REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 148 OF 2019

(AS CONSOLIDATED WITH CRIMINAL APPEALS NOS. 147 AND 149 OF 2019)

JOHANASE SHIVOKHOLO.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the sentence passed in Eldoret Chief Magistrate's

Criminal Case No. 2350 of 2019 by Hon. N. Wairimu, PM,

dated 12 September 2019)

JUDGMENT

[1] The appellant, **Johanase Shivokholo**, was jointly charged before the lower court with **Saul Sambasa** and **Gabriel Ouma** with the offence of severing with intent to steal contrary to **Section 32A** of the **Kenya Information and Communications Act, 2012**. It was alleged that, on the night of **31 July 2019** at Kidiwa Estate in Turbo Sub-county within Uasin Gishu County, with intent to steal, they jointly severed a copper telecommunications cable measuring 20 metres valued at **Kshs. 7,000/=** the property of **Telkom Kenya Limited**. They admitted the charge and were accordingly convicted and sentenced, in a summary manner, to pay a fine of **Kshs. 5,000,000/=,** in default to serve 10 years' imprisonment.

[2] Being aggrieved by the sentence imposed on them, each of the three appellants filed a separate appeal. Thus, **Saulo Sambasa** filed **Eldoret High Court Criminal Appeal No. 147 of 2019: Saulo Sambasa vs. Republic;** while **Gabriel Ouma filed Eldoret High Court Criminal Appeal No.149 of 2019: Gabriel Ouma vs. Republic**. The three appeals were consolidated with the instant appeal on **18 March 2021**. Henceforth, the appellants have been referred to herein as follows:

- **Johanase Shivokholo** as the 1st appellant
- **Saulo Sambasa** as the 2nd appellant
- **Gabriel Ouma** as the 3rd appellant.

[3] On his part, the 1st appellant relied on the grounds that he pleaded guilty at the trial; that he is a first offender; that his plea of guilty was out of inducement with a promise of leniency and that the sentence passed upon him was too harsh considering that nothing was stolen. He therefore prayed to be admitted to probation or be accorded a reduced sentence from that which was imposed on him. He added that he is remorseful, repentant and reformed; having learnt from his mistake. The same grounds were put forth, word for word, by the 2nd and 3rd appellants. On the basis thereof, the three appellants prayed that their appeals be allowed, conviction quashed and the sentence imposed on them set aside.

[4] The appeals were urged by way of written submissions. Hence, the 1st appellant filed and served his written submissions on **8 September 2020,** contending that he was charged before the lower court alongside persons who were hitherto unknown to him and sentenced to the mandatory minimum sentence provided for under the **Kenya Information and Communications Act.** He also posited that the trial court failed to consider the mitigating circumstances as required by the **Judiciary Sentencing Policy Guidelines** and the decision of the Supreme Court in **Muruatetu** (supra). He therefore contended that the sentence meted out to him was harsh, unjust and unfair. He urged the Court to note that, prior to his conviction and sentence, he had been granted a bond of **Kshs. 10,000/=** with a surety in like sum or in the alternative,

cash bail of **Kshs. 7,000/=.**

[5] The 1st appellant further drew the attention of the Court to the circumstances under which he was arrested and pointed out that no theft occurred; and therefore that he ought to have been treated with leniency, granted that he was a first offender. He cited the cases of **Ben Pkiech Loyatum vs. Republic,** Eldoret High Court Criminal Petition No. 24 of 2019 and **Republic vs. Thomas Patrick Gilbert Cholmondely**, Nairobi Criminal Case No. 55 of 2006 in which the offenders were sentenced to 8 months and 10 years' imprisonment, respectively, in cases involving the loss of human life. He thus terms his sentence a travesty of justice and an affront to **Articles 25(c), 27(1) (2) and (4), 28 and 50(2)** of the **Constitution.** The 1st appellant also urged the Court to take into consideration that he is remorseful and has reformed and learnt hard lessons from his incarceration.

[6] The 2nd appellant likewise submitted that, since he pleaded guilty to the charge, he ought to have been treated more favourably, being a first offender. He relied on **Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**, Nairobi HCCC No. 1729 of 2001 in urging the Court to find that the sentence imposed on him was too harsh, unjust and unfair. The 2nd appellant also questioned the constitutionality of **Section 23A** of the **Kenya Information and Communications Act** contending that it deprives the Court of its legitimate jurisdiction to exercise discretion in sentencing.

