REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. 10 OF 2019

TONNY KIPRONO ROTICH…....................…........1ST APPLICANT

CLEOPHAS LAGAT NGOSESE..............................2ND APPLICANT

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentence in Criminal Case No.50 of 2019 in the Senior Principal Magistrate's Court at Kapsabet delivered by Hon. B. Wachira, RM on 7 February 2018)

RULING

[1] Before the Court for determination is the Revision Application dated **13 February 2019**. It was filed by the law firm of **S.K. Kitur & Company Advocates** on behalf of the two Applicants, **Tonny Kiprono Rotich** (the 1st Applicant) and **Cleophas Lagat Ngosese** (the 2nd Applicant) pursuant to **Section 364(2), and 365** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya,** in respect of proceedings held before the **Kapsabet Senior Principal Magistrate's Criminal Case No. 50 of 2019**: **Cleophas Lagat Ngosese and Tonny Kiprono Rotich**, wherein the two Applicants had been charged with the offence of stealing from a locked motor vehicle contrary to **Section 279(g)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. Counsel accordingly required the Court to call for the lower court record with a view of satisfying itself as to the correctness, propriety and legality of those proceedings.

[2] The lower court record was accordingly called for and it confirms that the two Applicants were indeed arraigned before **Hon. B. Wachira**, Resident Magistrate, at Kapsabet Senior Principal Magistrate's Court on **7 January 2019** on a Charge of stealing from a locked motor vehicle contrary to **Section 279(g)** of the **Penal Code**. The particulars of the Charge were that, on the **31 December 2018** at Chemnyango Trading Centre in Kamobo Location within Nandi County, they jointly stole one Mobile Phone, Make OPPO A 37, Serial Number xxxxxxx IMEI No. xxxxxxxxxxxxxxx valued at **Kshs. 16,000/=** the property of **Violet Savai;** and that in order to commit such theft they opened a locked motor vehicle **Registration No. KAN 250Q**, Make Toyota Sprinter.

[3] The record further shows that before the two Applicants were required to respond to the Charge, an order was made for them to be taken for age assessment; the result of which was that the 2nd Applicant herein, **Cleophas Lagat Ngosese**, was found to be a minor of between 13 to 15 years old; while the 1st Applicant, **Tonny Kiprono Rotich**, was found to be an adult aged between 18 to 20 years. The Charge and all its elements were thereafter read over and explained to the Applicants to which they entered a plea of Guilty. Consequently, the 1st Applicant was sentenced to 2 years Imprisonment while the minor was placed at **Kimumu Probation Hostel** for 2 years and a further 1 year's Probation to be served thereafter.

[4] In the light of the foregoing, it was the contention of **Mr. Kitur,** vide his letter dated **13 February 2019**, that, as he was seated in the court room on the **7 February 2019** when the sentence was meted out on the Applicants, he noted that the two were almost of the same age; and that upon interviewing the 1st Applicant, he learnt from him that he was 21 years of age and had done his Kenya Certificate of Secondary Examination the previous year, and was anticipating joining Eldoret Polytechnic as soon as his father raised the fees. According to Learned Counsel, there was no evidence that the motor vehicle was broken into; and that neither of the Applicants was found in possession of the Mobile Phone. He therefore averred that the facts and their particulars as read out before the lower court did not clearly link the two Applicants to the offence; and that had the case gone for full trial the Applicants would not have been convicted or jailed. Counsel therefore posited that the sentence imposed by the lower court was too harsh and destructive to the lives of the Applicants as their ambition to go back to school has thereby been completely shattered.

[5] Pursuant to its supervisory mandate under **Article 165(6) and (7)** of **the Constitution**, **Section 362** of the **Criminal Procedure Code** gives the High Court revisionary powers in the following terms:

"The High court may call for and examine the records of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.*"*

[6] In the same vein, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

"In the case of a proceeding in subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may ... in the case of any other order other than an order of acquittal alter or reverse the order."

