**Wafula & another v Republic (Criminal Appeal 48 & 49 of 2020 (Consolidated)) [2023] KEHC 17245 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17245 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL APPEAL 48 & 49 OF 2020 (CONSOLIDATED)**

**JRA WANANDA, J**

**MAY 12, 2023**

**BETWEEN**

**GEOFREY NACHOLI WAFULA ..... 1ST APPELLANT**

**AGGREY LWOVA SHERITSA ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. The Appellants, Geofrey Nacholi Wafula and Aggrey Lwova Sherista were charged in Eldoret Chief Magistrate's Court Criminal Case No 1298 of 2020 with three (3) counts.

2. In Count 1 they were charged with the offences of burglary contrary to Section 304(2) and stealing contrary to Section 279 (b) of the Penal Code. The particulars of the offence were that on the night of May 5 and 6, 2020 at Lumakanda Township in Lugari Sub-county within Kakamega County, jointly with others not before the Court broke and entered the dwelling house of Wycliffe Onjote with intent to steal therein and did steal therein the following items, one generator machine, two dozens of water glasses, two dozens of cups, two pairs of shoes, seven kilograms of sugar, one handbag, six enamel serving bowls and one jembe, all valued at Kshs 17,790/=, the property of the said Wycliffe Onjote.

3. In Count 2 they were also charged with the offences and burglary and stealing. The particulars were that on the night of July 19 and 20, 2020 at Orembo village Lumakanda Location in Lugari Sub-County within Kakamega County, jointly with others not before Court broke and entered the dwelling house of Josephine Kaleka with intent to steal and did steal therein the following items; two 6 kgs gas cylinders make Hashi and K-gas, two plastic chairs, three kgs of maize flour, one kg of sugar, ½ litre of cooking oil, ½ kg of green grams and one kg of beans, all valued at Kshs 14,000/=, the property of the said Josephine Kaleka.

4. In Count 3 the 1st Appellant was charged with the offence of entering into a dwelling house with intent to commit a felony contrary to Section 305(1) of the *Penal Code*. The particulars were that on July 20, 2020 at Lumakanda Township in Lugari Sub-County within Kakamega County entered into the dwelling house of Betty Khasaboli with intent to commit a felony, namely, burglary therein.

5. In the alternative the 2nd Appellant was charged with handling stolen goods contrary to Section 322 (1) and (2) of the *Penal Code*. The particulars were that on July 22, 2020 at kwa Njoroge area in Lugari Sub-County within Kakamega County otherwise than in the course of stealing, dishonestly retained the following items: two gas cylinders make Hashi and K-gas, eleven cups and one plastic pail knowing or having reason to believe them to be stolen goods.

6. The Appellants pleaded guilty to all the three (3) charges and were convicted. Each was then sentenced to serve 4 years imprisonment on Count 1, 4 years imprisonment on Count 2 and 1-year imprisonment on Count 3. The sentences were ordered to run consecutively which means that the Appellants were each to serve an aggregate of 9 years in prison.

7. Being dissatisfied with the decision, the Appellants filed this Appeal.

**Grounds of Appeal**

8. The Appellants filed identical Petitions and Memoranda of Appeal on October 26, 2020. Subsequently, on January 5, 2023 and 24, 2023, respectively, they filed amended Grounds of Appeal. Again, the same were more or less identical and can be summarized as follows; that they pleaded guilty to the charges, they are 1st offenders, the sentence imposed was too harsh, they be given non-custodial sentence or a lesser prison term, the sentences do run concurrently rather than consecutively, they are remorseful and repentant, they are now rehabilitated and reformed. Although on his part, the 2nd Appellant has also added that there was duplicity in the charges, both Appellants are emphatic that they are not challenging the conviction.

**Hearing of the Appeal**

9. The Appeals were then consolidated and pursuant to directions given, the parties filed their respective Submissions. The 1st Appellant filed his Submissions on January 05, 2023 while the 2nd Appellant filed his on January 24, 2023. The Submissions were more or less identical.

10. The Respondent, through Prosecution Counsel Mark K Mugun, filed its Submissions on January 16, 2023.

**Appellant's Submissions**

11. The Appellants reiterated in more detail the matters set out in the amended Petition and Memoranda. They submitted that the sentence was too harsh and excessive and also faulted the trial Court for ordering that the sentences run consecutively rather than concurrently. They also submitted that they were 1st offenders and had since reformed and prayed that the sentence be reduced or they be given a non-custodial sentence. They also submitted that the sentence should run from the date of arrest. They were however this time emphatic that the appeal was not about the conviction and was entirely about the sentence.

