REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 24 OF 2015

JULIA WANGECI GITHUA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgement of Principal Magistrate Court at Kajiado in Criminal Case No. 803 of 2012)

JUDGEMENT

The appellant was indicted and arraigned in court before the Senior Principal Magistrate's Court at Kajiado with three offences namely:

COUNT 1

Stealing motor vehicle contrary to section 278(a) of the Penal Code whose particulars were that on the 7th of July 2012 at Kimana area in Loitokitok District within Kajiado County, stole a motor vehicle registration number KBA 633T Mitsubishi yellow in colour worth Ksh.3,500,000/= (three million five hundred thousand shillings) the property of Wilson Kiragu Muchendu.

COUNT 2

Stealing motor vehicle contrary to section 278(a) of the Penal Code whose particulars are that on 26th day of July 2012 at Loitokitok town in Loitokitok District within Kajiado County appellant stole a motor vehicle registration number KBC 610M Mitsubishi white in colour worth Ksh.2,500,000/= (two million five hundred thousand shillings only) the property of Geoffrey Kariuki Njeru.

COUNT 3

Stupefying in order to commit a felony contrary to section 230 of the Penal Code whose particulars were that on 8th day of August 2012 at Loitokitok Ark II Butchery in Loitokitok District, the appellant with intent to steal a motor vehicle registration number KBK 476D Isuzu lorry NKR white in colour, jointly attempted to administer stupefying ATAVAN TABLES to PAUL MAREKIA NJENGA a driver of the said motor vehicle.

The appellant was arraigned before the trial court on 4th June 2014 where the three counts were read, explained and subsequently pleaded guilty to each of the charge.

The learned trial magistrate upon complying with the procedure and prosecution presenting the facts on each count proceeded to convict appellant on her own plea of guilty.

The appellant was sentenced to 7 years imprisonment in respect of count 1 and count 2. As regards count 3 the appellant was sentenced to 10 years imprisonment. The sentences were ordered to run concurrently.

The appellant appealed to this court in a petition dated 20.4.2016 seeking an order of consolidation of sentence to run concurrently with Cr. Case No. 544 of 2012 and Mavoko Law Courts.

It is evident from the petition that the appellant on diverse dates and place committed various offences of which she was indicted and charged at Machakos, Kajiado determined by Mavoko Law Courts.

The trials in those courts heard and determined the charges against the appellant and appropriate orders on sentence made. The criminal cases held at Machakos and Mavoko Law Courts are not before this court. This being an appellate court it cannot make adverse orders affecting cases heard and determined at the above mentioned courts.

This court will therefore concentrate on evaluating the petition and the record in respect of Cr. Case No. 658 of 2012 and Cr. Case No. 803 of 2012 held at Kajiado Senior Principal Magistrate's Court. The trial in those indictments were heard and determined with appropriate orders on sentences made by each trial court.

Appellant's submissions:

The appellant on appeal submitted and relied entirely on her petition and memorandum of appeal filed before this court. She further contended that she was tried, convicted and sentenced for various offences at Kajiado, Mavoko and Machakos Courts.

It was her submissions that in Criminal Case No. 658 of 2012 the indictment was robbery with violence contrary to Section 296(2) of the Penal Code. The trial court convicted and sentenced her to death.

The appellant further contended that besides the robbery with violence conviction and sentences, there are other cased held at Machakos, Mavoko and Kajiado involving imprisonment terms for various offences.

In her submissions appellant drew the attention of this court to Criminal Case No. 803 of 2012 held at Kajiado. The record reveals she was sentenced as follows:

"Count I to serve 7 years imprisonment.

Count II to serve 7 years imprisonment.

Court III to serve 10 years imprisonment.

Sentences are to run concurrently."

The appellant has not contested her conviction on the three counts by the learned trial magistrate.

The bone of contention which concerns appellant in this appeal is for this court to exercise discretion and order consolidation of sentence imposed in Cr. Case No. 803 of 2012 to run concurrently with other sentences imposed by Mavoko and Machakos Courts.

