



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 25 OF 2019

JOSPHAT KIMUTAI ALIAS BROWN.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Senior Resident Magistrate's Court at Kabarnet Criminal Case no. 734 of 2018 delivered on the 5th April 2019 Hon. N. M. Idagwa, S RM]

JUDGMENT

Introduction

1. The appellant was convicted of two counts, one of theft of a motor cycle contrary to section 278A of the Penal Code and the other of general stealing contrary to section 268 as read with 275 of the Penal Code, and sentenced to imprisonment for five years on 5th April 2019. The particulars of the offences were as follows:

“CHARGE: STEALING MOTOR CYCLE CONTRARY TO SECTION 278(A) OF THE PENAL CODE

PARTICULARS OF OFFENCE: JOSPHAT KIMUTAI: On the 12th day of April, 2018 at Patkawani trading Centre in Baringo South Sub-County within Baringo County, stole a Motorcycle registration number KMDW 431X make boxer 150 red in colour valued at Kshs 80000/= the property of LINUS KIPROP KIBOR (COUNT II) SEE OVERLEAF

COUNT II

STEALING CONTRARY TO SECTION 268 AS READ WITH SECTION 275 OF THE PENAL CODE.

JOSPHAT KIMUTAI ALIAS BROWN: On the 12th day of April 2018, at Patkawanin trading Centre in Baringo County stole one mobile phone make ITEL valued at Ksh.3000/= the property of Titus Tarus Rutto.”

2. The appellant appealed raising the following grounds of appeal:

“PETITION OF APPEAL

My lordship, I kindly make the following grounds of appeal against judgment and sentence under the following circumstances.

- 1. That the trial magistrate erred in the law and facts in considering my conviction in absence of eye witness.*
- 2. That the trial magistrate erred in the law by accepting the prosecution evidence without taking into account my defense.*
- 3. That the trial magistrate erred in the law and facts by disregarding the legal principal governing the circumstantial evidence and went on to convict on basis of such evidence.*
- 4. That the trial magistrate appeared to assist prosecution by asking questions in their favor thus violating my fundamental rights under article 50 of the constitution.*
- 5. That I pray this honorable court to consider and admit and acquit me.”*

Written submissions on appeal

3. The appellant filed written submissions urging as follows:

“WRITTEN SUBMISSION

1. *My lords I pleaded not guilty in this case.*
2. *That the trial magistrate upon complying with the procedure and prosecution presented a list of four witnesses where the trial court convicted and sentenced the appellant to serve 5 years imprisonment upon which the appellant has filed an appeal. That this conviction is too harsh I pray that the honourable to exercise discretion and review the orders made by the trial court.*
3. *That I have a young family who are depended on me earning a living through services in various bakeries within my residence area including my complainant’s bakery.*
4. *That I did not commit the offence as alleged and for thereby argue this court to set aside both conviction and sentence which will be a relief in view of the circumstance I found myself in.*
5. *My lordship, it is my humble submission that this court evaluated the record so as to certify myself that the trial magistrate judged me in a lawful manner while relying on the case.*
6. *That, the honorable court may re-consider my Appeal and quash this conviction and sentence so that I may be set at liberty.*
7. *That this sentence is excessive in view of the circumstances of the case.*
8. *That the delivery of the cakes was solely a duty of PW1 and I was not assigned nor aware of the delivery process using the said motorcycle.*
9. *My lords the complainant and his family were housed in the same compound with the bakery where I was assigned to work (look at the sketch of the compound marked exhibit 4) and he or a member of his family did not see me demolishing the fence nor any commission in the complainant’s compound.*
10. *That the complainant residence was next to the complainant’s compound (see on exhibit 4 pg. no. 30)*
11. *My lords, the appellant submits that the rules of casual labourers are also ‘casual’ and the terms thereof ought not to bind the appellant to what he is not employed to perform as there is no written contract the appellant terms of service were limited to baking which includes mixing dough and making bread.*
12. *It is the witness testimony that the appellant had other places of engagement where he could go to work part-time without notice to the complainant.*
13. *My lords since I am a first offender I kindly request this honourable court to deem this sentence and give me a lenient sentence to enable me to meet my family.*
14. *That the matter herein emanated from my temperamental behaviour which I could not hold back despite the fact that during that every time I was drunk.*
15. *I have learnt my mistakes through the tough conditions in prison and I promise to show lawful acts that may not gross purpose with the law of the land.*
16. *That your lordship I pray that this application be a certified as argent and in the same be given a hearing date. I also pray to be present during the hearing day of my application.*

