



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

PETITION NO. 4 OF 2018

IN THE MATTER OF ARTICLE 22(A), 23(1), (3) 165(3) 50(1) 50(6)(A) 258(1) 259(1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS)
PRACTICE AND PROCEDURE RULES 2013 (RULE 4(1))**

AND

IN THE MATTER OF: SECTION 12 OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF SECTION 333(1)(2) OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF DECISION OF NGIBUINI V REPUBLIC (1987)KLR

AND

IN THE HIGH COURT CRIMINAL APPEAL NO. 24 OF 2015 AT KAJIADO

AND

**IN THE MATTER OF CRIMINAL CASE NO. 803 OF 2012 AND CRIMINALCASE NO. 966 OF 2012 AT KAJIADO LAW
COURT**

BETWEEN

JULIA WANGECHI GITHUA.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

***(Being an Revision/Appeal in Criminal Case No. 803 of 2012 and Criminal Case No. 966 of 2012, Criminal Case No. 804 of 2012 on the
order specifically on sentence)***

JUDGEMENT

The appellant was charged and convicted with the following offences:

Count 1

(a) In Criminal case N. 966 of 2017 she was indicated of the offence of preparation to commit a felony contrary to Section

308(2) of the Penal Code. The particulars of the charge were that on the 25th day of September, 2012 at Olchoro area, in Loitoktok District within Kajiado County not being at her place of abode, had with her a motor vehicle registration No. KBQ 609G Toyota Land Cruiser green in colour in the course of or in connection with theft of the said motor vehicle.

Count 2

Cheating contrary to Section 315 of the Penal Code. The specifics being that on the 25th day of September, 2012 at Olchoro area in Loitoktok District within Kajiado County by means of a fraudulent trick, obtained a motor vehicle registration No. KBQ 609G Toyota Land Cruiser from Simon Kuria Chege.

(b) In Criminal Case No. 804 of 2012 the appellant was charged with the offence of stupefying in order to commit a felony contrary to Section 230 of the Penal Code. The particulars of the charge were that on 8th August, 2012 at Loitoktok Ark II Butchery in Kajiado County with intent to steal a motor vehicle registration number KBK 476D Isuzu Lorry NKR jointly attempted to administer stupefying Atavan Tablets to Paul Njenga, a driver of the said motor vehicle.

There were other charges brought against the appellant but not filed or determined in any of the magistrate's court within the jurisdiction of Kajiado High Court. The appellant shall pursue any such appeals before the relevant appeal's court.

As regards the present criminal cases, the trial magistrate sentenced the appellant as follows:

In Criminal Case No. 966 of 2012 on Count 1, a sentence of 3 years was imposed by the court. Count 2, the appellant was sentenced to 2 years imprisonment. The appeal in Criminal Case No. 803 of 2012 was heard and determined in High Court Criminal Appeal No. 24 of 2015.

The appeal which is before me is in respect with Criminal Case No. 966 of 2012 where the learned trial magistrate sentenced the appellant to 3 years for Count 1 and 2 years imprisonment for Count 2 respectively.

In her appeal filed through counsel, Mr. Swaka the appellant seeks an order of consolidation of sentences to run concurrently with the period or sentences in Criminal Case No. 803 of 2012. Learned counsel drew the court's attention to the provisions of the law under Article 50(1)(6)(a) of the Constitution, and section 333 of the Criminal Procedure Code.

Analysis and Determination

The Law

Section 37 of the Penal Code provides that:

“where a person after conviction for an offence is convicted of another offence, earlier before sentence is passed upon him under the First Conviction or before the expiry of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence unless the court directs that it shall be executed concurrently with the former sentence or any part thereof.”

The above provisions is also fortified by Section 14(1) (2) of the Criminal Procedure Code which states that:

“(1) Where a person is convicted at the time of two or more distinct offences, the court may sentence him for other offences, to the several punishments prescribed therefore which the court is competent to impose, and those punishment when consisting of imprisonment shall commence the time after expiration of the other in the order the court may direct, unless the court directs that the sentences to run concurrently. (2) Provided in the case of consecutive sentences it shall not be necessary for the court by reason only of the aggregate punishment for the several offences being in excess of the punishments which the court is competent to impose for a conviction of a single offence.”

