



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 34(36 & 37) OF 2016**

**(From original conviction and sentence in Criminal Case No. 15 of 2015 & 19 of 2015 of the Chief Magistrate's Court at Kerugoya).**

**DAVID WACHIRA MURIITHI.....1<sup>ST</sup> APPELLANT**

**JAMES MWANGI NGUGI .....2<sup>ND</sup> APPELLANT**

**JEREMIAH NGUNGI NDUNGU ..... 3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

**Criminal Appeal No. 34 of 2016** – appellant David Wachira Muriithi

**Criminal Appeal No. 36 of 2016** - appellant James Mwangi Ngugi

**Criminal Appeal No. 37 of 2016** - appellant Jeremiah Ngungi Ndungu

The appellants were charged with the offence of stealing motor vehicle KBA 704Q contrary to **Section 278A of the Penal Code** and were each committed to serve 4 years jail term. On 17/07/2018, they withdrew the appeal on conviction and proceed with appeal on sentence.

**1. Sentence to run concurrently**

The appellant sought to have the sentence to run concurrently with **Criminal Appeal 34 of 2016** in which he was charged with the offence of stealing motor vehicle KBA 704Q contrary to **Section 278A of the Penal Code** and committed to serve 4 years jail term together with 2 others.

**Peter Mbugua Kabui v Republic [2016] eKLR.** The Court of Appeal held;

**Section 14 of the Criminal Procedure Code provides for circumstances in which a court can direct sentences to run concurrently or consecutively. Section 14 provides in part as follows:-**

**(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.....**

**As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.**

**In the instant case, the offences were not committed at the same time and in the same transaction; they occurred on diverse dates. Furthermore, the acts complained of were perpetrated against different complainants. Thus we find that the trial court and the High Court did not err in directing or ordering a consecutive term of imprisonment for the conviction in the two counts.**

In this case, he was convicted of offence of stealing motor vehicle KBF 917W on 14/07/2014 while in **Criminal Appeal 34 of 2016** he was charged with the offence of stealing motor vehicle KBA 704Q on 10/01/2015. These offences are distinct, they were committed at different dates, in different criminal transactions and against different complainants therefore the sentences cannot run concurrently.

## **2. Appeal on sentence**

In the case of **Bernard Kimani Gacheru V Republic [2002] eKLR**

The court in holding that sentence given was well deserved and found absolutely no reason to interfere with it stated;

**“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 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.”**

Refer to **George Karanja Njoroge V Republic [2008] Eklr**

The court in affirm the sentence imposed by the Court below stated;

**“The last-listed case, an appellate Court decision, sets out the pertinent principles which must guide this Court in disposing of the instant matter. The Court in that case stated (p. 270):**

**“The principles upon which an Appellant Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does 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 will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v. R (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 add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.....”**

**Section 278A of the Penal Code** provides:

If the thing stolen is a motor vehicle within the meaning of the Traffic Act ([Cap. 403](#)), *the offender is liable to imprisonment for seven years.*

**Section 2 of the Traffic Act** defines a motor vehicle as:

**“motor vehicle”** means any mechanically propelled vehicle, excluding any vehicle running on a specially prepared way such as a railway or tramway or any vehicle deriving its power from overhead electric power cables or such other vehicles as may from time to time by rules under this Act be declared not to be motor vehicles for the purposes of this Act;

The penalty for stealing motor vehicle under **Section 278A** above is 7 years imprisonment therefore the sentence imposed upon the appellant of 3 years was lawful. The trial court did not act on some wrong principle or overlooked some material factor therefore there is no reason whatsoever for this court to interfere with the sentence meted out to the appellant by the trial court as the same was neither harsh nor overly excessive.

I will now consider the issue raised by the appellant that the trial Magistrate did not consider the period the appellants had spent in custody when passing sentence. The appellants submits that they were in custody for a period of one year and eight months prior to his conviction on 29/8/16. The appellants urged the court to consider the time spent in custody and the sentence to run from the time they were arrested to the time of conviction.

For the State, Mr. Obiri, the prosecution counsel submits that the issue was raised before the trial Court. The court has to look at the offence. That the appellants do not deserve the reduction of sentence.

I have considered the submissions. The sentence imposed on accused person who has been convicted begins to run on the date on which it is pronounced. **Section 333(3) of the Criminal Procedure Code** provides:-

**“(2) Subject to the provisions of section 38 of the Penal Code 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.”**

Under this section the court must take into account the time already served in custody before sentencing. The record of the trial Magistrate must show that he/she took into consideration the period the appellants had served in custody when passing sentence. It is not enough for the trial Magistrate to state that he/she has considered the period spent in custody, it must be clearly shown that the period spent in custody has

reduced the sentence which the trial Magistrate has imposed on the convicted person.

The Court of Appeal in **Bethwel Wilson Kibet –v- R Court of Appeal at Eldoret Cr. Appeal No. 78/2009** where the offender was convicted of manslaughter and sentenced to five years imprisonment and the trial court did not indicate whether it had taken into account the nine years the offender had served in custody. The Court of Appeal stated that being guide by **Section 333(2) of the Criminal Procedure Code**, reduced the sentence to the time served. Though the Section does not specify how the court is to take into account the time in custody, it must be interpreted to mean that the sentence imposed must be reduced by the time the accused has spent in custody. So where the accused is sentenced to four years, it must read, less the specified period spent in custody. This is an issue of rights of an accused person because he is presumed innocent until proved guilty, **Article 50(2) (a) of the Constitution** refers. That is why a trial must start and terminate without unreasonable delay. **Article 50(2)(e) of the Constitution**. To mitigating on these rights of an accused a trial court must show that an accused person benefits by having the sentence reduced by the time he has spent in custody.

This is an appeal on sentence as the appellants abandoned the appeal. **Section 354(3)(b) C.P.C** provides that the High Court in an appeal against sentence, may reduce or increase the sentence or alter the nature of the sentence.

The provision gives the court power to reduce or increase the sentence. This must depend on the circumstances of each case.

The trial Magistrate noted the period the appellants were in custody but did not state that she had taken into account the period spent in custody to reduce the sentence which was imposed.

The appellants were sentenced to serve four (4) years in imprisonment on 29/8/2016. They have been in prison for two (2) years and three (3) months. They were in custody before trial for a period of one year and eight months. This gives a total of three years and eleven months. In line with the Court of Appeal decision, **Wilson Kibor –v- R** (supra), the appellants deserve to have the sentence reduced to the period served. In the circumstances I allow the appeal on the sentence and order that the sentence of imprisonment is reduced to the period already served. The appellants shall be set at liberty unless otherwise lawfully held.

The Judgment to apply in Criminal Appeal No. 35 of 2016.

**Dated at Kerugoya this 22<sup>nd</sup> this November 2018.**

**L. W. GITARI**

**JUDGE**

**Judgment read out in open court,**

**M/s Muthoni Holding Brief for Mr. Obiri for the State,**

**Appellants Present.**

**C/A – Naomi this 22/11/18.**