Her main ground being that she is a single mother with four school going children who are dependent on her for upkeep is being a sole breadwinner a consideration for this court to set aside the sentence; would it be a relief in view of the circumstances she finds herself.

Respondent's submissions:

Mr. Akula, Senior Prosecution Counsel vehemently opposed the appeal by the applicant on sentence. He placed reliance on the provisions of Section 348 of the Criminal Procedure Code on limitations of the powers of an appellate court to interfere with sentence of a trial court.

The learned respondent's counsel contended that appellant has not demonstrated any misdirection illegality or error to warrant review of the order by the trial magistrate. Learned counsel for the respondent reiterated the penalty provisions of Section 278 (A) of the Penal Code which formed the basis of the sentences imposed.

In his submissions the offences fall under cluster of felonies which the trial court applied the law as prescribed to sentence the appellant. In summary the learned respondent's counsel urged this court to find the appeal lacks merit and do dismiss it accordingly.

Analysis and determination:

This being a first appeal I am duty bond to evaluate the record so as to satisfy myself that the plea of guilty was taken in a proper manner. The trial court convicted the appellant on her own admission upon her making an application for change to plead to the charges.

I have perused the record and applying the legal principles in the case of **ADAN v REPUBLIC [1973] EA 445** do find that the plea taken by the trial court was unequivocal. I am further guided by the provisions of Section 348 of the Criminal Procedure Code Cap 73 of Laws of Kenya. It provides as follows:

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence."**

I find no reason to interfere with the order on conviction and in any event the same is not in issue in so far as this appeal is concerned.

The gist of the appeal:

The appellant filed this appeal seeking to invoke the court's jurisdiction to revise the sentences imposed by the trial court against her. She seeks the court's leniency in exercising discretion and urges the court to allow her to serve the concurrent sentences with other ongoing custodial sentences not in issue in this court

I should state from the onset that sentencing is a matter within the realm of the trial court. The appellate jurisdiction to interfere with sentence imposed by the trial court is always limited and there are very clear circumstances to warrant intervention.

The principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of **OGOLLA & S/O OWUOR Vs. REPUBLIC [1954] EACA 270** where the court stated:

> **"The court does not alter a sentence on the mere ground that if 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 Vs. REPUBLIC [1950] EACA pg 147, it is evident that the judge has acted upon wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."**

See **REPUBLIC Vs. SHERSHELOSITY [1912] CCA T.LR 364."**

In another case of **SHADRACK KIPROECH KOGO v REPUBLIC CR. APPEAL No. 253 of 2003** the court of Appeal stated thus:

> **"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of those, the sentence itself is so excessive and therefore an error of principle must be inferred."**

The appellant has urged that the sentences be consolidated or be set aside all altogether.

The provisions of the law under which the appellant has been charged and convicted gives the following respective punishments:

> **"Count 1 and 2: Stealing motor vehicle contrary to section 278 (A) if the Penal Code.**
>
> **The offender is liable to imprisonment of 7 years.**
>
> **Count 3: Stupefying in order to commit a felony contrary to Section 230 of the Penal Code.**
>
> **The offender on conviction is liable to imprisonment for life."**

I note that the legality of the sentences imposed against the appellant have not been challenged. The trial magistrate ordered the sentences to run concurrently. In this case the appellant was indicted with three distinct offences to which she pleaded guilty. The trial magistrate was therefore bound by Section 14(1) of the Criminal Procedure Code to impose at least two sentences to run consecutively.

The basis of that proposition is that the appellant had been charged with three distinct offences with every charge constituting independent transactions from the other. However Section 14(1) also allows the trial magistrate in exercise of discretion to authorize the sentences to run concurrently.

It may be noted that certain principles in sentencing have been developed through case law. The trial magistrate was therefore right to impose an order for sentences to run concurrently.