There are however definitive rules of interpretation of the provisions of the statute under Section 37 of the Penal Code and Section 14(1)(2) of the Criminal Procedure Code. In the case of ***Owiti v Republic 1984 KLR*** the Court of Appeal held that:

“where a person is convicted for two or more offences connected with same transactions, the established rule of practice is that sentences should run concurrently unless there are special circumstances to depart from the said rule.” (See also Text on Criminal Law by ***William Musyoka at page 217***).

The principles illustrative of Section 37 of the Penal Code and Section 14(1) of the Criminal Procedure Code are that concurrent sentences apply normally for offences committed in one transaction.

The law that regulates the jurisdiction of the High Court over subordinate courts on appeal or revision of any judgements or orders is precisely set out in Section 382 of the Criminal Procedure Code:

“subject to this section, no finding, sentence or order passed by a court of competent jurisdiction shall be revised or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrants, charge, proclamation order, judgements or other proceedings under this code unless the error, omission or irregularity has occasioned a failure of

justice.”

It is under these provisions the role of the appellate court is clearly set out to only interfere with the order on sentence imposed by a trial court where the error or omission has occasioned a failure of justice. Perhaps I should add the passage in the case of **Ogalo S/O Owora v R 1954 24 EACA 70** where it was held that:

“This court has power only to interfere with any sentence imposed by the trial court if it is evident that the trial court acted on wrong principles or overlooked some material factor or the sentence is illegal or is manifestly excessive or low as to amount to a miscarriage of justice.”

In the instant appeal the charge as framed was in respect of Section 308(2) and Section 315 of the Penal Code. The appellant pleaded guilty to both counts. On conviction of the appellant the trial court was under a duty to impose a sentence of not less than 7 years and not more than 15 years for the offence under Section 308(1) of the Penal Code. However, for reasons not recorded by the learned trial magistrate he settled for a sentence of 3 years imprisonment.

With regard to the Count II on cheating, the appellant was liable to be sentenced to a period of three years imprisonment but ended up with a two (2) year period custodial sentence.

So keeping in mind the nature of the offence contrary to Section 308 of the Penal Code the appellant got away with a lenient sentence that did not take into account the provisions of the law. It is necessary to state in this appeal that quantum of sentence though not in compliance with Section 308 of the Code is not punitive nor excessive.

I find no useful purpose to be served in entering the sentence to a period of 7 years. I take the view that justice of the case would be served by having both sentences commuted to the period already served by the appellant. It is paramount to note that the appellant pleaded guilty to the above offences and overtime since conviction and sentence the weight and impact of the period in custody has reinforced her positive to reform.

After taking a careful look of the record as far as the circumstances of criminal case No. 803 of 2012 are concerned in exercise of the powers under Section 14(1) of the Civil Procedure Code the grievance for the sentences to run concurrently is hereby allowed. That the substantive sentences in both Criminal case No. 803 of 2012 do run concurrently with this cumulative sentence in Cr. Case No, 804 of 2012.

Consequently, the appeal is allowed in the following terms:

- 1. That the sentence in criminal case No. 966 of 2012 by the trial court be retained with a rider that it be commuted to the period already served by the appellant.**
- 2. That sentences in criminal case No. 803 of 2012 do run concurrently with the order on sentences in Cr. Case No. 804 of 2012.**
- 3. That I am constrained to say anything with regard to Cr. Case NO. 594 of 2012 precisely heard and determined at Machakos and Mavoko Law courts. These class of appeal remain dismissed for want of subject matter jurisdiction the cause of action having arisen at subordinate courts not within Kajiado county.**

Dated, signed and delivered in open court at Kajiado this 23rd day of January, 2019.

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R. NYAKUNDI

JUDGE

Representation

Mr. Swaka for the appellant

Mr. Meroka for the DPP

The appellant