[7] Accordingly, I have carefully perused the lower court record in the light of the assertions set out in the letter dated **13 February 2019**. It is manifest that before the plea-taking was done, the learned trial magistrate made an inquiry as to the respective ages of the Applicants and had reports filed to inform appropriate treatment of the offenders. The record further confirms that the Learned Trial Magistrate took the plea in accordance with **Section 207** of the **Criminal Procedure Code,** and the steps set out in **Adan vs. Republic (1973) E.A. 445. In the case aforementioned, those steps were set out thus:**

"(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

[8] The record of the lower court shows that the Charges were read to the Applicants in Kiswahili language and their responses recorded in that language. The facts were then read over to the Applicants and they again unequivocally admitted those facts as true and their responses taken down in Kiswahili language. Thereupon, a conviction was recorded; whereupon an opportunity for mitigation was given to the Applicants. The record of the lower court further shows that after the Applicants expressed themselves in mitigation, the trial magistrate called for a Children's Report in respect of the minor on the basis of which the lower court deemed it appropriate and in the best interest of the minor that he be placed at **Kimumu Probation Hostel**. The lower court cannot be faulted for that decision in respect of the 2nd Applicant. The 1st Applicant was, on his part sentenced to 2 years' imprisonment. The penalty provided for in **Section 279** of the **Penal Code** is 14 years' imprisonment.

[9] Clearly therefore, the plea was properly taken and all the relevant provisions of the law, such as **Sections 279** of the **Penal Code**, and **Section 207** of the **Criminal Procedure Code** were complied with; and the sentence passed was otherwise lawful. The question that remains is whether the sentence of 2 years imprisonment passed on the 1st Applicant is appropriate in the circumstances.

[10] It is trite law that an appellate court does not alter sentence unless certain key principles, clearly spelt out in the case of ***Ogalo s/o Owuora vs. Republic [1954] 21 EACA 270,*** exist. In the stated case the court held:

"The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v Republic [1950] 18 EACA 147*, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that he sentence is manifestly excessive in view of the circumstances of the case."

[11] The 1st Applicant is a young man and this fact was ascertained by the trial court well in advance of plea-taking. The trial court asked for and obtained a Probation Report in respect of the 2nd Applicant. It is not clear why the same was not done for the 1st Applicant; and although in the case of the 1st Applicant the lower court stated that it had sought guidance from the Judiciary Sentencing Policy, this was not manifest in the ensuing sentence that was meted out in respect of the 1st Applicant. In his message in the **"Judiciary: Sentencing Policy Guidelines"** the former Chief Justice of the Republic of Kenya, the **Honourable Mr. Justice Willy Mutunga,** made this poignant statement:

"Sentencing has been a problematic area in the administration of justice. It is one of those issues that has constantly given the Judiciary a bad name – and deservedly so. Sometimes out rightly absurd, disproportionate and inconsistent sentences have been handed down in criminal cases. This has fueled public perception that the exercise of judicial discretion in sentencing is a whimsical exercise by judicial officers."

[12] The same observations were made by **Mbogholi Msagha, J,** Chairperson of the Judicial Taskforce on Sentencing in the Foreword of the document. Here is what he had to say:

"Underpinning these Policy Guidelines are the constitutional dictates that guide the exercise of judicial authority as reflected by Article 159 of the Constitution. The sentencing process, which entails the exercise of judicial discretion, must be in accord with the Constitution, as embodied in the Judiciary's overall mandate of ensuring access to justice for all. These guidelines are in recognition of the fact that while judicial discretion remains sacrosanct, and a necessary tool, it needs to be guided and applied in alignment with recognized principles, particularly fairness, non-arbitrariness in decision-making, clarity and certainty of decisions. The guidelines are, therefore, an important reference tool for judges and magistrates that will enable them to be more accountable for their sentencing decisions."

[13] Care must therefore be taken by courts so that in the exercise of their judicial discretion, inexplicable disparities are avoided. Indeed in, in **Fatuma Hassan Salo vs. Republic [2006] eKLR** **Hon. Makhandia, J. (as he then was) observed that:**

"Sentencing is a matter for the discretion of the trial court. The discretion must however be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous factors …"

[14] From the facts presented before me, I am satisfied therefore that, whereas the sentence passed in respect of the 1st Applicant was legal, it was excessive in the circumstances and was imposed without any sufficient justification. Given the age of the 2nd Applicant, a Pre Sentence Report ought to have been called for to enable the lower court determine what would have been appropriate sentence in his case, before imposing the 2 years imprisonment that was meted on him. I would accordingly order that a Probation Officer's Report be filed herein for the Court's consideration and further direction.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF MARCH, 2019

OLGA SEWE

JUDGE