DRAWN AND FILED BY THE SAID

KBT/73/019/LS JOSPHAT KIMUTAI ALIAS’BROWN,

KABARNET G.K PRISON,

P.O BOX 425, KABARNET.”

Hearing of the Appeal

4. At the hearing of the appeal on 30th September 2020, the appellant relied on his written submissions already filed and the DPP made oral submissions as follows:

“30/9/20

Appellant

I have filed submissions. I invite the court to consider the recommendation by the Prison in Charge.

Ms. Kitilit for DPP

Conviction

Motor Cycle was stolen by the appellant who had been employed by the complainant who had given him the bike to deliver cakes. Appellant lived in the compound where the Bakery was with other employees. The date when the motor cycle disappeared is the same date when the appellant disappeared.

Complainant and other employees conducted a search and upon consultation the appellant was arrested by the complainant and other civilians in possession of the motor bike. The complainant was able to prove ownership of the cycle, and he identified the appellant as his employee and also the cycle by registration number and ownership documents. Accused betrayed trust of the employer. The accused betrayed trust of the complainant. Doctrine of recent possession. The appellant is the one who had the cycle last and he was arrested with the same. Tracks showed cycle removed through a gap in the fence from the place where it used to be parked at night. There was no forceful entry. The appellant had the key to the motor cycle and he dishonestly deprived the complainant of the cycle by driving it away and not returning it.

Paragraph 14 of the written submissions, appellant states temperamental behaviour and drunkenness. It is an admission.

Sentence

Sentence is sufficient in the circumstances of the offence.

Appellant in reply

I pray that the sentence be reduced.”

Judgment was reserved for 22nd October 2020.

Review of evidence before the trial court

5. From the submissions of the appellant the challenge is purely on sentence for which he prays for leniency. However, in performance of its duty as a first appellate court as counselled by ***Okeno v. R*** (1972) EA 32, to determine the issue before the court whether the appellant was guilty as charged for the theft of the items set out in the counts before the trial court, this court has considered the evidence which was before the court to arrive at its own conclusion.

Determination

6. The court considers that the appellant was rightly convicted, the evidence of the complainant PW1 being corroborated by that of the accused’s colleague at work and employee of the complainant PW2, and the accused’s defence did not raise any reasonable doubt as to his involvement in the theft of the items stolen from the complainant in Count No. I and from PW2 in the Count No. II. Counsel for the DPP was obviously mistaken in her submissions that the motor cycle subject of the theft was recovered and consequently on the applicability of the doctrine of recent passion, as on the evidence the motor cycle was never recovered.

Compliance with section 169 of the CPC

7. The judgment of the trial court is, however, to be faulted for its failure to comply with section 169 of the Criminal Procedure Code in that it did not identify the offences for which the appellant was convicted and the applicable sections of the law involved, as follows:

“169. Contents of judgment

(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.

[Act No. 22 of 1959, s. 17.]

8. The setting out of the law for which conviction had been done is important especially in this case where two counts of offences were involved, and for determination of the applicable sentences. The accused was charged in Count I with theft of a motor cycle contrary to section 278A and with general stealing contrary to section 268 as read with section 275 of the Penal Code in Count II, and the two offences have different penalties, respectively seven (7) and three (3) years of imprisonment. Obviously, the charge in Count II was wrongly expressed to have been under section 268 as read with section 275 of the Penal Code, as the former only provides for the definition of theft and section 275 of the Penal Code set out the general offence of theft. The charge ought to have been framed as an offence of stealing contrary to section 275 of the Penal Code, with or without the redundancy of the definition section 268. The particulars of the charge in Count II were, however, clear that the appellant was being charged with theft of a mobile phone and no prejudice was occasioned by ordering the applicable sections in-elegantly, and the defect, if any, is curable pursuant to section 382 of the Criminal Procedure Code.

