REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 39 OF 2019

MOSES NGUGI MUTHONI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence by Hon. L. M. Wachira – SPM Gatundu dated and delivered on the 23rd day of May 2017 in the original Gatungu Chief Magistrate's Court Criminal Case No. 644 of 2015}

JUDGEMENT

1. The appellant was arraigned in court on 12th June 2015 and charged with five offences as follows: -

"Count I: Stealing contrary to Section 268 as read with Section 275 of the Penal Code.

Particulars

On unknown date within the Republic of Kenya stole National Identity Card No. 11239629 the property of Daniel Waimeri Mwangi.

Count II: Impersonation contrary to Section 382 of the Penal Code.

Particulars

On the 20th May 2015 at Igegania Shopping Centre in Gatundu North Sub-county within Kiambu County, with intent to defraud falsely represented himself to Rosalyline Kariuki as Daniel Waimeri Mwangi of National Identity Card No. 11239629.

Count III: Obtaining registration by false pretence contrary to Section 320 of the Penal Code.

Particulars

On the 20th May 2015 at Igegania Shopping Centre in Gatundu North Sub-county within Kiambu County obtained Safaricom Sim card registration account number 0729662838 falsely pretending that he was Daniel Waimeri Mwangi of National Identity Card No. 11239629.

Count IV: Kidnapping contrary to Section 25 of the Penal Code.

Particulars

On 27th May 2015 at Igegania Shopping Centre in Gatundu North Sub-county within Kiambu County, kidnapped James Kioro Nyathira with intent to cause him to be secretly and wrongfully confined.

Count V: Demanding property with menaces contrary to Section 302 of the Penal Code.

Particulars

On the 31st May 2015 at Igegania Shopping Centre in Gatundu North Sub-county within Kiambu County, with intent to steal demanded with menaces Kshs. 600,000/= from Cecilia Nyathira Mbuthia."

2. On the day of plea, he pleaded guilty to all the charges except the charge of kidnapping and was sentenced as follows: -

Count I: To serve 1-year imprisonment.

Count II: To serve 1-year imprisonment.

Count III: To serve 1-year imprisonment.

Count V: To serve 3 years' imprisonment.

Sentences to run concurrently.

3. He was subsequently tried on the charge of kidnapping and was found guilty, convicted and sentenced to six (6) years imprisonment. He appealed initially on both conviction and sentence but later amended his petition to appeal only on the sentence. At the hearing he relied on written submissions the gist of which is that he is remorseful and has undergone training in prison which has reformed him.

4. The appeal is however opposed. In her submissions which were made orally, Prosecution Counsel Ms. Maundu pointed out that the charge of kidnapping is what attracted the longest sentence. She urged this court to take cognisance of the fact that the kidnapped child has not been traced to-date and find that the sentence was not excessive.

5. In his reply the appellant then urged this court to order that the sentence runs concurrently with those in the other counts.

6. In the case of **Omuse Vs Republic [2009] KLR 214** the Court of Appeal citing the case of **Ogalo S/o Owuor Vs Republic [1954] 21 EACA 270** held: -

> **"1. The court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the Judge acted upon some wrong principles or overlooked some material factors.**
>
> **2. The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence."**

7. I have considered the sentences imposed by the trial court and found the same were lawful and there was no misdirection at all by the trial court. The trial Magistrate considered the moral blameworthiness of the appellant and took into account all other factors and cannot be faulted for imposing the sentences he did. I find no justification to interfere with the sentences.

8. The appellant pleaded with this court to order the sentence of six years to run concurrently with the previous sentences in the event that it did not find it fit to reduce the same. The offences charged in this case were founded on the same facts and formed part of a series of offences of the same or similar character and whereas **Section 14 (1)** of the **Criminal Procedure Code** provides that sentences shall run one after the other unless the court orders that they shall run concurrently the practice by the courts is to order that they shall run concurrently. Indeed, when the accused pleaded guilty to counts I, II, III & V the sentences imposed were ordered to run concurrently. It is evident that the Magistrate who tried him on the charge of kidnapping was not the one who sentenced him on the other counts. That would explain why there was no order for the sentence on the charge of kidnapping to run either consecutively or concurrently with the sentences on the other counts. In the case of **Ngibuini Vs Republic [1987] KLR 517** where the Court of Appeal was faced with a somewhat similar predicament it held: -

> **"In this connection our attention was drawn to the decision of the High Court of Tanzania in** *Mwakapesile v Republic [1965] EA 407* **with which we respectively agree in which it was held that where there is a single complex of offences connected in kind and time it is undesirable although not unlawful for the accused to be arraigned on separate occasions before different magistrates. The reasons why it is undesirable is as was explained in the case of** *Republic v Ames & Carey [1938] 1 All ER 515* **that it prevents the sentencing courts from looking at the appellant vis a vis the series of offences as a whole if they had been charged together. The maximum penalty for the offences charged in the two separate cases is seven years jail with or without an order for restitution. The trial magistrate in Criminal Case No 213/84 gave sentences of six and five years jail respectively for count 1 and 2. He clearly considered the offences very serious; if he had known that the appellant was also guilty of the thefts charged in criminal case No 212/84 he would most probably not have imposed a severer sentence. We are in the circumstances in agreement with learned counsel for the appellant that the sentences in the two separate trials ought to have been made to run concurrently and the High Court erred in failing to direct they do so run. The High Court order that the sentences in the separate trials do run consecutively is therefore set aside and we substitute an order that the sentences in Criminal Case 213/84 and 21/84 shall run concurrently. Order accordingly."**

9. Accordingly, I shall accede to the plea by the appellant that the sentence in the charge for kidnapping run concurrently with the sentences in those other counts. The rest of the appeal is otherwise devoid of merit and is dismissed.

Signed, dated this 23rd day of September 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 26th day of September 2019.

C. W. MEOLI

JUDGE