



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 23 OF 2013

DANIEL SIAMETO KATAMOKIAPPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

(An appeal from original conviction and sentence in Naivasha CM Criminal Case No. 3679 of 2013 by Hon. E. Riany, Resident Magistrate dated 18th January 2013)

JUDGEMENT

1. The Appellant Daniel Siameto Katamoki was charged on one **Count of Burglary Contrary to Section 304(2) and stealing Contrary to Section 279(b) of the penal code.**

He was charged with an **alternative charge of Handling stolen goods Contrary to Section 322(2) of the penal code.**

He was charged with a **second Count (Count II) of being in possession of Narcotic Drugs Contrary to section 4(a) of Narcotic Drugs and Psychotropic substances Control Act No. 4 of 1994.**

He was charged with a **third Count (Count III) of being in possession of Public Stores contrary to Section 324(2) of the penal code.**

2. The appellant pleaded not guilty to Counts I and III. He pleaded guilty to Count 2.
3. The Appellant was convicted on Count II of being in possession of Narcotic Drugs and sentenced to serve four (4) years in jail.
4. The Appellant was also convicted on Count I and sentenced to 4 years imprisonment and convicted on Count III and sentenced to 1 year. The sentences were to run concurrently.
5. The Appellant being dissatisfied with the decision of Hon. E. Riany, Resident Magistrate Naivasha preferred this appeal and vested the following grounds in his petition of appeal.

GROUND OF APPEAL

1. That I pleaded guilty to some of the counts but the trial magistrate failed to be lenient.
2. That I have now decided to change to a new life and will not engage in unlawfulness again.
3. That I pray the 2 sentences be merged to run concurrently.

1. Both the Appellant and Counsel for the respondent made oral submissions.

submissions by the appellant:

His oral submissions were not in line with what he had put down in his grounds of appeal. He stated that the trial magistrate had failed to consider in his judgment that the Appellant had;

- i. A misunderstanding with his wife
- ii. That there was a relationship between his wife and the arresting officer.
- iii. That the appellant had been serving a jail term of four years in the same file which sentence was too harsh.
- iv. That the Appellant suffers from Asthma and has to buy his own drugs in prison
- v. That he was not given enough time to bring his witnesses.

Submissions by Counsel for the Respondent

Mr.Chirchir Counsel for the respondent opposed the appeal .

He stated that the appellant's mitigation of appeal did not include what the appellant submitted orally which was in contravention of **Section 350(2) of the Criminal Procedure Code**.

He further submitted that his appeal should only be considered against sentencing on the counts that he did not plead guilty. since the Appellant had been convicted and sentenced on Count II on his own plea of guilty and had not appealed against that sentence, that sentence should not be interfered with. That the sentence on Counts I and III are not harsh and the Lower Court's decision should be upheld.

ISSUES FOR DETERMINATION;

1. i) Should the Appellant's Oral submissions be considered?
- ii) Sentence
- iii) Can the 2 sentences be merged to run concurrently?

Analysis

2. This Court being the first appellant court, it is incumbent upon it to reassess and re-evaluate the evidence and arrive at an independent conclusion. I am guided by the case of **Okemo -vs- Republic(1972) E.A 32**
3. The First issue relates to the oral submissions made by the Appellants which appear to be against the conviction as opposed to his mitigation grounds of appeal which only address sentence.

Section 350(2) of the Criminal Procedure Code **Cap 75** states;

“..... and the appellant shall not be permitted at the hearing of the appeal to rely on a ground of appeal other than those set out in the petition of appeal.”

The language is **Section 350(2)** is strict. There are some exceptions but submissions made orally in court are not within those exceptions. Therefore the Section does not admit any discretion on the part of the court.

I therefore decline to admit the oral submissions.

