

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 131 OF 2007

YUSUF ALI MWANDOGO APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The appellant, Yusuf Ali Mwandogo, was charged jointly with another person in the Chief Magistrate’s Court at Mombasa with stealing motor vehicle parts contrary to section 279 (g) of the Penal Code. Both accused also faced an alternative count of handling suspected stolen property contrary to section 322 (2) of the Penal Code.

The second accused pleaded guilty to both counts whereupon he was convicted on his own plea and fined Kshs. 10,000/= or five months imprisonment in default. The appellant pleaded not guilty to both counts and his case went full trial. He was finally found guilty of handling suspected stolen property and sentenced to imprisonment for 7 years. He appeals against this sentence. His advocate, Mr. Oplu, submitted that this sentence was harsh and manifestly excessive, especially compared to the one metted out to the 2nd accused. The disparity in the sentences metted out to the two and why the two should be treated differently had not been explained. He urged the court to adopt and apply the decision in MARANDO v. REPUBLIC, [1980] Kenya Law Reports, page 114.

Appearing for the Republic, Mr. Onserio did not object to the appeal against sentence. He said that the suspected stolen property was recovered and the learned trial magistrate should have taken that into account. He submitted that this court could interfere with the lower court’s sentence, and that the appellant had suffered enough.

In reply, Mr. Oplu submitted that the period served was adequate and urged the court to release the appellant.

I have considered the submissions of both counsel. In the case of MARANDO v. REPUBLIC (supra) the appellant and another man were charged with murder. They were acquitted of murder but convicted of manslaughter. The appellant was sentenced to four years’ imprisonment, and the other man to one day. The appellant appealed from his conviction and sentence. After summarizing the facts of the matter, the court proceeded to say –

“The appeal against sentence causes us much concern. When two or more people are convicted of the same offence, it is wrong in principle to impose different sentences except for good reason. For instance, one man may have a bad record, but that is not the case here. The appellant is a first offender. The judge gave no reason for sentencing the appellant for four years, and his co-accused to one day’s imprisonment... In the words of Hilbery J. in R v. Ball (1951) Cr. App. Rep. 164, 166 –

‘The differentiation in treatment is justified if the court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences ...’

We see no justification for the disparity in the sentences in this case ...”

Just as in Marando’s Case, this court sees no justification for the glaring disparity in the sentences between the two men, whereby one was sentenced to Kshs. 10,000/= fine or five months imprisonment in default, and the other one to seven years imprisonment for the same offence, without ascribing any reason therefor. If the sentence passed on the appellant is allowed to stand, he will no doubt suffer a justifiable feeling that he has been a victim of injustice. No reason was given for slapping a deterrent sentence of 7 years imprisonment while his co-accused got away with a paltry fine of Kshs. 10,000/= or five months imprisonment in default. No doubt he feels short changed as he has now served time for nearly nine months while his co-accused probably got away with a fine without spending even a night in jail.

For the above reasons, the appeal against sentence is allowed. The appellant is sentenced to imprisonment for the term served todate, with the consequence that he is hereby set free forthwith unless he is otherwise lawfully held.

Orders accordingly.

Dated and delivered at Mombasa this 27th day of May, 2008.

L. NJAGI

JUDGE