**Respondent's Submissions**

12. In its Submissions, the Respondent introduced a new angle to the matter by submitting as follows:

> " These are the submissions of the Republic conceding to the appeal on the conviction and subsequent sentence on the ground that the charge sheet was duplicitous and thus fatally incurable. For Count 3 the facts as admitted to by the Appellant were insufficient to prove the offence"

13. The Respondent therefore submitted that it is conceding to the Appeal because the Appellants were charged with more than one offence in one charge in contravention to the provisions of Section 134 of the *Criminal Procedure Code*. I believe that it is because of this concession that the Respondent did not submit on the rest of the grounds raised.

**Analysis and Determination**

14. This being the first Appeal, this Court has the duty to re-evaluate and analyze the proceedings in detail and come up with its own independent conclusions. This duty was espoused by the Court of Appeal in *Mark Oiruri Mose vs Republic* [2013] eKLR, in the following words: -

> " ...It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that..."

**Issues for determination**

15. It can therefore be deduced that although the Respondent concedes to the Appeal, such concession is based on totally different grounds from those preferred by the Appellants. Despite the said concession, this Court still has a duty to interrogate the ground for concession.

16. Considering the background set out above therefore, in my view, the Issues that arise for determination in this Appeal can be summarized as follows:

    i. Whether the charge sheet was defective for duplicity

    ii. Whether the trial Court erred in ordering that the sentences imposed should run consecutively rather than concurrently

    iii. Whether the sentence was excessive

    iv. Whether the time spent in custody should be factored in the sentences

17. I now proceed to analyze the Issues

**i. Whether the charge sheet was defective for duplicity**

18. Section 135(2) of the *Criminal Procedure Code* spells out how joinder of counts in a charge should be framed. It provides as follows:

> "Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count."

19. In the *Black's Law Dictionary*, 9th Edition at page 578, duplicity is defined as, "the charging of the same offence in more than one count of an indictment or, the pleading of two or more distinct grounds of complaint or defence for the same issue."

20. Under the explanation paragraph, it is stated that "duplicity in the Criminal procedure takes the form of joining two or more offences in the same count of an indictment."

21. A charge would therefore be bad for duplicity if it contains more than one offence in a single count. This is explained in *Archbold Criminal Pleading, Evidence and Practice, 2010* at page 9, in the following terms:

> "The indictment must be double; that is to say, no one count of indictment should charge the defendant with having committed two or more separate offences ...The question of whether a count breaches the general rule against duplicity is a question relating to the form of the count, not the underlying evidence ... thus, if the particulars set out in the count allege only one offence, the fact that the evidence at trial may reveal more than one offence does not make the count bad for duplicity."

22. In the case of *Omboga vs Republic* [1983] KLR 340, it was held as follows;

> "injustice will be occasioned were evidence is called relating to many separate counts all contained in one count because the accused cannot possibly know what offence exactly he is charged with."

23. Duplicity can also arise where the particulars of an alternative charge are a replica of those in the main count. According to the Respondent, the charge sheet is duplicitous because the Appellants were charged with more than one offence in one charge, namely, burglary and stealing.

24. However, the Court of Appeal, in *Njoka v R* [2001] KLR 175 held as follows:

> "Section 304 (2) of the penal Code, cap 63, was the main section under which the appellant was charged. The section does however create two offences rather than one offence. The first offence it creates is burglary and the second offence it creates is stealing from the house. Both offences, however, are usually committed in the course of one transaction and they carry one mens rea. They are, also, usually laid as one offence in one count. The charge is then said to carry two limbs namely one for burglary and one for stealing from the house."

25. The same Court in *Reuben Nyakango Mose vs Rep* [2013] eKLR reiterated the same position in the following terms:

> "It will in any event be seen that the framing of the charge of burglary in the Criminal Procedure Code envisages that another offence may be committed in the course of burglary.

That is why the relevant form is couched to include burglary and stealing in the same charge. The authorities we have visited and all relevant law envisage that because a thief who breaks into a dwelling house or a vessel will have had ulterior motives when he formed the intention to break into the house or vessel then what follows – this will ordinary but not necessarily be stealing – should be included in the burglary charge. There cannot therefore be duplicity when the offence of burglary and stealing are combined in the same charge."

26. Similar conclusions were also arrived at by Otieno J in *Rama Lenjaru v Republic* [2021] eKLR and by Achode J in *Bonface Wakumu Wangwe v Republic* [2021] eKLR

27. In view of the foregoing, I have keenly perused the charge sheet on record and I find nothing wrong with the two offences of burglary and stealing being combined in the same charge. The offences were clearly committed in the course of the same transactions and carried one mens rea Therefore, despite the concession by the State, I find that there was no duplicity of the charges herein.

