



REPUBLIC OF KENYA



KENYA LAW
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**Echur v Republic (Criminal Appeal E031 of 2021)
[2023] KEHC 641 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E031 OF 2021
JWW MONG'ARE, J
FEBRUARY 8, 2023**

BETWEEN

MOSES ECHUR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the sentence of Hon. R. Odenyo in Eldoret Chief
Magistrates Criminal Case E176 of 2021 delivered on 20th January 2021)*

JUDGMENT

1. The appellant was charged with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the *Penal Code*. The particulars of the offence were that; on the June 9, 2020, at an unknown time, at AIC Ndabamach secondary school in Soy sub county, within Uasin Gishu county, jointly with others not before court, broke and entered a computer room of AIC Ndabamach secondary school and committed therein a felony namely stealing four computers, 4 CPU's and a keyboard the property of AIC Ndabamach secondary school valued at Kshs 120,000/=.
2. The appellant was convicted of his own plea of guilty and sentenced to seven years' imprisonment on January 20, 2021. Being aggrieved with the sentence, he instituted this appeal *vide* a petition of appeal filed on June 10, 2021 premised on the following grounds;
 1. That (I) am a first offender and thus beg for leniency.
 2. That (I) am remorseful, repentant and reformed since (I) was incarcerated in prison.
 3. That (I) am a young man and pray to be reinstated in society to serve as a role model/mentor to others of similar behaviours.
 4. That (I) have served a substantial part of (my) sentence.



5. That may this honourable court be pleased to consider the sentencing policy of 2016 published by the Kenya judiciary and establish the mitigating circumstances that would lessen the custodial sentence.

The parties prosecuted the appeal by way of written submissions.

Appellant's Case

3. It is the appellant's case is that the trial court did not consider his mitigation when imposing the sentence. He states that he is remorseful and has served a substantial part of his sentence. He also asked the court to take into consideration that he spent three years in custody before he was sentenced. He prayed that the appeal be allowed and his sentenced be reduced or quashed.

Respondent's Case

4. Learned counsel for the state opposed the appeal on the basis that the appellant is a repeat offender. He stated that the appellant was charged in criminal case No 3160 of 2019 with a similar offence and placed on a one-year probation sentence on November 19, 2019. Further, that the appellant abused the non-custodial sentence by committing a similar offence while on probation. He submitted that the appellant was sentenced on January 20, 2021 and has served two (2) years of his sentence and therefore cannot claim to have served a substantial part of his sentence. The sentence of 7 years is within the law and commensurate to the offence. Counsel urged the trial court to dismiss the appeal and uphold the conviction.

Analysis & Determination

The appeal is against the sentence and therefore I shall not delve into the merits of the conviction.

Whether the sentence was excessive

5. Section 306 of the *Penal Code* states as follows;
any person who—
 - (a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or
 - (b) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.

The appellant having been convicted on his plea of guilty and sentenced to serve a seven-year sentence as prescribed by the law, the upshot of the above is that the sentence was within the law. I find that in the circumstances and the fact that the appellant committed this offence while out on probation for another similar offence, the sentence is not excessive and will therefore not interfere with it.

6. The appellant invited the court to find that the period of his incarceration during the trial was not taken into account during sentencing. Having been sentenced on January 20, 2021 the appellant has therefore served two years of his sentence. The law requiring the power and jurisdiction for an appellate



court to interfere with any sentence passed by a trial court is well stated in the case of *Ogalo s/o Owuora* 1954 24 EACA 70. It is well set out that:

“This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice”

7. I note that the sentence prescribed by the law is not mandatory. The statute provides that an offender is liable to imprisonment for seven years and does not state whether the same is a mandatory maximum or minimum. The accused alleges to have been held in custody pending the hearing of his case before the magistrate’s court. However, upon perusal of the record, I note that the accused was arraigned and convicted on his own plea of guilty and he was forthwith given a custodial sentence. Section 333(2) of the *Criminal Procedure Code* provides as follows;

S. 333. warrant in case of sentence of imprisonment

- (1)
- (2) subject to the provisions of section 38 of the *Penal Code* (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

In the case of *Abmad Abolfathi Mobammed & another* Criminal Appeal No 135 of 2016 (eKLR 2018) held thus at page 28:

“Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person”

In the appellant’s case, I note that the accused was arrested on January 14, 2021 and arraigned on January 15, 2021 and convicted on his own plea of guilty on January 20, 2021. It is therefore, not true that the appellant was in custody for a period of two years during the hearing of his case. The principle of law under section 333(2) of the *Criminal Procedure Code* cannot therefore come to his aid. The appellant is not a first offender. At the time of his arrest, he was on probation for a conviction of a similar offence where he had been given a non-custodial sentence.

8. In the forgoing circumstances I find that the sentence meted on the appellant for the offence is proper and in accordance with the law and I find no reason to interfere with it. I therefore, find that the appeal herein is unmerited and the same is dismissed forthwith. The appellant to serve the remainder of the sentence as per the orders of the trial court.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 8TH DAY OF FEBRUARY 2023

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J.W.W. MONGARE

JUDGE

Judgement Delivered virtually in the Presence of

1. Appellant is present

2. MS Okok for State

3. Loyanae- Court Assistant

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J.W.W. MONGARE

JUDGE

