



**Peter & another v Republic (Criminal Appeal E034 & E049 of 2023
(Consolidated)) [2024] KEHC 12548 (KLR) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E034 & E049 OF 2023 (CONSOLIDATED)**

MW MUIGAI, J

OCTOBER 15, 2024

BETWEEN

ANTONIO PETER 1ST APPELLANT

JAMES JOHN 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the sentence of by Hon. B.S. Khapoya (PM) in Kithimani Principal Magistrate Court in PMCR. Case No. E794 of 2022 delivered on 1st November, 2022)

JUDGMENT

Trial Court Record

1. The Appellants herein were jointly charged with 2 Counts namely:

Count 1: Breaking into a Building and committing a Felony contrary to Section 306(a) of the Penal Code. The particulars as per the charge sheet were that the Appellants on the 20th day of September, 2022 at Matuu Town in Yatta Sub-County within Machakos County, jointly with others not before the Court broke and entered in a shop of Ultum Mega Limited – Honda Dealer and therein stole four motor cycles of chasis numbers (1)BFOJA309XHS240419,(2)BFOJA30958S336703, (3)BFOJA3-9HS337445, (4) BFOJA3091HS339646 and eight(8) pieces of Honda oil 0.9 Litres each all valued at kshs.546,900/-.

Alternative Charge

Handling Stolen Goods Contrary to Section 322 (1)(2) of the Penal Code. The particulars of the offence being that on 20th September, 2022 at ISINET TOWN in Kajiado South Sub-County within Kajiado County, otherwise than in the cause of stealing, dishonestly retained one motor cycle of chasis



number BFOJA309XHS240419 and BFOJA309HS337445 respectively knowing or having reasons to believe the same to be stolen.

Count II: Being unlawfully present in Kenya contrary to Section 53(1) (J) as read with Sub-Section 53(2) of the *Kenya Citizenship and Immigration Act* No.12 of 2011. The particulars of the offence being that on the 21st day of September, 2022 at Matuu Police Station in Yatta Sub-County within Machakos County, the Appellants being Tanzanian citizens were found in Kenya without any valid documents or pass.

2. The substance of the charges and every element were read to the Appellants in a language that they understand and when asked whether they admits/denies - the Appellant pleaded Guilty on both counts.
3. On 26th September, 2022 the facts of the Charges were read out to the Appellants by the Prosecution and the Appellants informed the Court that the facts were correct and the Appellants were convicted on their own plea of guilt.

Sentence

4. On 1/11/2022 the Appellants were sentenced as follows:

In Count I – Each accused person was sentenced to serve in jail for a period of seven (7) years.

In Count II – Each accused person was sentenced to pay fine of kshs.50,000/- in default to serve in jail for a period of 6 months. Upon the paying of fine and/or completion of sentence the Appellant and his co-accused were to be deported back to Tanzania.

The Appeal

5. Dissatisfied with the conviction and sentence the Appellants filed their appeal based on the following grounds:-
 - a. That they are Tanzanian Nationals and were misled by people who sold the motor bikes to them.
 - b. That the sentence for Count I is too harsh in comparison to the offence and without an option of the fine.
 - c. for Count II the sentence is reasonable but the option of fine is too high.
6. The matter was canvassed by way of Written Submissions.

Written Submissions

1st Appellant's Submissions

7. The 1st Appellant submitted that proportionality is one of the core principles underpinning the sentencing process, as stipulated by the Sentencing Policy Guidelines, whereby, the current sentencing policy is more focused on rehabilitation than punishment.
8. Reliance is made in the case of *Fatuma Hassan Salo -vs- Republic* [2006] where the court stated that;

Sentencing is a matter for the discretion of the trial court. The discretion must however, be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous or irrelevant factors,”



9. On that account, Article 15 of the United Nations (UN) recommendations pony up that when sentencing the judiciary should ensure that sentences meted should reflect the promotion of human dignity and the overall goal of justice which should be restorative is observed.