**ii. Whether the trial Court erred in ordering that the sentences imposed should run consecutively rather than concurrently**

28. Section 14 of the *Criminal Procedure code* provides as follows: -

" Sentences in cases of conviction of several offences at one trial

(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—

(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

(b) of fines which amount in the aggregate to more than twice the amount which the Court is so competent to impose.

(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence".

29. In *Peter Mbugua Kabui vs Republic* [2016] eKLR, the Court of Appeal stated as follows:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act transaction a concurrent sentence should be given."

30. On its part, the *Judiciary Sentencing Policy Guidelines* provides as follows:

> " 7. 13 – Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims the sentences should run consecutively".
>
> 7. 14 The discretion to impose concurrent or consecutive sentences lies in the court."

31. It is therefore clear that where separate and distinct offences are committed in a different criminal transaction even though the counts may be on one charge sheet it is not illegal to mete out a consecutive term of imprisonment. The discretion to impose concurrent or consecutive sentences lies on the Court.

32. What then constitutes the same transaction? The Court of Appeal addressed this question in *Mwarome Munga Janji v Republic*, CR A No 10 of 2019, KLR and adopted the definition given to the term in the earlier decision in *Nathan v Republic*, [1965] EA 777 where it had been stated as follows:

> " If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction."

33. In this instant case, from the particulars supporting the charges preferred against the Appellants, it is clear to me that the offences subject of the Appellants' convictions were not committed at the same time or in the course of the same transaction. The offences in Count 1, 2 and 3 were each committed on different dates, against different victims and at different places. The trial Magistrate cannot therefore be faulted for ordering that the sentences were to run consecutively rather than concurrently.

**iii. Whether the sentence imposed was excessive**

34. I agree with the Appellants that the aggregate sentence of 9 years imposed on each of the Appellants who pleaded guilty appears excessive in the circumstances. The Court does not appear to have given credit to the Appellants for pleading guilty.

35. In *Wanjema v R//* (1971) KLR 493, it was held as follows:

> " A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this Court's interference with it on each of these grounds. No account was taken, as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51, Cr App R 165 and Geoffrey (1967) 51 Cr App R 449. (This admits no

doubt because the magistrate awarded the maximum sentence to this offender: which of itself is unusual)."

36. In this instant case, although the trial Magistrate states his consideration of the Appellants' mitigation, he is not shown to have given credit to the fact that the Appellants pleaded guilty. Giving credit to the plea of guilty, noting the remorse of the Appellants before the trial Court where they asked for leniency, noting the modest value of the items stolen and considering the absence of use of any violence against the victims, I consider the aggregate sentence of imprisonment for 9 years to be excessive in the circumstances.

37. I therefore reduce the sentence imposed on each of the Appellants to 2 years imprisonment for Count 1, 2 years imprisonment for Count 2, and 6-months imprisonment for Count 3. As ordered by the trial Court, the same shall run consecutively. The aggregate sentence is therefore reduced from 9 years to 4 years and 6 months imprisonment for each of the Appellants.

**iv. Whether the time spent in custody should be factored in the sentences**

38. Section 333(2) of the *Criminal Procedure Code* provides as follows:

> "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."

39. In *Ahamad Abolfathi Mohammed & Another v Republic*, [2018] eKLR, the Court of Appeal stated as follows:

> "By dint of section 333 (2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "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. .... We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012."

40. From the Charge Sheet, I note that the Appellants were arrested on July 22, 2020. Although they were granted bail, it seems that they both remained in custody throughout the trial as it appears that they were unable to raise bail. They were then convicted and sentenced on October 13, 2020. The period between arrest and sentence is therefore about 3 months. This period ought to be therefore factored and reduced from the aggregate of 4½ years prison sentence that this Court has now imposed.

**Final Orders**

41. In the end, I order as follows:

i. I uphold the conviction.

ii. On the sentence, I hereby set aside the aggregate sentence of 9 years imprisonment imposed by the trial Court for each of the Appellants and substitute it with an aggregate sentence of 4 years and 6 months imprisonment for each of the Appellants, as follows; 2 years imprisonment for Count 1, 2 years imprisonment for Count 2, and 6-months imprisonment for Count 3.

iii. The sentences shall be computed as from the date of the Appellants' arrest as appears in the Charge Sheet, namely, July 22, 2020.

iv. As ordered by the trial Court, the sentences shall run consecutively.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 12TH DAY OF MAY 2023**

**.....**

**WANANDA J R ANURO**

**JUDGE**