REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL APPEAL NO. 14 OF 2020

PETER MURIUNGI KIRII ..... APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal against conviction and sentence of Senior Principal Magistrate's Court at Marimanti by

Hon. S.N NYAGA (R.M.) delivered on 7/2/2018.)

JUDGMENT

Introduction

1. This is an appeal against the judgment which was delivered on ***05/02/2018 in Marimanti Resident Magistrate's Court in Criminal Case No. 442 of 2017.*** The Appellant herein was charged with three offences.

These are :-

(i) Stealing contrary to **Section 275** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars were that on 29/09/2017 at Ciakithini village of Gatue location in Tharaka North Sub-County within Tharaka Nithi County, the Appellant stole one mobile phone make Itel valued at Kshs. 1,500/=, the property of Mary Kanyuki Kathenya.

(i) Assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. The particulars of this offence were that on 29/09/2017 at Ciakithini village of Gatue location in Tharaka North Sub-County within Tharaka Nithi County, the Appellant unlawfully assaulted Mary Kanyuki Kathenya, thereby occasioning her actual bodily harm.

(iii) Assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. The particulars of this offence were that on 29/09/2017 at Ciakithini village of Gatue location in Tharaka North Sub-County within Tharaka Nithi County, the Appellant unlawfully assaulted Rebecca Karugo Makembo, thereby occasioning her actual bodily harm.

2. The Appellant pleaded not guilty in all the three (3) charges and the matter proceeded to full trial. The prosecution called a total of five (5) witnesses in support of its case against the Appellant. After a full trial, the Appellant was convicted on the three counts and sentenced to serve five (5) years' imprisonment on each count. The court further ordered the sentences to run consecutively.

The appellant was aggrieved by both the conviction and sentence and filed vide a Petition of Appeal filed on 18/06/2020.

The Appeal

3. The Appellant in his original Petition of Appeal advanced six (6) grounds of appeal. However, vide the Amended Supplementary Grounds of Appeal filed on 14/07/2021, he substituted the same with the following grounds:

i. THAT the learned trial magistrate erred in law and fact by not noticing that the prosecution did not prove their case beyond any shadow of doubt.

ii. THAT the trial magistrate erred in the law and fact in admitting uncorroborated evidence which was marred with a lot of falsehood.

iii. THAT the trial magistrate erred in law and fact by not noticing that there existed vendetta between the families of PW2 and the

accused person.

iv. THAT the learned trial magistrate erred in law and fact by disregarding the facts raised in the Appellant's defense.

v. THAT the learned trial magistrate erred in law and fact by basing his judgment on a trial that was already concluded thereby contravening Article 50(2) of the Kenya Constitution.

vi. THAT the trial magistrate erred in law and fact by convicting and sentencing the Appellant without considering the facts of the case and the law provisions.

He prays that the appeal be allowed, sentence be set aside and be set at liberty.

4. The appeal was disposed of by way of written submissions. The Appellant filed his written submissions on 14/07/2021 while the Respondent filed its written submissions on 21/07/2021.

The Appellant's Submissions

5. It was the Appellant's submission that the prosecution failed to prove their case beyond any shadow of doubt because he failed to summon all material witnesses who were present at the scene of the alleged crimes and failed to tender all material evidence.

6. The Appellant further submitted that the mandatory sentence of fifteen (15) years meted out on him failed to conform with the tenets of a fair trial that accrue to the Appellant under **Section 25(c)** of the **Constitution (sic)**. It was also his contention that offenses that are committed on the same day and at the same time ought to run concurrently. The Appellant finally submitted that his conviction on the first count was based on hearsay and that his defense was not taken into consideration.

The Respondent's Submissions

7. In opposing the Appellant's appeal, the Respondent submitted that the ingredients of stealing and those of the offence of assault causing actual bodily harm were well proved, candid, corroborated and consistent. The Respondent further submitted that the trial court did consider the Appellant's defence and addressed his evidence in the judgment at page 29 of the typed proceedings.

8. The Respondent finally submitted that the issue of unfair trial or a vendetta against the Appellant did not arise at any point during the trial and as such it is just an attempt by the Appellant to escape culpability. The Respondent thus prayed for the appeal to be dismissed and the conviction and sentence upheld.

