



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.152 OF 2016

(An Appeal arising out of the conviction and sentence of

Hon. Onginjo - CM delivered on 18th September 2015

in Kibera CM. CR. Case No.6020 of 2012)

PATRICK OKWERO WAMBANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Patrick Okwero Wambani was charged, with another, with the offence of **stealing a motor vehicle** contrary to **Section 268(1)** as read with **Section 278A** of the **Penal Code**. The particulars of the offence were that on the night of 9th November 2012 at Total Petrol Station in Westlands, Nairobi County, the Appellant, jointly with others not before, court stole a motor vehicle make Isuzu Bus NQR 66 Registration No. KBS 142K valued at Kshs.4.2 million, the property of Abednego Okenye Ongata. The Appellant pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve five (5) years imprisonment.

The Appellant is not appealing against his conviction, but rather, he is appealing against the custodial sentence that was imposed. The Appellant pleads with the court to take into consideration that he was a first offender. He told the court that he had learnt his lesson in the period that he has been in prison. He has trained in motor vehicle mechanics and was now qualified to be a useful member of the society. He urged the court to take into consideration the period of two (2) years and ten (10) months that he was in remand custody before he was convicted. He told the court that he had been in lawful custody since 14th November 2012 when he was arrested. Ms. Atina for the State opposed the application. She submitted that the sentence that was meted out on the Appellant reflected the gravity of the offence that the Appellant committed. In particular, she submitted that the Appellant betrayed the trust of his employer by stealing from him when he was entrusted with the responsibility of taking care of the motor vehicle. She emphasized that the custodial sentence that was meted on the Appellant was legal and should not be interfered with.

This court has carefully considered the plea for reduction of custodial sentence made by the Appellant.

The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No.135 of 2016** (unreported) held at Page 25 of its judgment as follows:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle, ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000 this Court stated thus:

“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 the 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 stated is shown to exist. (See also Wanjema v. Republic [1971] E.A.493.”

In the present appeal, it was clear to the court that, whereas the custodial sentence that was imposed upon the Appellant was legal, the trial magistrate did not take into consideration the period that the Appellant had been in remand custody before he was convicted. The Appellant was in remand custody for a period of about three (3) years before his conviction. This period ought to have been taken into account at the time the trial court sentenced the Appellant. This court is of the view that the trial court fell in error when it failed to take into consideration the period that the Appellant had been in remand custody as provided under **Section 333(2)** of the **Criminal Procedure Code**. The trial court further failed to take into consideration that the Appellant was a first offender.

The **Sentencing Policy Guidelines** at Page 20 provides thus:

“7.10 The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.

7.11 In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

In the present appeal, it was evident that if the trial court had taken into consideration the period that the Appellant had been in remand custody, then it would have sentenced the Appellant to a shorter period than it did. This court has taken into consideration that since his incarceration, the Appellant has been in prison for a period of two (2) years and six (6) months. This court is of the view that the Appellant has been sufficiently punished as a result of which his sentence is commuted to the period served.

The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF MARCH 2018

L. KIMARU

JUDGE