated that he lived with the complainant for 3 years and when he asked her for money she declined to give him and that is when he took her phone and money. He apologised for committing the offence.

5. The trial magistrate convicted the appellant on his own plea of guilty and after calling for probation report she sentenced the appellant to 5 years’ imprisonment. The appellant having being aggrieved and dissatisfied by the sentence, acting in person filed this appeal in respect to sentence on the following grounds: -

i. That he is remorseful and is repenting for the offence and he is promising to shun it.

ii. That he has learned the consequences of acting contrary to the law and promise that he will be a good citizen abiding by the law after being released.

iii. That sentence imposed is too harsh and excessive and his young family will end up perishing if he remains incarcerated.

iv. That he has undergone various courses of rehabilitation while in prison and he promise to be a changed person after his release.

v. That he begs the honourable court to grant him leniency and he be released out of prison or order sentence reduction;

APPELLANT’S CASE

6. On 9th September 2020, the appellant informed the Court that he was satisfied with conviction and he was appealing on sentence only. He stated that he has been in custody for 9 months and that he has 3 children who were abandoned by their mother when he was arrested. He

urged Court to allow him serve his sentence out of prison to enable him take care of his children. Further that his parents are not financially able and were depending on him and he has a sister who also depend on him.

7. He further submits he used to work for the complainant who did not pay him and he decided to use force to take from her. He submits he was remorseful and seek forgiveness from the complainant and the Court. He said he has suffered in prison but has learnt farming skills like planting sunflower and ploughing the farm which has improved his farming skills. He said he is a class 7 drop out.

RESPONDENT'S CASE

8. The state counsel, **Brenda** on behalf of the prosecution submitted, the appellant was charged with the offence **house breaking contrary to Section 304(1) (b) and Stealing contrary to Section 279(b) of the Penal Code** and that he pleaded guilty when the charge was read and explained to him.

9. The state counsel submitted that **Section 348 of the Criminal Procedure Code** provides that where there is a plea of guilty, appeal should only be on sentence. She submitted that charges were read to the appellant on 9th January, 2020 and facts were read to him again on 13th January, 2020 to which he still pleaded guilty.

10. The state counsel submitted that ingredients are as in the case of **Adam Vs Republic** were met; that the appellant was sentenced to 5 years' imprisonment where Act provides for 7 years' imprisonment. She submitted that the trial magistrate called for Probation report; was presented to Court before sentence was imposed. She submitted that all the circumstances were looked into by the trial magistrate before sentencing the appellant. Further that the appellant indicated to the Court he has reports but has not tendered any document to the Court to confirm that. She urged Court to uphold the trial Court sentence as the same was lenient in the circumstance.

ANALYSIS AND DETERMINATION

11. The appellants appeal only on sentence only. He was sentenced to 5 years' imprisonment. He seeks the Court to reduce the imprisonment terms or he be allowed to serve his imprisonment term out of prison.

12. I have perused the record of appeal and considered submissions by both the appellant and the state counsel, and wish to consider whether the sentence imposed was harsh and the appellant deserved reduction.

13. The appellant was charged under **Section 304(1)(b) of the Penal Code** which provides for **house breaking and burglary** as follows:

“having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.”

14. And **Section 279(b) of the Penal Code** which provides for **stealing from the person; stealing goods in transit**, etc. If the theft is committed under any of the circumstances following, that is to say as follows: -

“if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house.”

15. From the record the appellant was arrested on 3rd November, 2017 and presented in court on 6th November, 2017. The appellant was sentenced on 27th November, 2019. The trial magistrate in the sentence stated: -

“I have considered the amount that the accused stole, the period he has been in remand and what he has told the Court in mitigation. I hereby sentence him to serve three (3) years in prison...”

16. I am live to the fact that the appellant Court is not at a discretion to interfere or alter the sentenced of the lower court unless the sentence is too excessive. In **Mokela vs. The State (135/11) [2011] ZASCA 166**, the **Supreme Court of South Africa** held that:

“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.”

17. In the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, pronounced itself on this issue as follows: -

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

18. In the case of **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No. 253 of 2003** the Court of Appeal stated thus: -

“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))”

19. The Court of Appeal, on its part, 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.”

20. The Supreme Court in the Francis Karioko Muruatetu –vs- Republic [2017] eKLR decision gave the following guidelines when this court will be considering the appellant’s appeal on re-sentencing:

“(71) As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

“25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

21. I have perused the probation officer’s report. The probation officer indicated that the appellant was not a first offender while the prosecutor indicated that there were no previous records of the appellant. There being no previous record availed to Court, I will take it that the appellant was a first offender. Record show that he was remorseful and pleaded for pardon form the Court. Taking into consideration the above, I am inclined to reduce the jail term to 3 years and noncustodial sentence of probation for 2 years upon completion of the 3 years’ jail term.

22. FINAL ORDERS

1. Sentence of imprisonment reduced to 3 years.
2. Upon completion of jail term, the appellant to serve on probation for 2 years.

Judgment dated and signed at Nakuru this day of, 2020

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RACHEL NGETICH

JUDGE

Judgment dated, signed and delivered at Eldoret this 28th day of October, 2020

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HELLEN OMONDI

JUDGE

In the presence of:

Koment - Court Assistant

Okoth for State

Appellant in person