Issues Arising for Determination

9. Having set out the respective parties' positions as above, it is my most considered view that the issues for determination are as follows:

i. Whether the prosecution proved the charge against the Appellant beyond any reasonable doubts; and if so,

ii. Whether the sentence meted upon the Appellant by the trial court was appropriate.

Analysis

10. This is a first appeal. The law is well settled that the first appellate court has a duty to re-evaluate the evidence adduced before the trial court, analyse it and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses and assess their demeanour. In **Kiilu & Another vs. Republic [2005] 1KLR 174** the Court of Appeal stated that:

> **"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**"

See also **Okeno vs. Republic [1972] EA 32 on the same subject.**

11. In this case, the trial magistrate found that the prosecution had proved the charges against the Appellant to the requisite standard of beyond any reasonable doubt. This court is therefore called upon to consider afresh the evidence on record while considering the issues raised in this appeal. Below is analysis of the evidence that was adduced before the trial court and the determination of the issues raised in the grounds of appeal.

Whether the prosecution proved the charges against the Appellant beyond any reasonable doubts.

12. Grounds of appeal nos. 1, 2, 3, 4 and 5 are dealt with under this head.

13. In Count I, the Appellant was charged with theft of a mobile phone contrary to **Section 275** of the **Penal Code** which provides as follows:

> **"Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."**

14. Section 268(1) of the **Penal Code** provides for the definition of theft as follows:

> **"(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."**

15. In Counts II and III, the Appellant was charged with assault causing bodily harm contrary to **Section 251** of the **Penal Code** which provides as follows:

> **"Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years."**

16. To establish the offence of assault, one needs to prove that the person charged assaulted another one and caused them actual bodily harm. In this case, the Appellant was known to PW1, PW2 and PW3. As such, his identification was not in question. It was PW1's testimony that on the material day, she had gone to PW2's home when the Appellant came and started making noises at PW2. PW2 testified that the Appellant's daughter, NWJ, was hidden at PW2's home after that the Appellant allegedly defiled her and there is an ongoing incest case over the incident. The Appellant then became violent and hit PW2 with a shovel. PW1 tried to intervene but the Appellant turned on her and cut her wrist with the shovel. The Appellant then grabbed PW1's phone and left as PW1 ran for her safety.

17. PW2 corroborated PW1's evidence on how the Appellant went to her (PW2's) home and violently attacked her and PW1 and then took PW1's phone. PW2 also corroborated the PW1's testimony that the Appellant's daughter had been left in her home because she had been defiled several times. It was further her testimony that the Appellant tried to kill her as he commanded her daughter to bring him a knife from the kitchen and the child brought a panga.

18. PW3 was a neighbour to PW2. She testified that on the material day, she heard someone screaming. She responded to the screams and found the Appellant assaulting PW2 with a shovel. The Appellant tried to also attack her, but she managed to run away and went back to her home. She confirmed that PW1 and the Appellant's daughter were also in the compound.

19. PW4, a clinical officer at Marimanti District Hospital testified on behalf of Mwangi, his colleague, who treated and filed the P3 forms for PW1 and PW2 following the assault incident. He produced the said P3 forms as PExh 2 and 4 respectively. PW5 was the investigating officer. He recorded the statements of the witnesses, referred the victims for treatments, visited the scene, and concluded the investigations by arresting and charging the Appellant with the offences. He produced a shovel blade and a blood-stained panga as PExh 6 and 7 respectively.

20. From the P3 Form P Exhibit 2, tenderness was observed on the right hand of PW1 and the degree of the injury sustained was classified as 'harm'. PExh 3 was PW1's treatment notes which established that she sustained soft tissue injury related to assault. On the other hand, PW2, as per PExh 4 sustained a cut on the parietal side of the head, a cut on the palm and a red eye. She was treated with eye drops and stitching was done. These soft tissue injuries were equally classified as 'harm'. In his defence, the Appellant denied assaulting PW1 and PW2 stating that he was the one who was roughed up. In the circumstances, it is my view that the prosecution evidence was consistent, well corroborated and pointed towards the guilt of the Appellant. As such, I hold the view that trial court was correct to find the Appellant guilty on Counts II and III.

