



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 164 OF 2017

DOUGLAS LAMPOSON LEMELWAI APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Appeal from the original conviction and sentence in Kabarnet Principal Magistrate's Court Criminal Case No. 34 of 2014 delivered on the 18th day of November, 2014 by

Hon. S.O Temu,PM]

JUDGMENT

Introduction

This appeal is from severity of sentence only. The appellant presented his grounds of appeal as 'mitigation' grounds pleading remorsefulness and seeking leniency in the sentence.

Breach of Probation Order

The appellant was sentence to serve imprisonment for 3½ years after absconding while on probation order following conviction for assault causing actual bodily harm contrary to section 251 of the Penal Code. The trial court acted well within its powers under section 8 of the **Probation of Offenders Act**, which provides for one of the consequences of breach of probation sentence, as follows:

"8. Failure by probationer to comply with probation order

(3) If it is proved to the satisfaction of the court by which the probation order was made that the probationer has failed to comply with any of the provisions of the probation order, then—

(a) (ii) if the probationer was convicted of the original offence in respect of which the probation order was made, the court may pass any sentence which it could pass if the probationer had just been convicted before that court of that offence."

Escape from Prison

After serving 2 months thereof he escaped from custody and was rearrested and directions given for him to serve the original sentence of 3 ½ years less the two months that he had serve before escape. In the criminal trial for escape the appellant was convicted on his own plea of guilty and sentenced to imprisonment for 2 years. The conviction and sentence in the escape case, ***KBT Principal Magistrate's Court Criminal Case No. 656 of 2014***, is not before this court.

The appellant does not challenge the conviction and for the offence of assault causing in this appeal and in his **Memorandum of Mitigation only seek a reduction of the sentence, expressing remorse and willingness to seek reconciliation between his family and that of the complainant.**

Section 251 of the Penal Code provides for a sentence of imprisonment for 5 years for the offence of assault causing actual bodily harm thereunder.

Remission of sentence

The appellant should have benefit from remission as his sentence after breach of the Probation Order was passed on 16th November 2014

before the provision therefor [section 46 of the Prisons Act] for remission was removed by Statute Law Miscellaneous Amendment Act No. 18 of 2014 of 24th November 2014. Although the escape from custody would disentitle him to remission, the appellant has since his re-arrest and recommencement of imprisonment term on 21/8/2015 served three years and one month (**as at 21st July 2018**) of the three year six months sentence taking into account the two months served before the escape from custody.

Pre-trial Detention

Section 333(2) Proviso of the Criminal Procedure Code which requires the Court while sentencing a convicted person to an imprisonment term to take into account the time that an accused trial has been remanded awaiting trial as follows:

*“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. **Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.**”*

[Act No. 7 of 2007, Sch.]”

The appellant herein was arrested on 18.1.2014 and charged in court on 20.1.14 when he was remanded awaiting trial, which concluded on 18.3.14 when the appellant was placed on 1 year Probation.

Unlawful Order

In obvious, and perhaps understandable, anger that the appellant had denied having been the accused before the court who had previously been placed on probation prompting a protracted process of identification by finger print examination, the trial court acted contrary to the express provisions of section 333(2) Proviso, when it ruled:

“Court:

I have confirmed beyond reasonable doubt that the accused herein is the same accused that was charged, tried, convicted and sentenced by myself on 18.3.14.

He is the same person that was placed on probation and absconded. I thus reverse the probation sentence and convict him to serve 3 ½ imprisonment.

The sentence to commence today as the accused has taken the court and the police through an exercise which was not necessary to have investigations conducted on his finger prints as he denied that he was the person who was charged, tried, convicted and sentenced in this file.”

By this order, the appellant lost the benefit of credit of the 2 months pre-trial remand from date of arrest on 18.1.2014 to 18.3.2014, as provided for under section 333(2) of the Criminal Procedure Code.

Conclusion

In the circumstances, the appellate court is justified on the ground of the trial court’s failure to consider an important material factor of pre-trial detention as required by law, to interfere with the sentence. See **Wanjema v. R** (1971) EA 493. The appellant has not shown himself deserving of the mercy of court in sentencing for his conduct in breaching the probation sentence and subsequently his escape from custody upon imprisonment. However, he is entitled to equal benefit of the law under Article 27 of the Constitution and to the extent that he was denied the benefit of the pre-trial detention credit his sentence of three years commencing the date of the sentence was unlawful. In addition, I consider that the period of over **three years and three months** that the appellant has been in prison awaiting trial and after conviction and sentence is sufficient punishment for the offence of assault causing grievous harm contrary to section 251 of the Penal Code.

Orders

Accordingly, the sentence of imprisonment for 3½ years is, pursuant to section 354 (3) of the Criminal Procedure Code, reduced to such period that the appellant has already served as will enable the appellant to be released from custody immediately, unless he is otherwise lawfully held.

DATED AND DELIVERED THIS 25TH DAY OF JULY, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person

Ms. Macharia, Ass. DPP for the Respondent.