4. In his petition of appeal, all that is contained therein is mitigation as to why the court should reconsider the sentence and be lenient to him. The appellant was convicted for 8 years for handling stolen goods, being in possession of public stores and being in possession of Narcotic Drugs which he considers as being harsh.
5. **FINDINGS-**

The circumstances in which the appellate court may interfere with the sentence passed by the trial court

were set out in the case of **Macharia vs. R** [2003] 2 EA 559 as follows:-

“The principle upon which this court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogola s/o Owuor [1954] EACA 270, wherein the predecessor of this court stated:-

“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 of the trial judge unless as was said in James vs. R [1950] 18 EACA 147 it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case.”

In the instant case, the appellant has challenged the sentence passed against him on the ground that the same was to run consecutively and not concurrently. Section 14 (1) of the Criminal Procedure Code, Cap 75-

subject to the provisions of subsection (3) when a person is convicted at 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.

In **Sawedi Mukasa s/o Abdulla Aligwasia** [1964] XIII EACA 97

“That the practice where a person commits more than one offence at the same time and in the same transaction is, save in very exceptional circumstances, to impose concurrent sentences.”

The construction of the phrase “same transaction was considered by the court in **Rex vs. Saidi Nsabuga s/o Juma & Another** [1941] 8 EACA as cited with approval in the case of **Odero vs. Republic** [1984] KLR 621:-

“if a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the 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.”

In the instant case, the offences in count III of being in possession of public stores and the alternative charge of handling stolen property are linked together by similar criminal intent, in that the Appellant handled this property, which was public stores, knowing or having reason to believe that the same was stolen or unlawfully obtained. They therefore form part of the same transaction and the trial magistrate's order that the sentences on both counts should run concurrently was sound.

The Appellant had also pleaded guilty to the 2nd count of being in possession of narcotic drugs contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances Act for which the Appellant was sentenced to 4 years imprisonment commencing on 5th December 2012. The trial court did not give direction whether this sentence was to run consecutively or concurrently vis a vis the sentences counts III and the alternative charge. Consequently, it is deemed by operation of the said Section 14 (1) of the Criminal Procedure Code, Cap 45 that the same are to run consecutively.

The Appellant has urged the court to direct that all the sentences herein run concurrently. The offence of being in possession of narcotic drugs is quite distinct from the offences in handling stolen property and being in possession of public stores. The three offences are not connected as per the description laid out in the aforesaid case of **Rex vs. Saidi Nsabuga s/o Juma & Another** and the same cannot therefore run consecutively.

The Appellant also faulted the trial magistrate for failing to be lenient bearing in mind that he pleaded guilty on the 2nd count. In deed the longevity of sentence is a matter of discretion of the trial court. However this discretion has to be exercised lawfully and must be proportional to the offence committed. In **Omuse vs. R [2009] KLR 214** the court elaborated on this and stated thus:-

“further the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is thus not proper exercise of discretion in sentencing, for the court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence. See Ambani vs. R [1990] KLR 161”

In the instant case, the trial Magistrate reached an incorrect finding and did not sentence the appellant within the stipulated period under the penal code for the charge of handling stolen goods.

Section 322(2)

“A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not less than 7 years or more than 14 years”

I therefore set aside the sentence of 4 years imprisonment meted out for the offence of handling stolen goods and substitute it with 7years imprisonment.

On the 2nd count, the Appellant was found in possession one roll of bhang with a street value of Kshs. 20/=. He pleaded guilty to the offence and in mitigation stated that he has asthma. I find that the sentence meted out of 4 years imprisonment to be excessive in the circumstances. I therefore substitute it with a sentence of 2 months.

CONCLUSION;

1. On Count 1 the appeal is dismissed. The sentence was defective. The minimum sentence for the offence of handling stolen goods under **Section 324(2)** is 7 years. The appellant is sentenced to 7 years.
2. The sentence of 4 years imprisonment on count II is set aside and substituted with a sentence of 2 months
3. The sentences for Count III & the alternative charge to run concurrently.
4. The sentence for count II to run consecutively the sentences for counts III and the alternative charge

It is so ordered.

Dated, signed and delivered at Nakuru this 15th day of November 2013.

L N WAITHAKA

JUDGE

PRESENT

Daniel Siameto : appellant

Mr Marete for the state

Emmanuel Maelo: Court Clerk

L N WAITHAKA

JUDGE