Ombachi v Republic (Criminal Appeal E002 of 2024)
[2024] KEHC 13885 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13885 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E002 OF 2024

WA OKWANY, J

OCTOBER 24, 2024

BETWEEN

EVANS OMBACHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Sentence in the Chief Magistrate's Court at Nyamira, Criminal Case No. E865 of 2023 delivered by Hon. W.K. Chepseba, Chief Magistrate on 5th June 2023)

JUDGMENT

1. The Appellant was convicted, on his own plea of guilty, for the offence of burglary contrary to Section 304 (2) and Stealing contrary to Section 279 (b) of the *Penal Code*. He also faced an alternative count of handling stolen property contrary to Section 322 (1) (2) of the *Penal Code*.

2. He was sentenced to serve 2 years imprisonment for the first count and 4 years' imprisonment for the alternative count of handling stolen property. The trial court was silent on whether the sentences were to run consecutively or concurrently.

3. Aggrieved by the decision on sentence, he appealed to this Court vide Petition of Appeal wherein he listed several grounds, inter alia, that he pleaded guilty to the offence without knowing the gravity of the sentence and that the sentences imposed were harsh and excessive.

4. The Appeal was canvassed through written submissions.

5. The Appellant submitted that the sentences imposed by the trial court were punitive and excessive because he had not only pleaded guilty to the charges thereby saving court the time that could have been spent in a full trial but that the items that were stolen were also recovered. He also pleaded for a non-custodial sentence while stating that he was a first offender.

6. Counsel for the Respondent conceded to the Appeal and submitted that the sentence was excessive since the value of the stolen items was only Kshs. 6,100/= and that violence was not used during the commission of the offence.

7. It is trite that the duty of a first appellate court is to re-examine the entire evidence from the trial court and to arrive at its own independent findings and conclusions while making an allowance for the fact that it did not see or hear the witnesses testify first-hand. In *Okeno v Republic* (1972) EA, 32, it was held: -

> " That the first appellate court has a duty to carefully examine and analyze afresh the evidence presented from the lower court and draw its own conclusions bearing in mind that it lacks the advantage of seeing the witnesses and observing their demeanor."

8. I have considered the grounds of appeal and the submissions of the parties. I find that the only issue for my determination is whether the Appeal on sentence is merited.

9. It is trite that where a party pleads guilty to a charge, an appeal can only lie in respect of sentence. Section 348 of the *Criminal Procedure Code* is succinct on this issue and states as follows: -

> 348. 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.

10. In *Alexander Lukoye Malika v Republic* [2015] eKLR the Court of Appeal held 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."

11. The Appellant pleaded guilty to the main charge of burglary and stealing. The facts of the case were subsequently read to him and he confirmed that they were true. A plea of guilty was then entered and the trial court proceeded to convict and sentence him. I have perused the proceedings of the trial court during plea taking and I find that the plea was unequivocal. I will therefore only address the issue of sentencing.

12. It is trite that sentencing is the preserve of the trial court and that the appellate court should not interfere with the trial court's discretion on sentence unless it is shown that the trial court applied the wrong principles or misapprehended the law or facts or imposed an excessively harsh or lenient sentence in light of the circumstances of a case. In *S. v Nchunu & Another* (AR 24/11) [2012] ZAKZPHC6, the Kwa Zulu Natal High Court stated:-

> " It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:
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> > " Plainly, any sentence imposed must have deterrent and retributive force. But off course one must not sacrifice an accused person on the altar of deterrence. Whilst

deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. .....It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society."

13. Section 279 of the *Penal Code* stipulates as follows: -

279. Stealing from the person; stealing goods in transit, etc.

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.

304. Housebreaking and burglary

(1) Any person who—

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

(b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.

14. A perusal of the trial court's record reveals that as opposed to sentencing the Appellant on the main count, which consisted of two offences, the trial court also sentenced him on the second limb of the main charge (stealing) and the alternative charge of handling stolen goods. I find that the trial court erred in this regard because the manner in which the charges were crafted in the charge sheet meant that the two limbs of the first charge, being separate offences, ought to have been considered as one charge because they occurred in the course of one transaction. This is the position that was adopted by the High Court in Mpumalanga South in the case of *S v Maswetswa* 2014 (1) SACR 288 (GSJ),referred to the decision of Jennet J. in *S v Cetwayo* 2002 (2) SACR 319 (E) where it was held that: -

" It is trite that housebreaking with intent to commit an offence is in itself a substantive offence (see s 262 of Act 51 of 1977) and that it is a separate offence from the actual offence, for the purpose of which the housebreaking was committed, if such be committed. The practice is, however, that, if the offences relate to what is in effect a single incident, they are, unless there is good reason to the contrary, charged as a single offence and a single punishment is imposed.