21. With regard to Count 1, PW2's testimony corroborated that of PW1 that after the Appellant assaulted them, he took PW1's mobile phone before leaving the scene. PW1 produced the receipt of the phone as PExh. 1 as evidence of ownership. As noted earlier herein, the Appellant was known to both PW1 and PW2 hence his identification is not in dispute. According to PW5, the mobile phone was never recovered. Upon being put on his defence, the Appellant merely denied taking any phone. The Appellant's daughter aged about 10 years old was called as a defence witness. She testified that his father did nothing and the court noted that she looked threatened while testifying. I am thus of the view that considering all the evidence in totality, the prosecution proved its case against the Appellant. Although the stolen mobile phone was not recovered, the evidence from PW1 and PW2 was sufficient and credible. Clearly, the failure of the Appellant to return the phone to its rightful owner was a manifestation of the intention to permanently deprive PW1 of her phone. PW1 was thus permanently deprived of her phone since it was never recovered. As such, I opine that the evidence adduced by the prosecution was sufficient to prove the offences beyond any reasonable doubt. Thus, the Appellant's conviction by the learned trial magistrate is sustainable.

22. The appellant submitted that the prosecution failed to call her daughter who was a material witness as she was present at the scene of the crime.

The appellant has relied on Section 143 of the Evidence Act and the ***Ugandan Case of Bukenya and Others –v- Uganda.***

Section 143 of the Evidence Act provides as follows:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

The prosecution is obligated to call the witnesses who are sufficient to prove a fact. They need not call a superfluous number of witness to prove the same fact. Failure to call a witness will only be fatal to the prosecution case if it is proved that they failed to call the witness(es) for some alterior motives and especially where it is proved that if the witnesses was called, he/she would have given adverse evidence against the prosecution case. I find that prosecution called sufficient witnesses in support of their case and failure to call the said witness is not fatal.

Whether the sentences meted upon the Appellant were appropriate

23. Ground of Appeal no. 6 is dealt with under this head.

24. In the case of **Ogolla s/o Owuor (1954) EACA 270** it was stated as follows with regards to the jurisdiction of this court to alter the sentence imposed by the trial court:

> **"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."**

25. The sentence for the assault under **Section 251** of the Penal Code is five years whereas the sentence for stealing under **Section 275 of the Penal Code** is three years. The phrase "shall be liable" as used in Penal Statutes has been judicially construed in several cases to mean that the courts have discretion to impose the stated penalty as a maximum sentence only but not as a mandatory sentence. In its decision in **MK v Republic [2015] eKLR** the Court of Appeal stated as follows:

> **"19. What does "shall be liable" mean in law" The Court of Appeal for East Africa in the case of Opoya vs Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James vs Young 27 Ch. D. at p. 655 where North J. said:**
>
> **"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced."**
>
> **We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s. 184 which are "shall be sentenced to death."**

(See also the Court of Appeal decisions in ***Daniel Kyalo Muema vs Republic [2009] eKLR*).**

26. Based on the above authorities, it is my view that the trial court in considering the circumstances of the case, should have imposed a maximum of 3 (three) years for Count I and 5 (five) years for Counts II and III. It thus my view that the trial court erred in imposing a sentence of five years for Count I as the same exceeds the maximum of 3 (three) years that is prescribed under **Section 275 of the Penal Code.**

27. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated as follows:

> **"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we 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)."**

28. In the case of **Wanjema v. R [1971] E.A. 493, 494**, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of plain error of omnibus sentence and the illegality of the sentence. Therefore, in view of the above analysis, this court can interfere with sentence meted by the trial court with regard to Count I.

29. So, what is the appropriate sentence in this case? **In the case of BMN v Republic [2014] eKLR** the Court of Appeal stated as follows:

> **"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."**

In this case the offences were committed in the same transaction and the trial magistrate ought to have ordered the sentences to run concurrently

30. In my view, a sentence of three (3) years with respect to Count 1 and five (5) years with respect to Count II and III each will meet justice in this case. As the three offences were committed as part of the same transaction, the sentences herein should be served concurrently (see **Odero v. R (1984) KLR 621**).

Conclusion

31. From the foregoing, I find that the appeal against conviction lacks merit and is dismissed. The appeal against sentence succeeds.

I order as follows:-

1) The sentence by the trial magistrate is set aside.

2) On the first count the accused will serve three (3) years imprisonment.

3) On the 2nd count the accused will serve five (5) years imprisonment

4) On the 3rd count, the accused will serve five (5) years imprisonment.

5) The conviction and sentence to run concurrently.

6) The sentence to run from 7/2/2018.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 4TH DAY OF OCTOBER 2021.

L.W. GITARI

JUDGE

4/10/2021

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

4/10/2021