Mutuku v Republic (Criminal Appeal E089 of 2021)
[2023] KEHC 22690 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22690 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E089 OF 2021

TM MATHEKA, J

SEPTEMBER 22, 2023

BETWEEN

MUTETI MUTUKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the sentence of Hon. J.D. Karani (RM) in Makindu Resident Magistrate's Court Criminal Case No. E259 of 2021 delivered on 27th August 2021)

JUDGMENT

1. The appellant was charged with Burglary contrary to section 304(2) and Stealing contrary to section 279(b) of the *Penal Code*. In the alternative he was charged with handling stolen property c/s 322 (1) (2) (sic) of the same Code.

2. He initially pleaded not guilty on April 12, 2021. But after numerous mentions and non- appearance before the trial court he changed plea on August 10, 2021.

3. The particulars of the offence were that on the night of April 7, 2021 at Ngwata Village area in Kibwezi Sub-County within Makueni County, he broke and entered the dwelling house of Matata Kelly with intent to steal therein and did steal a pair of jeans trouser, one shirt, one pair of rubber shoes, two mobile phones make Samsung and x-tigi, one cylindrical power bank, one usb cable, two curtains and one black carrier bag all valued at Kshs 7,500/=, the property of the said Matata Kelly.

4. He was convicted and on August 27, 2021, sentenced to 3 years imprisonment on each limb of the offence. The sentences were to run consecutively.

5. Aggrieved by the sentence, the appellant lodged this appeal on two grounds: that the sentences ought not to run consecutively but concurrently, and that the court did not apply s 333(2) of the *Criminal Procedure Code*.

6. The appeal was canvassed through written submissions.

7. The appellant submits that as a young man, the consecutive sentences are more punitive than corrective. He contends that they should be concurrent as separating them amounts to double jeopardy. He relies on; Francis Karioko Muruatetu where the Supreme Court gave guidelines on factors to be considered in sentencing.

8. He submits that the trial court noted his inability to pronounce mitigation grounds and attributes it to lack of legal aid or advice from any quarters. That having gone through the painful moment in remand custody, the only thing he wanted was to have his case decided as soon as possible. He relies on *Pett –vs- Grey Hound Racing Ass* (1968) All ER 545, *Thomas Alugha Ndegwa –vs- R* (2016) eKLR and *R –vs- Karisa Chengo & 2 Others*.

9. He submits that he is a first offender and has learnt his lesson after staying in prison for one year and eight months. That he has gone through the process of counseling and training which have reformed him.

10. He relies on section 333(2) of the *Criminal Procedure Code* (CPC) and the Judiciary Sentencing Policy Guidelines for the submission that time served in custody should be taken into account.

11. He prays for; the sentence meted upon him to run concurrently, the time spent in remand to be computed in line with the regulations, the court to be lenient on him as he is a first offender. That he has learnt to be a law abiding citizen and he is from a poor family background.

12. The State, through Prosecution Counsel Vera Omollo, submits that sentences are imposed to meet the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation. That according to paragraph 4.2 of the sentencing policy, all the aforementioned objectives should be considered in totality while sentencing.

13. She submits that the sentences were to run consecutively due to the rampant nature of the offences in the region. She contends that the sentence was meant to deter members of the public and the appellant from committing crimes of such nature. She relies on the case of *Nicholas Mukila Ndetei –vs- R* (2019) eKLR where the court stated;

> " ...The need to protect the society clearly requires the court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not.."

14. She submits that the appellant was entitled to ten (10) years imprisonment on the first limb and fourteen (14) years on the second limb as per the provisions of sections 304 and 279 of the *Penal Code*. She submits that the trial court was lenient and the same should be enhanced to reflect what the law prescribes.

Analysis

15. The circumstances under which an appellate court can interfere with a sentence have been codified in many judicial pronouncements. In *Bernard Kimani Gacheru –vs- Republic* [2002] eKLR, the Court of Appeal restated this principles:

> " 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 appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that

the trial court 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 states is shown to exist."

16. In this case, the appellant was charged under sections 304 (2) and 279 (b) of the *Penal Code* which provide as follows; 304(2)

> "If the offence is committed in the night, it is termed burglary and the offender is liable to imprisonment for ten years.
>
> 279(b) If the theft is committed under any of the circumstances following, that is to say—
>
> (b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house; the offender is liable to imprisonment for fourteen years."

17. It is evident that the appellant committed the offence of breaking into a house and stealing from therein. This was a single event involving one complainant. However, the prosecution presented a defective charge before the court, charging the appellant with two complete offences in one, each with its own sentence. S 304 is about house breaking, and committing a felony therein. S 279 is about stealing various forms of stealing. To combine the two creates an amorphous offence with two different penalties. For an unrepresented person like the appellant he suffered prejudice as he would not have known the difference.

18. Hence it is my considered view that the charge as framed for count 1 is defective.

19. The appellant pleaded guilty to breaking into a dwelling house at night and stealing from therein. S 279 was placed in the *Penal Code* vide [Act No 53 of 1952, Sch, Act No 24 of 1967, Sch] It states that if the value of the stolen item is more than a hundred shillings then one is liable to imprisonment for 14 years. Look at that, in our present circumstances, one can see a targeted offender. Theft of anything valued above Ksh 100 could earn a person up to 14 years' imprisonment.

20. That besides it is my humble view that the prosecution had the choice, on the facts to choose between the two offences burglary and stealing c/s 304(1) (b) as read with s 304 (2) of the *Penal Code* or just stealing from a dwelling house c/s 279(b).

21. With regard to concurrent and consecutive sentences, the 2016 Judiciary of Kenya Sentencing Policy Guidelines provide that;

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

22. From the trial court record, the appellant stated as follows in mitigation; "I ask court to make a decision today." The trial court noted that the appellant was not remorseful and also noted that the offence was rampant in the region.

23. It is however evident that despite the appellant's initial denial of the charges, he eventually pleaded guilty. A plea of guilt is a mitigating factor as it saves precious judicial time and is an indication of

remorse. In *R –vs- Jacob Weremba Kong'ani* [2006] eKLR, the learned Judge acknowledged that a plea of guilt is a mitigating factor. He expressed himself as follows;

> " I have given due consideration to these mitigating factors including the fact that the accused pleaded guilty to the charge, is a young man and is a first offender who has shown remorse for the offence. I have also taken into account the fact that the accused has been in remand for about a year... Yet the fact that the accused is young, was drunk, is remorseful, pleaded guilty and is a first offender who has been in custody for about a year does mitigate against sentence."

24. Further, the provision to section 333 (2) of the *CPC* states that;

> 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.

25. It is therefore a requirement that any period spent in custody prior to the sentence should be considered. In this case, the appellant was arrested on April 10, 2021 and remained in custody until his sentencing on August 27, 2021. The record does not show that this period was taken into consideration.

26. From the foregoing, the trial magistrate overlooked material factors to wit; the Judiciary Sentencing Policy guidelines, the fact that the appellant pleaded guilty and the fact that he had been in custody for four (4) months and 17 days prior to sentencing.

Determination.

27. Having found that the main charge as drafted was defective, I set aside that charge and quash the conviction and set the sentence aside.

28. However, the facts as pleaded by the appellant prove the alternative charge of handling stolen property Contrary to Section 322(1) as read with s 322(2) of the *Penal Code*. The appellant accordingly convicted of this charge.

29. The sentence of three years' imprisonment is reasonable and the same is maintained however it is to run from April 10, 2021.

30. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND SEPTEMBER, 2023

.....

MUMBUA T MATHEKA

JUDGE

CA - Nellima

State - Ms Omollo

Appellant - Present in person