**Kosgei v Republic (Criminal Appeal 46 of 2014)**
**[2024] KEHC 273 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 273 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL APPEAL 46 OF 2014**

**RN NYAKUNDI, J**

**JANUARY 24, 2024**

**BETWEEN**

**ELIAS KIPLAGAT KOSGEI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal on sentence in criminal case 3492 of 2013 presided over by Hon. B. Limo (RM))***

## JUDGMENT

Coram: Before Justice R. Nyakundi

Mugun for the state

Appellant in person

1. The appeal herein arises from the sentence and conviction in Kapsabet Criminal Case no 3492 of 2013 – *R v Elias Kiplagat Kosgei*. The appellant was charged with one count of house breaking and stealing contrary to section 304(1) and 279(b) of the *Penal Code*. Additionally, he was charged with handling stolen goods contrary to section 322(2) of the *Penal Code*. The particulars of the charge were that on 11th November 2013 at Kaptumo village in Nandi County, the accused broke and entered into the house of Stephen Kipyego Tanui with the intent to steal and did steal therein, one jacket, two long trousers, one shirt, one pair of shoes and a bag all valued at Kshs. 4,000/- the property of one Stephen Kipyego Tanui.

2. The accused person was arraigned in court on 5th December 2013 and upon the facts of the offence being read out to him in open court, he pleaded guilty to the offence. The appellant did not offer any mitigation and was sentenced to seven years imprisonment for count one and fourteen years imprisonment for count two, which sentences were to run concurrently.

3. Being aggrieved with the sentence and conviction, the appellant instituted the present appeal vide a petition of appeal premised on the grounds that he is remorseful and that he was young and unable to understand the consequences of the offence. Further, that he is the third born and first son of his family with elderly parents who depended on him for their daily needs. He stated that he was married with two children who depended on him. He prayed for a reduction of his sentence or a non-custodial sentence.

4. The applicant submitted that he has undergone rehabilitation and reformed. He referred the court to the *sentencing policy guidelines* 2016 and the objectives therein and urged the court to exercise discretion in granting him a lesser sentence.

**Analysis & Determination**

5. I note that the appeal is mainly premised on mitigation being that the appellant pleaded guilty to the offence. Section 348 of the *Criminal Procedure Code* provides as follows;

> No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence.

6. In *Alexander Lukoye Malika v Republic* [2015] eKLR the Court of Appeal identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:

> " A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also, where upon admitted facts the Appellant could not in law have been convicted of the offence charged."

7. I have considered the mitigation of the appellant and the circumstances of the case and it emerges that the appellant stole property worth Kshs. 4,000/-. Further, no violence or threat of the same was used in the committing of the offence and the appellant admitted to having committed the offence. In entering a plea of guilty, the trial court should have extended some leniency to the appellant as serving 14 years for the offence of housebreaking is, in my view, an excessive punishment given the circumstances of the case.

8. The court of appeal, on its part in *Bernard Kimani Gacheru v Republic* (2002) eKLR restated that;

> " it is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellant court will not easily interfere with sentence unless, that sentence is manifestly overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court, might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already state is shown to exist."

9. It is trite that sentencing though vested within the discretionary powers of the trial court it requires a procedure that is inclusive of all the mitigating and aggravating factors which may have an effect in the final verdict. Despite the conviction of an offender he or she is always entitled to the full

protection for the right to a fair trial. In the *Muruatetu dicta* (2017) eKLR the supreme court invited the courts to consider specific factors in the traditional approach to sentencing, which is the seriousness of the crime, the personal circumstances of the offender, purpose of punishment which comprises of retributive, deterrent, rehabilitative, and restorative, elements, and the need for incapacitation, to determine an appropriate sentence. Critically reviewing the approach taken by trial court there was a material misdirection which vitiates its sentencing discretion. A sentence of imprisonment imposed for a burglary, house breaking and stealing contrary to section 304 (1) of the *penal code* was punitive and excessive in the peculiar circumstances of the case. This is a case where part of the stolen property were recovered from the appellant and appropriated restored back to the complainant.

10. The appellant has already served 11 years in prison, a period which I believe is enough punishment for his offence. This was a case ripe for custodial sentencing. Section 354(3)(a)(ii) provides tis court with certain powers as follows;

    (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may;

        (a) in an appeal from a conviction—

        (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

        (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

        (iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

11. Invoking the power of the court under section 354 of the *Criminal Procedure Code*, I hereby interfere with the sentence of the trial court and reduce it to time served. The appellant shall be set at liberty immediately unless otherwise lawfully held.

    It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 24TH DAY OF JANUARY 2024**

**.....**

**R. NYAKUNDI**

**JUDGE**