The current position in the law is that where a trial judge or magistrate is faced with multiple charges or offences an appropriate decision on the aggravating and mitigating factors has to be borne in mind in each distinct sentence.

Where an offender has been charged and convicted with two or more counts involving the same transaction in a charge sheet or information as provided under Section 135(1) (2) of Criminal Procedure Code at the trial, the practice is to direct that the sentences should run concurrently.

The question I need to address in this appeal is whether the appellant committed more than one offence in the same transaction. If this was the case then the sentences imposed should run concurrently.

The Court of Appeal has defined the phrase ***'same transaction rule'*** in the case of **REPUBLIC v SAIDI NSABUGA S/O JUMA & ANOTHER [1941] EACA** and revisited it again in **NATHAN v REPUBLIC [1965] EA 777** where the court stated as follows:

> **"If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction."**

The one transaction rule requires that where two or more offences are committed in the course of a single transaction the sentencing court should consider an order for concurrent instead of consecutive.

In applying the above principle to the instant case one has to be satisfied that the offences committed fall under the sequence of a single transaction.

In my view the appellant committed a series of offences which were distinct at various times and locations with different complainants. The offences did not necessarily flow from each other as to purely constitute a single transaction connected with each other.

The trial court had the option to mete out consecutive sentence but exercised discretion and ordered for concurrent sentences. On my part I find no illegality of principle when the trial magistrate made an order for concurrent sentence. The trial magistrate is vested with wide discretion which only an appellate court can interfere with, if it was not exercised judiciously. In the instant appeal no such grounds have been presented by the appellant to warrant interference with the sentences.

On reflection of the indictments it is instructive to note that appellant committed serious offences. One such offence of stupefying in order to commit a felony contrary to Section 230 of the Penal Code which carries a maximum sentence of life imprisonment.

The trial magistrate sentenced the appellant to ten (10) years imprisonment instead of life imprisonment as provided for this offence. There is no material deduced from the record or memorandum of appeal to dissuade this court that either of the sentences was manifestly excessive as to occasion an injustice. I am fortified by the provisions of Section 12 of the Criminal Procedure Code where it provides:

> **"Any court may pass a lawful sentence combining any of the sentences which it is authorized by the law to pass."**

The position taken by the trial court in ordering for concurrent sentences has the anchor in law in the principles elucidated in the case of **NGIBUINI v REPUBLIC [1987] KLR**. In this case the appellant was tried in separate cases where the complainants were neither the same nor did the offences arise out of the same transactions. The court formed the opinion that the offences formed a series of offences of the similar character and ordered that the sentences to run concurrently in substitution of an earlier order of consecutive sentence.

In scholarly text on principles of sentencing **D.A.THOMAS (HAREMANN 2ND EDITION [1979] pg 53** articulated the rational of one transaction rule as follows:

> **"The essence of one – transaction rule appears to be that consecutive sentences are in appropriate when all the offences taken together constitute a single invasion of the same legally protected interest. The principle applies where two or more offences arise from the same facts……..but the fact that the two offences are connected simultaneously or close together in time does not necessarily mean that they amount to a single transaction."**

In this appeal the appellant cannot be said to be a first offender to have attracted leniency from the sentencing court. The sentences complained of were not excessive either taken individually or in aggregate. The appeal on sentence therefore fails.

DECISION:

Having considered the appeal, submissions by appellant and respondent's counsel and mitigating factors as stated by the appellant; I see no merit on interfering with sentence imposed against the appellant.

In my judgment I accordingly affirm the decision of the lower court and decline to set aside the sentence. I further dismiss the appeal to order for consolidation of sentences in Cr. Case No. 803 of 2012 to run

concurrently with other sentences in Cr. Case No. 594 of 2012 and No. 1440 of 2012 at Machakos and Mavoko Courts whose appeals are not a subject matter before this court.

The upshot appeal is hereby dismissed.

It is so ordered.

Dated, delivered in open court at Kajiado on 16th day of May, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Appellant in person

Mr. Akula for State

Mr. Mateli Court Assistant