In confirmation of the above I need only refer, firstly, to *R v Chinyerere* 1980 (2) SA 576 (RA) where at 580A – C Lewis JP said the following:

" One has to bear in mind, however, that housebreaking with intent to steal and theft are separate offences. This is made clear in Hunt South African Criminal Law and Procedure vol II. The learned author traces the history of housebreaking

with intent to steal and theft and points out that under the old Roman-Dutch law housebreaking with intent to steal and theft was simply regarded as an aggravated form of theft. However, in the modern South African law this is no longer the case. The learned author at 644 says this:

> " The effect of this development is that, unlike Roman Dutch law, house-breaking is no longer regarded as an aggravated form of theft. The house-breaking with intent to steal and theft are two separate offences, though they are in practice charged and punished as one offence, so that in such cases the result is the same.'"

15. I find that the trial court was required to be specific in sentencing the Appellant by meting out a punishment that was clear and unambiguous for the charges that the Appellant pleaded guilty to. The said court was expected to mete a single punishment on the first charge despite the fact that it had two limbs.

16. Turning to the alternative charge, I find that the trial court erred in law by sentencing the Appellant to 4 years imprisonment on the alternative charge yet the Appellant had already been sentenced on the main count.

17. I find therefore that the trial court did not apply the right legal principles in imposing the sentence of 4 years for the charge of handling stolen goods because it was an alternative charge to the main count that the Appellant had already been sentenced for.

18. I have considered the principles of sentencing and the guidelines that govern the exercise of discretion by a court of law at sentencing. According to *Judiciary Sentencing Policy Guidelines* (2016) at paragraph 7.19, it is provided as follows: -

    7.19. In deciding whether to impose a custodial or a non-custodial sentence, the following factors should be taken into account:

        1. Gravity of the offence: In the absence of aggravating circumstances or any other circumstance that render a non-custodial sentence unsuitable, a sentence of imprisonment should be avoided in respect to misdemeanors.

        2. Criminal history of the offender: Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentences in the absence of other factors impinging on the suitability of such a sentence. Repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstance.

19. Paragraph 23.8 further stipulates the mitigating circumstances that should be considered by the court at sentencing: -

    23.8 Mitigating circumstances warrant a more lenient penalty than would be ordinarily imposed in their absence. They include:

        1. A great degree of provocation.

        2. Commitment to repairing the harm caused by the offender's conduct as evidenced by actions such as compensation, reconciliation and restitution prior to conviction.

        3. Negligible harm or damage caused.

4. Mental illness or impaired functioning of the mind.
5. Age, where it affects the responsibility of the individual offender.
6. Playing of a minor role in the offence.
7. Being a first offender.
8. Remorsefulness.
9. Commission of a crime in response to gender-based violence.
10. Pleading guilty at the earliest opportunity and cooperation with the prosecution and the police.

20. I note violence was not used when the offence in question was committed and that the Appellant, who was a first offender, expressed remorse and admitted to the offence by pleading guilty thereby saving the court's precious judicial time. The trial court should have taken these factors into account during sentencing.

21. It is trite that an accused person is entitled to receive the least severe form of punishment. Having established that the sentence for the alternative charge was not tenable in law, I find that the Appellant deserves leniency on sentence for the main count. Consequently, while I affirm the 2 years imprisonment sentence for the main count, I direct that the Appellant shall serve a non-custodial sentence for the remaining period of the 2 years' sentence.

22. In conclusion, I find merit in the Appeal on sentence and allow it by setting aside the 4 years sentence on the alternative count. I also set aside the 2 years sentence on the main count and substitute it with probation sentence for the remaining period of the said 2 years' imprisonment sentence.

23. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF OCTOBER 2024.

W.A. OKWANY

JUDGE