



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 214 CONSOLIDATED WITH 215, 216 AND 2017 OF 2019

DANIEL KARIITHI MBUKURU

RICHARD MUTWIRI KANGATA

WILFRED MUTETHIA

JULIUS KUBAI MITILI.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The court has in discharge of its duty as a first appellate court (see *Okeno v. R* (1972) EA 32) and considered the evidence before trial court in relation to the consolidated appeals, which were principally on **sufficiency of evidence** to prove the charges of theft c/s 268 as read with 275 of the Penal Code facing the appellants as the accused in the case. This court is satisfied that the appellants were guilty as charged, and, consequently, properly convicted by the trial court on the basis of the circumstantial evidence and application of the doctrine of recent possession.
2. The appellant faced, together with other four accused persons, five counts of theft of maize from different complainants with three alternative charges of handling stolen property c/s 322 of the Penal Code. The trial court had convicted for stealing the accused persons, three of whom the court discharged under section 35(1) of the Penal Code, and one (Accused 7) who was sentenced to imprisonment for the time served, on account his long period of pre-trial detention.
3. The trial court, however, imposed concurrent sentence of imprisonment for two (2) years against accused 1, the 4th Appellant in Criminal Appeal No. 2017 of 2019 herein **JULIUS KUBAI MITILI** and fines of Ksh.20,000/- for each charge facing accused persons 5, 8 and 3, (appellants 1, 2 and 3) as shown in the Sentence of the trial court set out below:

“SENTENCE

This court has had regard to the facts leading up to the offences the accused are convicted of their mitigation, the conceded fact that they are first offenders and the duration that the 7th accused has stayed in remand custody.

The 1st accused has shown no contrition for the offences he is convicted of and has been adamant of his innocence despite having found guilty upon full evaluation of evidence brought forth against them. In each of the offences he is convicted of the pt accused is sentenced to served two (2) years imprisonment to run concurrently.

The 7th accused is sentenced to time already served in remand custody and forthwith DISCHARGED under Section 35(1) of the Penal Code in all offences he is convicted of.

The 3rd accused, 5th accused and 8th accused are sentenced to pay a fine of Kshs.20,000/=for each of the offences they are convicted of in default of which they shall serve eighteen (18) months imprisonment for the same to run concurrently. Title deeds to be released to respective depositors. 65 SOGOMOG. P.M.

Cr.c.1226/17”

4. The default sentence of imprisonment for eighteen (18) months for the default of payment of a fine of Ksh.20,000/- was illegal for being contrary to the guide as to default sentences set out in section 28 (2) of the Penal Code, under which the default term of imprisonment for a fine of Ksh.20,000/- is a period of 6 months. Accordingly, for the 2 counts of, the affected appellants (Accused 3, 5 and 8) should have served a total of 12 months or prison custody time of 8 months (four months, with remission each, served consecutively in terms of the Proviso to section 37 of the Penal Code).

5. The Appellants in Criminal Appeals Nos. 214, 215 and 216 of 2019, respectively, **DANIEL KARIITHI MBUKURU, RICHARD MUTWIRI KANGATA and WILFRED MUTETHIA** have already served in full their default sentences of 18 months on each count and were released reported in October 2020.

6. The Appellant presently in custody has only about 30 days to completion of his two-year sentence, his date of release being **15th March 2021, as the appeal, previously scheduled for hearing at the judicial service week of August 2020, could not be heard owing to the Covid-19 interruption of the court business.**

7. As regards the appeals in Criminal Appeal Nos. 214, 215, 216 of 2019, the trial court was in clear error in failing to follow the guide under section 28 (2) of the Penal Code to which every court is by the **Kenya Judiciary Sentencing Policy Guidelines**, 2016 paragraph 11.11 p.29 directs as follows:

“Imprisonment in Default of Payment of a Fine

11.11 The period of imprisonment in default of payment of a fine must not exceed six months unless allowed by the law under which the conviction has been obtained. The Penal Code, for instance, allows for imprisonment for twelve months where the amount exceeds Kshs. 50,000. **Where the law does not expressly set the period of imprisonment in default of payment of a fine, the court must be guided by the scale laid out in section 28 (2) of the Penal Code.**”

8. Section 342 of the Criminal Procedure Code footnoted in the above passage provides for a general limit of 6-month default sentence as follows:

“342. Limitation of imprisonment for non-payment of fine, etc.

No commitment for non-payment shall be for a longer period than six months, unless the law under which the conviction has taken place enjoins or allows a longer period.”

Orders

9. Consequently, while finding no merit in the consolidated appeals from conviction and therefore, dismissing he appeals from conviction under section 354 (3) of the Criminal Procedure Code, the court finds that the sentence of default term of eighteen (18) months on failure to pay a fine of Ksh.20,000/- was contrary to section 28(2) of the Penal Code and, therefore, illegal. The said sentences will, therefore, be set aside, and substituted with a default sentence of imprisonment for six (6) months for failure to pay the fine of Ksh.20,000/-.

10. However, as the appellants in the relevant appeals (Criminal Appeals Nos. 214, 215 and 216 of 2019) have already served their sentences in full and have been released, the court does not make any further orders on their appeals.

11. As the appellant who remains in custody, **JULIUS KUBAI MITILI**, is due for release just over a month away on 15/3/2021, his sentence of two years - although not excessive in the circumstances of the case - having been **substantially** served will, pursuant to section 354 (3) (b) of the Criminal Procedure Code, be reduced the **period already served**, so that the appellant is forthwith released from custody, unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 8TH DAY OF FEBRUARY, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellants in person.

Ms Nandwa, Prosecution Counsel for the Respondent.