



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 150 OF 2015

FRANCIS MUREU MUGARU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the sentence of D.G.Karani PM in Criminal [Case No. 30 of 2012](#) delivered on 21st November 2013 in the Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appellant was charged with two counts of the offence of stealing contrary to Section 275 of the Penal Code. The particulars of count I were that on dates between 21st December 2011 and 4th January 2012 at Donyo Sabuk market within Machakos County, he jointly with others stole 821 steel bracings valued at Kshs. 4,926,000/=, the property of Kenya Power and Lighting Company Limited.

As an alternative to Count I, the Appellant was charged with the offence of handling stolen goods contrary to section 322(1) as read with section 322(2) of the penal code. The particulars were that on 11th January 2012 at Donyo Sabuk market within Machakos County otherwise than in the course of stealing, dishonestly retained 240 pieces of steel bracings knowing or having reason to believe them to be stolen good.

In count II, the particulars were that on the night of 8th-9th January 2012 at Donyo Sabuk market within Machakos County jointly with others, he stole 1500 meters of aluminum conductors valued at Kshs. 600,000/- the property of Kenya Power and Lighting Company Limited. The Appellant was also charged with an alternative offence to count II of handling stolen goods contrary to section 322(1) as read with section 322(2) of the Penal Code. The particulars were that on 11th January 2012 at Donyo Sabuk market within Machakos County otherwise than in the course of stealing, he dishonestly retained 4 sacks of aluminum conductors knowing or having reason to believe them to be stolen good.

The Appellant was arraigned in the trial court on 12th April 2012, and he pleaded not guilty to the charges. He was tried, convicted of both counts of the offence and sentenced to pay a fine of Kshs 250,000/= on each count, and in default to serve 2½ years in jail for each count to run consecutively. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the sentence only.

The Appellant availed submissions date 14th March 2016 and a response to the Respondent's submissions dated 12th April 2014. The Appellant is praying that this Court waives the fiscal fines of Kshs. 250,000/= per count as alternatives to imprisonment due to his poverty. Further, that the consecutive sentences

imposed be substituted with concurrent sentences under section 14(1) of the Criminal Procedure Code. The Appellant further argued that the High Court retained the unlimited original jurisdiction in criminal and civil matters and had supervisory jurisdiction over subordinate courts under Article 165(3) (a) and 6 of the Constitution.

The Appellant in mitigation stated that he was a first time offender and was praying for leniency. He stated that he was the sole breadwinner in his family and had three young children. Further, that he was remorseful, repentant, reformed and rehabilitated after spending about 30 months in prison, which time served this Court should also take into account .

Lillian Mogoi, the learned Prosecution counsel, filed submissions dated 21st March 2016 in opposition to the appeal. It was urged therein that the Appellant had failed to defend himself and did not disclose how he came in possession of the stolen exhibits. Further, it was stated that the offences were under two counts which were distinct from each other, since they occurred at different times, and the theft was of different items, hence the sentence was executed consequently and not concurrently as provided under section 14(1) of the Criminal Procedure Code and section 37 of the Penal Code. Reference was made to the decision in **John Chege Mwangi V Republic, (2008) eKLR** in support of this position.

I have considered the Appellant's mitigation and the arguments by the Prosecution, and find that the issues for determination by the court are whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute, and whether the said sentence is amenable to reduction and /or variation.

Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-

“ In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence”.

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal 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 these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306))”

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“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 factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306))”

In the instant appeal, the Appellant was charged with, and convicted of the offence of stealing contrary to

Section 275 of the Penal Code, which provides as follows:

“Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.”

The said section does not provide for the option of a fine, and it is not stated in the court record or judgment what law the trial magistrate applied in imposing the fine of Kshs 250,000/= for each of the counts the Appellant was convicted of. To this extent the imposition of a fine was unlawful.

It was also argued by the Appellant that the two imprisonment sentences meted out on him should run concurrently and not consecutively. The principles that apply for sentences to run concurrently or consecutively are stated in section 14 of the *Criminal Procedure Code* 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.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences –

(a) of imprisonment which amount in the aggregate to more than fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.”

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 and/or 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 *Ondiek – v- R (1981) KLR 430*, it was also stated by the Court that the practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances, the sentences imposed ought to run concurrently. Likewise in *Nganga – v- R, (1981) KLR 530*, the High Court held that concurrent sentences should be awarded for offences committed in one criminal transaction.

The issue in this appeal therefore is what criminal transaction or act led to the offences the Appellant is convicted of. I note from the particulars in the charge sheet that there are two offences of stealing alleged to have been committed by the Appellant on different dates and of different items. However, from the record of the trial Court and evidence adduced during the trial, the act or transaction that led to the charging of, and conviction of the Appellant for these two offences was one and the same transaction, which was that of the Appellant being found in possession of the stolen items on 11th January 2012. The trial magistrate therefore erred in imposing consecutive imprisonment sentences for the two offences.

The Appellant’s appeal therefore succeeds only to the extent that the sentence by the trial magistrate that the Appellant pays a fine of Kshs 250,000/= on each count, and in default to serve 2½ years in jail for

each count to run consecutively is set aside; and is substituted by an order that the Appellant be sentenced to imprisonment of two and a half (2½) years for each of the counts he was convicted of, which sentences shall run concurrently. The substituted sentence shall take effect from 21st November 2013 when the Appellant was convicted by the trial court.

The effect of this Court's order hereinabove is that the Appellant has effectively fully served his sentence, as he has been in prison for 2 years and 7 months since the date of his conviction. I therefore consequently order that the Appellant be and is hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DATED AT MACHAKOS THIS 23RD DAY OF JUNE 2016.

P. NYAMWEYA

JUDGE