



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Criminal Appeal 90 of 2009

ENOCK OGECHI KWENDO:.....:APPELLANT

VERSUS

REPUBLIC:.....:RESPONDENT

(Being an appeal arising from the Judgement of the Learned Trial Magistrate B.N. Mosiria Esq. Senior Resident Magistrate at ITEN delivered on the 4th June 2009 in Senior Resident Magistrate's Criminal Case No. 137 of 2009)

JUDGMENT

I. Background

1. Enock Ogechi Kwendo was charged with two Counts of :

Stealing:

Contrary to Section 275 of the Penal Code.

The Particulars of offence

On the 11th March 2009 at Iten Township in Keiyo District within Rift Valley Province Stole 10 pieces of Bamba 50 Safaricom Cards valued at 500/= the property of Angeline Serem.

Count II

Stealing

Contrary to Section 275 of the Penal Code

The Particulars of offence

On the 11th March 2009 at Iten Township in Keiyo District within Rift Valley Province Stole 10 pieces of Bamba 50 Safaricom Cards valued at 500/= the property of Mirriam Serem.

2. A plea of not guilty was entered on both counts on 16th March 2009. The appellant original accused was released on bond on his surety depositing his pay slip and a letter from his employer.
3. Two months later, the surety returned to court and asked that he be discharged from being a surety. This was granted by the Court.
4. The appellant/ original accused returned to Court for trial on 2nd June 2009. He pleaded guilty to

the two counts. The trial magistrate convicted him on his own plea. He prayed, in mitigation for forgiveness and stated his health was poor.

5. A sentence of 3 years imprisonment on Count I and 3 years imprisonment on Court II was imposed. The sentence was to run consecutively namely, the appellants was to serve 3 years imprisonment in Count I. Once completed he would begin to serve the next 3 years imprisonment making a total of 6 years imprisonment.
6. Being dissatisfied with both the conviction and sentence, the appellants lodged his petition of Appeal on 12th June 2009 through an Advocate.

II. Petition of Appeal

7. The grounds raised by appellants is that the Trial Magistrate erred:
 - (i) **In convicting or sentencing the appellants for 6 years without an option of a fine.**
 - (ii) **Hon. Magistrate failed to warn the appellants of the consequences of pleading guilty**
 - (iii) **The language used by the court was not understood by the appellants.**
 - (iv) **The Hon. Magistrate failed to record the actual words used by the appellants.**
 - (v) **The surety gave emotional comments that influenced the trial magistrate**
 - (vi) **The mitigating factor such as illness was not taken into account.**
 - (vii) **The sentence was excessive.**
8. The appellants argued through his advocate that an option of a fine should have been imposed instead of imprisonment. The said sentence coming to 6 years imprisonment ran consecutively but for the value of the items stolen it was excessive.
9. The words recorded by the surety had an influence on trial magistrate after the appellants was released on bond. It was soon cancelled on allegation of the appellants' misconduct. This had a bearing on the excessive sentence imposed.

III. In Reply by the State

10. The accused being convicted for an offence under Section 275, Penal Code, the law provides a sentence of 3 years imprisonment being the maximum sentence.
11. He would concede that in two counts the offence should read concurrent and not consecutively. He relied on the cases of **Ng'ang'a =vrs= Republic (1981) KLR 531** and the case of **Zawedi Mukasa s/o Abdulla Aligwaisa =vrs= Republic Criminal Appeal 182/1946(XIII)** where it was held that at the time an offence is committed at the same time the sentence imposed should run concurrently unless for exceptional circumstances.
12. In the **Ng'ang'a Case (Supra)** the Courts continued that a consecutive sentence on more than one count should be imposed unless it is under Section 221 (enhancement) of the Criminal Procedure Code. The State

therefore conceded that the sentence ought to read concurrent and not consecutive.

13. As to the Sentence, there are clear principles established by law. A trial magistrate must take into account the value of the items stolen. The value of the items in this appeal was 500/- a sentence of 3 years imprisonment was excessive.

IV. Opinion

14. The appeal before me was on both conviction and sentence. I noted that apart from stating that the conviction was unequivocal in the Petition of Appeal there was no reference to this during the submissions made by the appellants' advocate.
15. The Trial Magistrate complied with the law and procedure of taking plea as held in the case of **Adan vrs Republic (1973) (E.A) 445**. I would therefore not interfere with the conviction entered on the plea of guilty.
16. The main ground of appeal was on sentence. It must be noted that an offence of stealing under Section 275 of the Penal Code is a felony. This means that no fine is permitted to be imposed by the Trial Magistrate. The said Magistrate may in fact impose alternative punishment of conditional or unconditional discharge, probation or imprisonment.
17. The appellants admitted to the facts that he approached two separate shopkeepers. He asked to purchase credit cards for 500/- each. He would pay for the cards but on being issued with the card and his change he would request for a whole sale price. When the shop keeper would decline he insisted he be given his money back. At this point he would return false cards having exchanged the shop keepers credit card with his. He did this twice being two separate incidents. The false cards were produced as exhibits to Court.
18. It is therefore imperative when sentencing to take into account the value of the items stolen, in this case 500/= in each count; but the circumstances in which it was stolen is and must be noted. The prosecution should have gone further to bring further counts on the offence of forging, the cards, uttering and obtaining the same. Where did the appellants obtain the false credit cards?
19. The sentence of 3 years imprisonment on each count is not excessive. It is within the law.
20. The issue is whether the sentence should run concurrently or consecutive? I would agree that the sentence should run concurrent and that the appellants serve 3 years imprisonment on both counts and not a total of

six years imprisonment

21. I do not think the surety influenced the trial

Magistrate. The plea of guilty was taken a month or so later giving time to the trial Magistrate to approach the issue of sentencing reasonably. The fact that the appellants pleaded guilty would have been taken into account. Therefore the sentence of imprisonment should have been concurrent.

22. As the case law in the **Ng'ang'a case** (Supra) states

that concurrent sentence should be awarded for offences committed in one Criminal transaction. In the **Sawedi Mukasa case** (Supra), exceptional circumstances include a person who breaks into a house, then commits a felony of Rape, the sentence should run consecutively.

23. The Appeal herein is allowed only on the sentence to read 3 years imprisonment to run concurrently.

24. The Appeal against conviction is dismissed.

Dated this 15th day of July 2010 at Eldoret

M.A. ANG'AWA

JUDGE

Advocate

- (i) D.Omboto, an Advocate instructed by the firm of M/s Rioba Omboto & Co. Advocate for the Appellant
- Absent on strike
- (ii) J.K. Chirchir Senior State Counsel instructed by the office of the Attorney General for the State/Respondent
- Present.