Judgment of Trial court

9. In her judgment, the trial court only said:

“JUDGMENT

... The motor bike, radio and phone disappeared that morning at the same time the accused disappeared. Only one conclusion is to be drawn out of this and it is that the accused disappeared with the missing items. ***I therefore have no doubt that it's the accused who stole the complainants' property. The Prosecution have proved their case beyond reasonable doubt. I find the accused guilty in both counts. I convict him under section 215 of CPC.***

Signed and dated this 5th day of April, 2019.

N M IDAGWA, RM

5/4/2019”

[emphasis added]

Sentence

10. On the sentence the trial court said:

COURT: Accused mitigation noted he is hereby sentenced to 5 years imprisonment. 14 days Right of appeal explained. The sentence to run from 28/8/2018.

N M IDAGWA, RM

5/4/2019”

11. Although it said that it “***found the accused guilty in both counts***”, without complying with section 169 of the Criminal Procedure Code, the trial court exacerbated the error in imposing one **omnibus** sentence for the two offences. That was plainly wrong as omnibus sentences are impermissible (See ***Kiarie & Another v. The Republic (Note)*** (1980) KLR 52 (Sachdeva, J.) citing ***R v. Meyerowitz*** (1947) 14 EACA 130 and ***Mohamed Warsama, H.T. Musa Aboker, Bab Majelo v. R*** (1956) 23 EACA 576. The trial court should have convicted on both counts of the charge sheet and passed separate respective for each count. There must be a sentence on each offence. See ***Kiarie v. R*** (1975) EA 324 (Trevelyan & Waiyaki, JJ.).

12. If the trial court’s sentence were considered to have been intended to apply to the both counts, imprisonment for five (5) years for the offence of general theft charged under **Count II** would be **illegal** for exceeding the maximum prescribed under section 275 of the Penal Code, and as regards the offence of theft of motor cycle under section 278A of the Penal Code charged in Count I, which has a maximum penalty of seven (7) years imprisonment, the sentence of imprisonment for five (5) years would be **excessive** for the appellant in this case who is **a first offender**.

Principles for appellate interference with sentence

13. On the test of ***Wanjema v. R*** (1971) EA 493, 494, the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of the plain error of omnibus sentence and the illegality of the sentence with regard to Count No. II.

Appropriate sentence

14. A sentence of imprisonment for four (4) years with respect to the theft of the motor cycle in Count I and two (2) years for general theft of the mobile phone in Count II meets the justice of the case. As the two offences were committed as part of the same transaction, the sentences

of imprisonment herein passed will be served concurrently (see **Odero v. R** (1984) KLR 621).

Orders:

15. Accordingly, for the reasons set out above, the court makes the following orders on the appellant's appeal:

1. The appellant's appeal against conviction is dismissed. The Court will however, as in **Kiarie v. R** (1975) EA 324, put the matter right by amending the record and entering convictions for theft of motor cycle contrary to section 278A of the Penal Code in Count I and stealing contrary to section 275 as read with section 268 of the Penal Code in Count II.
2. The omnibus sentence of imprisonment for five (5) years imposed on the appellant by the trial court is set aside.
3. The appellant is sentenced to serve imprisonment for **four (4) years** for offence of stealing a motor cycle contrary to section 278A of the Penal Code charged in Count I and imprisonment for a term of **two (2) years** for stealing contrary to section 275 as read with section 268 of the Penal Code charged in Count II.
4. The sentences will be served **concurrently**, and **commence** on **28/8/2018** as ordered by the trial court.

Order accordingly.

DATED AND DELIVERED THIS 22ND DAY OF OCTOBER 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant present in person.

Ms. Kitilit, Prosecution Counsel for the Respondent.