



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL REVIEW NO. 2 OF 2018

ALI HASSAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application brought by the appellant under Article 50(2) of the constitution and Section 362 of the Criminal Procedure Code in respect to the custodial sentence of 3 years imprisonment for the offence of breaking and steeling contrary to Section 306(a) of the Penal Code.

The appellant moves to this court on appeal/revision on grounds the sentence was punitive and excessive in the circumstances of this case. (b) that the learned trial Magistrate should have considered an alternative sentence of a fine besides imprisonment.

Facts and procedural History of the matter

The appellant on 24th August 2017 was indicated with the offence of shop breaking and steeling Contrary to Section 306(a) as read with Section 268(1) of the penal code. The brief particulars of the offence were that on 21st August 2017 at Jimmy Kinyozi and Salon shop in Ongata Rongai Township within Kajiado County. The appellant broke and entered Jimmy's Kinyozi and Saloon did steal from therein 1 balding Shaving Machine valued at Kshs 5000 Philip Clipper Machine valued at 45000, normal clipper Machine valued at Kshs. 7000 all valued at Kshs.16500 the property of James Ngugi Muniu.

On 26th September 2017 the appellant pleaded guilty to the charge and thereafter was sentenced to three years imprisonment. Before scheduling a sentence hearing the learned trial magistrate called for the pre-sentence report which was presented to court dated 16th October, 2017.

The trial Court found as a mitigating factor the accused was a first offender. The court also heard from the appellant on mitigating factors that he stole the property as an employee of the complainant in order to sell them to pay himself outstanding dues. It was further established that the pre-sentence report was non-responsive on grounds that he is a flight risk and has no relatives within the jurisdiction of the court for any meaningful supervision to take place while serving non-custodial sentence.

One year down the line a different post-conviction sentence report was requested for by this court. The report filed in court on 10th December, 2018 graphically details the family background, antecedents of the appellant, and victim impact statement. In overall it departs from the initial report made by another officer who dis-recommended the appellant as a fit person for non-custodial sentence. The current probation report makes reference to the initial inquiry carried on 16th October, 2017, but fails to reconcile the change of circumstances to warrant non-custodial sentence.

The instant report significantly highlights that the appellant has an on-going case referred as Cr. Case No. 409 of 2017 before the same court charged with the offence of house breaking and stealing. It is against this background I will consider the application.

Analysis and determination

On appeal the guiding principles upon which this court can interfere with the sentence of a trial court are well settled as stated in the cases of *Macharia v Republic* 2003 2 EA 559 and *Ogola S/O Owuor* 1954 EACA 270. ***“The key principle in these cases is that the court on appeal 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, secondly, unless it is evident that the judge has acted upon some wrong principles or overlooked some material factors -----”***

On appeal the appellant submitted that his three year term of imprisonment is inappropriate for being punitive, harsh and excessive.

I note with dint of Section 306(a) and Section 268(1) of the Penal Code the legislature prescribes a sentence of 7 years for any accused person found guilty and convicted of the offence of house breaking and stealing.

I have considered the appellant sentence of three years. It is below the stated seven years of the maximum sentence sanctioned by parliament. Accordingly to the record the appellant was treated as a first offender, inspite of the pending on-going case with the same elements to the one he was convicted and sentenced by the trial court. With regard to the nature of the offence the presentence report established that the personal circumstances of the appellant are such that he is a flight risk to abide with the conditions for a non-custodial sentence. However, when the second post-conviction was presented before court that fact of flight risk to drive him out of the jurisdiction of this court has been adequately addressed by the probation officer. This to me is a crucial element for any offender to be released on probation.

The other unique feature of this appeal is the character of the appellant. One relevant fact is the appellant criminal history. It is not disputed that the appellant has a pending criminal case based on the nature, and in relation to the current offence he was convicted of by the trial court.

In this appeal there is no evidence that the trial court failed to apply the guiding principles on sentencing requiring this court to revisit the issue and interfere with the discretion of the learned trial magistrate. In passing sentence, I hold the view that the trial learned magistrate took into account the gravity of the offence, the mitigating factors, the contents of the pre-sentence report and the fact that in mitigation the appellant was not remorseful nor did he regret the offence. He accepted responsibility with a rider that it was a way of recovering his unpaid dues; form the complainant. That expression was supposedly made at the face of the court without material to proof that the house breaking and theft occurred as of necessity.

In this case the court would have been more lenient if the appellant in line with restorative justice he pledged to compensate the complainant for the loss. While the appellant's labour dispute is insulated in the law, it does not include commission of a crime to vindicate those rights. Indeed if it is true the appellant was wronged by the complainant his best recourse was to file a civil claim in the Employment and Labour Court for a declaration of payment of his dues and benefits. It is obvious house breaking and theft cannot be one of the remedies in an employment labour relation dispute between an employee and an employer

Having weighed the argument on appeal nothing persuades me to exercise discretion to interfere with the 3 years imprisonment sentence which I consider appropriate regardless of whether the appellant pleaded guilty to the charge. In the result the appeal on sentence fails and it is hereby dismissed.

Dated, signed and delivered in open court at Kajiado this 17th day of December, 2018.

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R. NYAKUNDI

JUDGE

Present:

The appellant

Mr. Meroka for the DPP