REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT LODWAR
CRIMINAL APPEAL NO 25 OF 2019

PHILIP NAMAYA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*appeal against Criminal original sentence in Criminal Case no 229 of 2019 of the Principal Magistrates Court at Kakuma)*

JUDGEMENT

1. The appellant was charged with the following charges:

A) COUNT 1 breaking into a building and committing a felony contrary to Section 306 of the penal code, the particular of which was that on 26th July 2019 jointly with others broke and entered into the Police Canteen and stole a Sonny TV valued at Ksh. 30000

B) COUNT 2 stealing contrary to section 268 as read with section 275 of the penal code, the particular of which was that on the night of 26th day of July 2019 at Kakuma Refugee Camp jointly with others not before the court stole mobile phone Techno Spark 2 (KA7) and national identity card number 30799646 the property of PETER MURIMI. There was an alternative charge of handling stolen property.

C) COUNT 3 breaking into a building and committing a felony contrary to section 306(a) (b) of the Penal Code the particular of which was that on 27th day of August 2019 broke and entered into YOUNG ELECTRONIC SHOP and stole items therein valued at Ksh.98500 property of FRANCIS WAFULA and an alternative charge of handling stolen property.

D) COUNT 4 breaking into a building and committing a felony contrary to section 306 (a) (b) the particular of which were that on 30th day of August 2019 at Kakuma police station broke and entered the police canteen and stole a television make Philip valued at Ksh. 25,000, with an alternative charge of handling the stolen property.

E) COUNT5 Conveying suspected stolen property, the particular of which were that he was found conveying chloride Exide battery and red light reasonably suspected to have been stolen or unlawfully obtained.

2. He pleaded guilty to count 2 ,3, 4 and 5 of the charges, was convicted on his own plea of guilty and sentenced to serve three years on count 1, two years on cont2 to run concurrently, four years on count 3, three years on count 4 and 5 to run concurrently.

3. Being dissatisfied with the said sentence, he filed this appeal and sought that the three count under Section 306 (a) (b) be consolidated and the sentence reduced to lesser one as serving long sentence will deny him a chance of completing his education. It was further contended that he was a first offender.

4. The appeal being only on sentence, the court ordered for a presentencing report and invited the parties to make written submissions thereon.

PRE-SENTENCING REPORT

5. It was contended that the appellant was a known social deviant, who could not be paroled as most of the stolen items were never recovered. It was stated that the appellant was aged 22years, who was a bodaboda rider at the time of the offence. It was contended that his criminal behaviour could be attributed to personal greed and peer influence. It was recommended that the same be subjected to institutionalized rehabilitation.

SUBMISSIONS

6. It was submitted by the appellant that he was a first offender and remorseful. He submitted that he was an orphan on whom his 13-year-old sister depended and since the offences were committed in the same area, he sought for consolidation of the charges and reduction of the sentence

7. Mr Tanui for the state submitted that they had filed written submission and were relying on the presentencing report, however the record of the proceedings confirmed that they did not file any written submissions.

DETERMINATION.

8. It must be stated for record purposes that the appellant pleaded guilty to the charges and was convicted on his own plea of guilty and therefore his appeal herein is only limited to the sentence herein.

The conditions upon which the appellate court may interfere with the sentence of the trial court were set out in the case of **SIMON KIPKURUI KIMORI V REPUBLIC [2019] eKLR** as follows:

> ***"5. Since the appellant is only appealing against sentence, it is important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:***
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> ***"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"***
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> ***6. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:***
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> ***"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."***
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> ***7. The predecessor of the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-***
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> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***
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> ***8. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-***
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> ***"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"***
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> ***9. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:***
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> ***"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."***

9. In this matter the appellant pleaded guilty to all the counts and in sentencing him the trial court had this to say:

> ***"In the circumstances therefore, since for the above, the incidents took place on different dates and also since in each case different items were stolen, I proceed to sentence the accused herein as follows:-***
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> ***"For the main count, he is sentenced to serve three years in jail For count 2, he is sentenced to serve 2 years in jail. Since both the main charge and count 2 were committed in a single transaction, I order the sentence to run concurrently***

For count 3 he is sentenced to serve four years in jail

For count 4 he is sentenced to serve three years in jail

For count 5 he is sentenced to serve three years in jail. Since the third count herein was committed on different dates to count 4 and 5 the same shall run consecutively while counts 4 and 5 above shall run concurrently."

10. It is this sentence which has aggrieved the applicant and the issue for the courts determination is whether the trial court acted on wrong principles of law so as to render her determination herein amenable for interference by this court?

11. In sentencing the appellant, it is clear from the record that the trial court did not error and that the sentence was based on correct principles, I have however noted that the same did not take into account the appellant mitigation. The appellant in his mitigation had indicated that he had been given the said items by a police officer to sell for which the court ordered for investigation.

12. From the record of the proceedings, there is no indication that the outcome of the said investigations was presented to court at the time of sentencing and further there is no indication as stated heroin that the court took into account the appellants mitigation while passing the sentence, it is also clear from the record that most of the stolen items were recovered, which the court should have taken into account while passing sentence herein.

13. I have further noted that the trial court did not interrogate the charge sheet presented before her as I am of the considered view that count 1 and 2 should have formed one count as the two items were stolen at the same time and same place and would therefore quash the sentence on count 2.

14. Being a first appellant court and in exercise of the powers thereof under Section 345(3) (b) of the Criminal Procedure Code alter the sentence herein mated out as follows:

Count 1 to serve 2 years.

Count 3 to serve 2 years.

Count 4 and 5 to serve 3 years on probation to run concurrently.

15. The state has a right of appeal.

16. And it is ordered.

DATED SIGNED AND DELIVERED VIRTUALLY

AT NAIROBI THIS 2ND DAY OF JUNE 2021

J. WAKIAGA

JUDGE