[7] Further to the foregoing, the 2nd appellant stated that he has been nursing injuries he suffered in 2016 in a road traffic accident; and that he has reformed and learned from his incarceration. He also mentioned that he has a family who depended solely on him before his incarceration; and that his children have had to drop out of school after his imprisonment. He consequently prayed that his appeal be allowed and the sentence set aside.

[8] On his part, the 3rd appellant reiterated the submissions of the 1st and 2nd appellants and stressed that the sentence imposed on him was extremely harsh. He also pointed out that during plea-taking, an order was made for his release on a bond of **Kshs. 10,000/=** with a surety in similar amount, or cash bail of **Kshs. 7,000/=.** His understanding was that that was an acknowledgment that the offence he was faced with was not so serious as to attract a fine of **Kshs. 5,000,000/=** or imprisonment for 10 years. He pointed out that no theft occurred, and urged the Court to set aside the sentence imposed on him by the lower court.

[9] On behalf of the Respondent, **Mr. Mugun** relied on his written submissions filed herein on **24 March 2021**. He pointed out that the appellants were convicted on their own pleas of guilty after they admitted the facts to be true. He therefore submitted that the plea-taking process was proper and that the plea unequivocal and in line with **Adan vs. Republic**. As regards the sentence imposed on the appellants, **Mr. Mugun** urged the Court to note that the lower court called for a probation officer's report; which indicated that all the three appellants were repeat offenders who had been vandalizing cable lines within Kamukunji area for quite some time. He therefore took the view that the sentence imposed on them is not only lawful but is also deserved; and urged for the dismissal of this appeal.

[10] The appellants appeared to question their conviction, by alleging that they were duped into pleading guilty to the charge by the investigating officer. They also raised issues about the time the offence was alleged to have occurred and contended that they were merely passing by the scene when they were arrested. That approach is however not open to them at this point in time. This is because **Section 348** of the **Criminal Procedure Code, Chapter 75** of **the Laws of Kenya** is explicit that:

> **"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."**

[11] Accordingly, the duty of the Court in this appeal is limited to ascertaining that the appellants' pleas were otherwise unequivocal; and that the sentence imposed on them was legal and warranted by the disclosed facts. To this end, **Section 207** of the **Criminal Procedure Code** provides that:

> **(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**
>
> **(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**
>
> **Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**
>
> **(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.**
>
> **(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.**

[12] A reiteration of the aforestated provision is to be found in ***Adan vs. Republic*** *[*1973] EA 446 wherein **Spry, V.P**. explained that:

> ***"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The***

magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."

[13] The record shows that the Appellant's plea was unequivocal and that the procedure set out in **Section 207** of the **Criminal Procedure Code** and **Adan vs. Republic** (supra) was strictly complied with. The process took place on 4 different dates as follows:

· On **2 August 2019** when the appellants were first arraigned before court, the charges were read over to them and a plea of not guilty entered, even though they are recorded to have admitted the charge. The matter was then fixed for hearing on **9 August 2019** and the appellants given the option of being released on bond **of Kshs. 10,000/=** or cash bail of **Kshs. 7,000/=.**

· On **9 August 2019** when the case was scheduled for hearing, the matter could not proceed due to non-attendance of the witnesses. The Prosecution sought adjournment to another date; whereupon the appellants asked that the charge be read over to them again. That request was acceded to by the lower court and after the charge was read over in Kiswahili language, the appellants responded thereto by admitting the charges; which admission was recorded in Kiswahili and a plea of guilty entered in respect of each of them. The Prosecutor then sought for time to present the facts and, consequently, the matter was deferred to **14 August 2019.**

· On **14 August 2019**, after the facts were narrated, the appellants again admitted them and their response recorded in Kiswahili language; whereupon a conviction was recorded for each of them.

· The Prosecuting Counsel thereafter informed the lower court that the appellants had no previous record. On that account the court called for a Community Service Report.

· The impugned sentence was not imposed until **12 September 2019** after the lower court perused the Probation Officer's Reports filed in respect of each of the appellants; which reports did not favour their being placed on probation or community service.