2nd Appellant's Submissions

10. The 2nd Appellant submitted that proportionality is one of the core principles underpinning the sentencing process, as stipulated by the Sentencing Policy Guidelines, whereby, the current sentencing policy is more focused on rehabilitation than punishment.
11. Into the bargain, the sentence must not be more or less that is merited in view of the gravity of the offence, also behavior is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.
12. In the instant case the Trial Court failed to exercise its discretion in fashioning its pronouncement, consequently imposing oppressive sentence in disregard of the Appellants isolated circumstances.
13. Reliance is made in the case of Fatuma Hassan Salo -vs- Republic
14. On that account, Article 15 of the United Nations (UN) recommendations pony up that when sentencing the judiciary should ensure that sentences meted should reflect the promotion of human dignity and the overall goal of justice which should be restorative is observed.

Respondent's Submissions

15. The Respondent in its submissions dated and filed in court on 13th December, 2023 submitted that the Appellants accepted a serious charge of breaking into a building namely shop, and stole four motor cycles valued at Kshs.546,900/-. The sentence is not excessive, since it's within the purview provided by the law.
16. In Count II the Appellants failed to pay the fine for Kshs.50,000/- in default 6 months imprisonment. They have already served the 6 months sentence.
17. In Court of Appeal, on its part, in Bernard Kimani Gacheru -vs- 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 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 stated is shown to exist.”
18. In Mokela -vs- The state [135/2011] 2011 ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”



19. Also, in the case of Ogolla son of Owuor -vs- Republic [1954] EACA 270, sentence can only be enhanced in clear circumstances that:

“The Court does not alter a sentence unless the Trial Judge has acted upon wrong principles or overlooked some material factors.”

Determination/Analysis

20. The Court considered the pleadings and submissions by parties. The 1st & 2nd Accused persons pleaded guilty on their own plea of guilt.
21. The Court record confirms that on 22/9/2022 the charges were read to the Accused persons in Kiswahili and they pleaded guilty. The plea of guilt was entered for each of Accused persons on both Courts.
22. On 26/9/2022 the Prosecution read facts of the events of 19/9/2022 of a breaking in and investigations conducted revealed 2 motor cycles whose Chassis Nos were read to the Trial Court, were recovered from the Accused persons. Also recovered were 2 phones and Kshs. 3600/- from the Accused person.
23. Each of the Accused person agreed the Facts read were correct and the Trial Court convicted each of Accused on their own plea of guilt.
24. Pre-Sentence proceedings were on 1/11/2022; 1st Accused sought lenient sentence, on his mitigation that his mother was aged and his children depended on him. 2nd Accused prayed for leniency in mitigation his children and siblings depended on him. The Plea taking was as per the case of Adan vs Republic and as provided by Section 207 CPC. Appeal on conviction on plea of guilt is not appealable as per Section 348 CPC.
25. Sentencing Guidelines 2016 provide; that during sentencing hearing in determination of sentence there are aggravating and mitigating circumstances to be taken into account. In Pre-Sentencing proceedings the Accused shall have the opportunity to provide mitigation.

Sentencing Guidelines 2023 provide;

Proportionality: The sentence meted out must be proportionate to the offending behavior meaning it must not be more or less than is merited in view of the gravity of the offence.

Accountability and Transparency: The reasoning behind the determination of sentence should be clearly set out and in accordance with the law and the sentencing and

Totality of the Sentence: The sentence passed for offenders convicted for multiple counts must be just and proportionate, considering the offending behavior as a whole.

26. The mitigating factors herein are that the Appellants are 1st Offenders as there was no evidence to the contrary adduced by the Prosecution during Trial. They pleaded guilty at the earliest opportunity and the items stolen 4 motorcycles; 2 were recovered and released to the Complainant.

Disposition

1. To ensure proportionality of the sentence and taking into account the circumstances of the case and mitigation by Accused persons, the sentence of 7 years imprisonment is reduced to 5 years imprisonment in Count 1 for both Appellants and the 2nd Count sentence remains the same as Appellants were unlawfully present in Kenya.



JUDGMENT DELIVERED SIGNED & DATED ON 15TH OCTOBER 2024 IN OPEN COURT IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

