



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

HCRA 49 OF 2012

SIMON MARDEN LEPOYARIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(BEING AN APPEAL FROM ORIGINAL CONVICTION AND SENTENCE IN P.M CRIMINAL
CASE NO.417 OF 2011 BY **HON A B MONGARE , SRM** DATED 1/3/12)

J U D G E M E N T

1.The appellant was charged with three counts. The first count was for the offence of being Drunk and disorderly in a public place contrary to section 33(1) as read with section 33(2) of the Alcoholic Drinks Act No.4 of 2011, the second count for resisting lawful arrest by police contrary to section 253 (b) of the penal code and the third count for malicious Damage to property contrary to section 339(1) of the penal code.

2. The appellant pleaded guilty on all three counts and was convicted. Based on a probation report presented in court, the appellant was sentenced to two years' probation and in addition was to attend the Drug and Alcohol rehabilitation program at St Martins.

3.The trial court subsequently cancelled his probation sentence, as he had breached the probation order by committing another offence, robbery with violence. He was sentenced to 3 months imprisonment, on the first count, 1 year imprisonment on the second count and 2 years imprisonment on the 3rd count.

4. The appellant being dissatisfied with the decision of Hon A.B Mongare Senior Resident Magistrate, Nyahururu preferred this appeal and listed the following grounds of appeal in his memorandum of appeal.

A. GROUNDS OF APPEAL

4.(i) The magistrate convicted him without giving him time to explain why he did not report to the probation officer.

(ii) His wife had polio and he was the only one to take care of her- thus the reason for not going to the probation officer.

(iii) The sub chief was aware of the issue and had even confirmed he would inform the probation officer.

(iv) The sentence was too harsh.

B. AMENDED GROUNDS OF APPEAL

The appellant later amended his grounds of appeal

to read as follows:

- i. The learned Magistrate erred in law and fact by convicting him with same Articles of the criminal procedure code which did not correspond with his case.
- ii. The learned magistrate convicted him in law and fact by not following the fair proceedings and a fair trial.
- iii. The learned magistrate convicted him and did not take into consideration the alternatives and contradictions of dates at the time of the crime.
- iv. That the learned trial Magistrate erred in law and fact by convicting him with no exhibits having been availed in court.

6. The appellant was unrepresented and did not wish to add anything to his submissions. Mr Marete, counsel for the state did not oppose the appeal. He stated that the sentence was too harsh and urged court to look at the circumstances of the case and sentence. He advocated for a custodial sentence and added that the appellant was very remorseful.

7. Under section 348 of the Criminal Procedure Code, Cap 75, a person who pleads guilty, is convicted and sentenced on his own plea of guilty, can only appeal on grounds of either legality or extent of the sentence.

8. An appellant court can interfere with the sentence imposed if the sentence is found to be harsh and excessive. Refer to the case of **Wanjema Vs Republic**

(1971) E.A 493.

9. This court notes that the trial magistrate when sentencing the Appellant, did not state how the sentences were to run as required under section 14 of the criminal procedure code.

10. Sentences must run concurrently or consecutively. So far the appellant has served 1 year 8 months upto October 2013. If the sentence was to run concurrently he would be left with less than 4 months if granted remission. If the sentence was to run consecutively, he would have served half the sentence. The appellant was arrested with being drunk and disorderly and resisting arrest.

11. This court will exercise its discretion and sentence the appellant to the term already served. The appeal against sentence is allowed to that extent and he is released from prison forthwith unless otherwise lawfully held.

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

L N WAITHAKA

JUDGE

PRESENT

Simon Marden Lepoyari- Appellant

Mr Marete for the state

Emmanuel Maelo: Court clerk

L N WAITHAKA

JUDGE