[14] The foregoing chronology confirms that the appellants' pleas were indeed unequivocal and that the lower court fully complied with the dictates of **Section 207** of the **Criminal Procedure Code** and the principles laid in **Adan vs. Republic.**

[15] As regards the sentence imposed on the appellants, it is trite law that an appellate court ought not to alter sentence unless certain factors, some of which were aptly spelt out in the case of ***Ogalo s/o Owuora vs. Republic [1954] 21 EACA 270,*** exist. In the stated case the court held:

> **"The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v Republic [1950] 18 EACA 147*, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case."**

[16] In the instant matter, the appellants complained that the sentence imposed by the lower court was harsh and disproportionate to the crime. They relied, *inter alia*, on **the Judiciary Sentencing Policy Guidelines, wherein a three-step approach to sentencing is recommended. Firstly, the sentencing court is to determine the sentencing options provided by the specific statute creating the offence. Secondly, the court has to determine whether a non-custodial or a custodial order would be the most appropriate in the circumstances. Thirdly, if custodial sentence is the most appropriate option, it is recommended that the court determines the duration of the custodial sentence taking into account the mitigating and aggravating circumstances, examples of which are set out in the Guidelines. In addition, the Policy Guidelines also acknowledge that one of the cardinal principles underpinning the sentencing process is the principle of proportionality.**

[17] Nevertheless, Parliament, in its wisdom took a conscious measure by providing for minimum sentences for certain crimes. This special category of offence includes severing with intent to steal contrary to in respect of which **Section 32A** of the **Kenya Information and Communications Act, 2012** provides that:

> **"A person who, with intent to steal, severs any telecommunication apparatus or other works under the control of a licensee, commits an offence and is liable, on conviction, to a fine of not less than five million shillings or to imprisonment for a term of not less than ten years or to both."**

[18] The rationale for the minimum sentences per **Section 32A** aforestated was well-captured by **Hon. Wendoh, J.** in **Daniel Nguthuku Wainaina vs. Republic** [2017] eKLR thus:

> **"...I believe the stiff sentences prescribed in the Act were meant to deter the would be offenders because of the likely inconvenience, setbacks and costs that are involved when any act of vandalism or theft is committed to any communication apparatus in this day and age. In these days of internet, everything comes to a sudden halt and at a great expense to all, if cables are vandalized or stolen. In this case the appellant had severed an underground cable of 300 metres. The above sections provide for a minimum sentence and the court has no discretion to give a sentence below the prescribed one. Upon conviction, one will be sentenced to fine of less than Kshs. 5,000,000/= in default to a term of not less than 10 years'**

imprisonment or to both fine and sentence."

[19] It is true that, on the basis of **Muruatetu,** mandatory minimum sentences were interrogated and, in quite a number of appeals and petitions, the sentences were set aside on the ground that mandatory minimum sentences are unconstitutional. For instance, I am aware that in **Michael Kasamani & another vs. Republic** [2019] eKLR **Hon. Majanja**, **J.** declared unconstitutional a similar provision, under the **Energy Act,** as the subject provision herein. The two appellants in that appeal had been convicted of the vandalism of electrical apparatus contrary to **Section 64(4)(b)** of the **Energy Act, 2006** and sentenced to pay a fine of **Kshs. 5,000,000/=,** in default to serve 10 years in imprisonment. The learned Judge declared the provision unconstitutional to the extent that it provided for a mandatory minimum sentence; and thereafter reduced the sentence to 3 years' imprisonment. Here is how the learned Judge reasoned on the matter (at paragraph 19 of the Judgment dated **26 September 2019**):

> **Mandatory minimum sentences have been under attack since the decision of the Supreme Court in the case of Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017]eKLR where it held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 50 of the Constitution. Further, that enactment of a mandatory death sentence is a legislative intrusion into the judicial realm. Thereafter the Court of Appeal applied the same principles in several cases where it held that the mandatory minimum sentences under the Sexual Offences Act were unconstitutional (see Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR and in Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014). The inescapable conclusion is that the mandatory minimum sentences under the Energy Act, 2006 must suffer the same fate hence the mandatory minimum sentence prescribed under section 64 thereof is unconstitutional. At this point I wish to observe that the Energy Act, 2006 was repealed by the Energy Act, 2019 which re-enacted the same offence and penalty at section 168 thereof."**

[20] Since then, the Supreme Court has had occasion to clarify matters vide its Directions dated **6 July 2021** at paragraphs 11, 12 and 14 thereof thus:

> **[11] The ratio decidendi in the decision was summarized as follows;**
>
> > **"69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".**
>
> **[12] We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.**
>
> **[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court."**

[21] In the result, it is my finding that the sentence imposed on the appellants was well within the confines of the applicable law. I note that the charge was indicated as having been filed under the **Kenya Communication Act of 2012**, instead of the **Kenya Information and Communications Act, 2012.** It is my considered view that that is a defect that is curable under **Section 382** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya** and that no prejudice was suffered by the appellants on account of that error.

[22] The foregoing being my view of the matter, t**he three appeals are devoid of merit and are hereby dismissed.**

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF NOVEMBER 2021.

OLGA SEWE

JUDGE