



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 51 OF 2013

PETER ROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made by the learned Ag. Senior Resident magistrate at Bomet court (Hon.V. Karanja) in Bomet Senior Principal Magistrate's court criminal case No. 899 of 2013)

JUDGMENT

PETER ROTICH, the appellant herein, pleaded guilty to a charge of escape from lawful custody contrary to **Section 123** as read with **Section 36** of the **Penal Code**. The particulars are that on the 18th day of September 2013 at about 8.10am in Bomet township within Bomet county, being in lawful custody of I.P Daniel Kameta and CPL. Stephen Masaku, having been arrested for the offence of riding a motorcycle without a driving licence escaped from the said custody. The appellant was sentenced to serve two (2) years imprisonment. Being dissatisfied, the appellant preferred this appeal.

On appeal, the appellant put forward the following grounds in his petition:

1. **THAT** the trial Magistrate erred in entering a plea of guilty against the appellant.
2. **THAT** the trial Magistrate erred in failing to appreciate that the plea of guilty was qualified.
3. **THAT** the trial Magistrate erred in failing to appreciate that the following words “I was afraid” said in mitigation by the appellant amounted to a retraction of the plea of guilty.
4. **THAT** in the circumstances there the appellant's plea was unequivocal and the trial Magistrate erred in failing to change the appellant's plea after the utterance of the said “I was afraid”.
5. **THAT** in the alternative and without prejudice to the foregoing, the sentence of two years against the appellant was harsh, oppressive, arbitrary and unconscionable:-

(a) The appellant was a first offender.

(b) The trial Magistrate did not consider alternative forms of punishment.

(c) The trial Magistrate did not address his mind to principles of sentencing.

(d) The trial Magistrate did not justify the imposition of the sentence of two years to the exclusion of other forms of punishment.

When the appeal came up for hearing, Mr. Koskei, learned advocate, for the appellant summarized

the aforesaid grounds to two: **First**, it is stated that the plea was equivocal. **Secondly**, it is Mr. Koskei's argument that the sentence of two (2) years imprisonment is harsh and excessive. Miss Muthee, learned State counsel conceded the appeal on the aforesaid grounds. The background of this appeal appear to be short and straightforward. It is said that on 18th September 2013, the traffic base commander, Bomet Police Station was on routine traffic checks together with two other police officers. They stopped motorcycle registration no. KMCZ 993 R Bajaj and demanded that the appellant gives the police his driving licence. The appellant had none. He did not also have a reflective jacket. The police arrested and hand cuffed him. While being escorted to Bomet Police Station it is alleged the appellant jumped out of a police moving motor vehicle. He managed to run away. The police gave a chase and caught up with him. He was then arrested and charged with the offence he was convicted for.

Having outlined the facts leading to this appeal let me now consider the merits or otherwise of this appeal. The first ground of appeal is to consider whether or not the plea was equivocal. It is the submission of Mr. Koskei that the plea was equivocal because the appellant when called upon to confirm whether the facts were correct or not, he stated he was afraid. I have critically examined the recorded proceedings and it is apparent on the face of it that the appellant admitted the charge. The prosecution thereafter outlined the facts in three languages i.e Kiswahili, English and Kipsigis. The appellant was called upon to either accept or deny the facts and he chose to accept. Before sentencing the appellant, the learned acting Senior Resident Magistrate gave the appellant as required by law a chance to mitigate and that is when the appellant stated he was sorry and argued that he was afraid. In the circumstances of this case it cannot be said that the plea was equivocal. Consequently, the first ground of appeal must fail.

In the second ground of appeal, Mr. Koskei was of the view that the sentence was harsh and excessive. It is his argument that the appellant being a first offender should have been given a lesser sentence. The learned advocate further argued that the appellant should have been given a fine as an option instead of a custodial sentence. The offence the appellant was convicted for is a misdemeanor which attracts a maximum sentence of two years or a fine under **Section 36** of the **Penal Code**. In this case, the appellant was a first offender. The record shows that the appellant was remorseful. I agree with the submission of Mr. Koskei that in the circumstances the sentence of two (2) years imprisonment is harsh and excessive. There is no good reason why the appellant was given a maximum sentence yet he was a first offender who was very remorseful. The principles of sentencing enjoin courts to treat first offenders who are remorseful with leniency. Another very cardinal principle of sentencing is that where the punishment is prescribed to be a fine or imprisonment or both, the court is enjoined to give a fine as a first priority for first offenders unless there are good reasons to apply the other options. In the case before this court the learned trial Magistrate did not give reasons why she did not give the appellant a fine as a first option. In the circumstances, I am convinced the order on sentence must be interfered with. The appeal against conviction is dismissed. However, the appeal against sentence is allowed. Consequently the sentence of two (2) years imprisonment is set aside. The appellant has so far served 55 days in prison. I am satisfied that it is sufficient punishment hence he should be set free forthwith unless lawfully held. I commend the office of the Director of Public Prosecution for rightly conceding the appeal.

Dated, signed and delivered this 12th day of November, 2013.

J.K.SERGON

JUDGE

In open court in the presence of :

Mr. Koskei for the Appellant

N/A Miss.Muthee for the Respondent

Mr. Korir- Court clerk