



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 85 OF 2015

(CORAM: J. A. MAKAU – J.)

MICHAEL N. WAMWEYA APPELLANT

VERSUS

STATERESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 671 of 2014 in Bondo Law Court before Hon. M.M. Nafula – (S.R.M.)

JUDGMENT

1. The Appellant Michael Ngesa Wamweya and another were charged with an offence of **Robbery contrary to Section 296 (1) of the Penal Code**. The particulars of the offence are that on 2nd day of July 2014 at about 7.05 p.m, at Nyangoma sub-location, in Central Sakwa Location, Bondo District, within Siaya County jointly with another not before court robbed Boniface Otiemo Chiaji. The Appellant and another faced an Alternative Charge of **Handling Stolen goods contrary to Section 322(1) (2) of the Penal Code** the particulars of the alternative charge are that on the the 7th day of July 2014 at about 22.00 hrs at Witeithiew in Thika District within Kiambu County otherwise than in the cause of Stealing dishonest retained one Motor cycle Number plate KMCC 265J knowing or having reasons to believe it to be Stolen goods.

2. That after full trial the learned trial magistrate convicted the Appellant, who was the 2nd accused and the other who was the 1st accused with the alternative charge of **Handling Stolen Goods contrary to section 322(2) of the Penal Code** and sentenced the 2nd accused to pay a fine of Kshs 30,000/= in default to serve 4 years imprisonment and the 1st accused to serve 7years imprisonment.

3. The Appellant being aggrieved by the sentence of 7 years for an offence of handling stolen goods preferred this appeal only against the sentence, setting out the following grounds of appeal:-

1. ***That is manifestly harsh and excessive.***
2. ***That he was the sole breadwinner in his family and his siblings and his aged parents depended on him fully to cater for their needs.***
3. ***That he was a first offender and remorseful and begged for leniency.***

4. That he prayed for a non-custodial sentence or a reduction of the same so he may engage in a positive development of our great nation.

4. At the hearing of the Appeal, the appellant appeared in person while Mr. Ombati learned State prosecution Counsel appeared for the state.

5. The Appellant relied on his written submissions which he handed over to Court. He briefly emphasized that the sentence was harsh and has the psychological effect on his mind, that he is a first offender, that he has gone under transformation, that he is the breadwinner of his family and that he has now realized his mistake. He prayed the court to be lenient, set aside the sentence or replace it with a more lenient one. Mr. Ombati, learned state prosecution Counsel opposed the appeal against sentence, urging the main charge was robbery with violence contrary to **Section 296 (1) of the Penal Code** which attracts a maximum sentence of 14 years, whereas the alternative charge of having stolen goods can attract a sentence of up to 7 years. He stated appellant was sentenced to 7 years, which sentence was within the provisions of the law therefore it was lawful. He urged the court to exercise its discretion judiciously.

6. The learned trial magistrate before imposing sentence against the appellant had no mitigation from the Appellant. The prosecution had specially stated the appellant was not a first offender. The appellant did not challenge the prosecution on the fact that he was not a first offender but left the matter to the court. In this appeal he denies that he had a previous conviction. I note the prosecution at the trial did not produce Appellant's record to demonstrate he is not a first offender. The court upon convicting both the 1st and 2nd accused imposed different sentences without giving reason as to why one was to serve 7 years and the other to pay a fine of Kshs.30,000/= in default to serve 4 years. That once a sentence is imposed upon an accused person it does not have effect only on, the accused but his family as well and causes a psychological effect on both the convict and his immediate family members though they may be innocent. In imposing sentence, in my view the court should take into account the psychological effect it may have on the family members of the convict and the suffering it may cause on the children and family of the convict. I have considered the sentence provided for under **Section 322(2) of the Penal Code** which provides:-

“A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.”

7. I note the said said Section do not have a mandatory minimum sentence but gives discretion to court to impose appropriate sentence as conditions may allow. I note the Appellant should have been given same sentence as his co-accused and if then the sentence was based on the fact that the 2nd accused was a mother to the Appellant and a female, it was in my view discriminatory on basis of gender.

Article 27 (1) (2) (3) (4) and (5) the Constitution of Kenya 2010 provides:-

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) a person shall not discriminate directly or indirectly against another on any of the

grounds specified or contemplated in clause 4.

8. Further under **Article 159(2) (b) of the Constitution of Kenya 2010**, it provides that justice shall be done to all, irrespective of their status. In view of the above and there being no reason given for issuing different sentences to different accused persons on same offence based on same facts, I find the learned trial magistrate discriminated against the Appellant who should have been given lighter sentence as his co-accused. The Appellant should have been given same sentence as the co-accused however, where court in my view without any compelling reasons opts to give lower sentence in exercise of its discretionary powers than the maximum sentence, and where more than one accused are convicted of the same offence on same facts, the sentence must in my view be the same for all accused persons.

9. **The upshot is that I have considered the mitigating factors given by the appellant, the sentence imposed on the Appellant and that imposed upon his co-accused as well the provision of Section 322(2) of the Penal Code and I am convinced the appeal against sentence ought to succeed. I therefore allow the appeal against the sentence, set aside the sentence of imprisonment for 7 years and substitute it with a fine of Kshs.30,000/= in default of payment to serve 4 years imprisonment. That if the appellant is unable to pay the fine he will serve the sentence of 4 years from the time of sentence thus 10.9.2014. That upon payment of the fine of Kshs.30,000/= the Appellant shall be set at liberty forthwith unless otherwise lawfully held.**

DATED AT SIAYA THIS 24TH DAY OF MARCH, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

In the presence of:

Appellants in person - present

Mr. Ombati for State

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akide

J. A. MAKAU

JUDGE