REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

H.C.CR.A. NO. E005 OF 2020

PATRICK KIMATHI KAUMA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is an appeal against the judgment that was delivered on 2nd July 2019 in ***Marimanti Senior Resident Magistrate's Court in Criminal Case No. 191 of 2019***. The Appellant herein was charged with the offence of stealing contrary to **Section 268** as read with **Section 275** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence were that on 5th November 2018 at Marimanti market in Tharaka South Sub-County within Tharaka Nithi County, the Appellant stole one wallet, Kenyan National Identity Card no. 35992101, Electors card no. 0020924572 all valued at Kshs. 400/=, the property of Peter Muriithi Chabari.

2. The Appellant also faced an alternative charge of handling stolen goods contrary to **Section 322(1)(2)** of the **Penal Code**. The particulars of this offence were that on 13th February 2018 at Marimanti area in Tharaka South sub-county, Tharaka Nithi County otherwise than in the course of stealing dishonestly retained one Kenyan National Identity Card No. **35992101** and Electors card No. **0020924572** knowing them to be stolen goods.

3. The Appellant pleaded not guilty to the charges and the matter proceeded to trial with the prosecution calling three (3) witnesses. After a full trial, the Appellant was acquitted on the main charge. He was however found guilty on the alternative charge and sentenced to five (5) years imprisonment.

4. Being dissatisfied with the said decision, the Appellant filed the present appeal against both the conviction and sentence vide a Petition of Appeal filed on 2nd October 2020.

The Appeal

5. The Appellant in his original Petition of Appeal advanced five (5) grounds of appeal. He however abandoned those grounds vide Amended Grounds of Appeal filed on 14th July 2021 and opted to substitute them with the following two (2) grounds:

> **i. THAT** the learned trial magistrate erred in both law and fact by convicting and sentencing the Appellant to serve 5 years imprisonment despite that the complainant stated that he was not robbed.
>
> **ii. THAT** the learned trial magistrate erred in both law and facts by failing to note that the case was a frame-up because the allegations that the Appellant.

6. The appeal was canvassed by way of written submissions. The Appellant filed his written submissions on 14th July 2021 while the Respondent filed its submissions on 24th September 2021.

7. In his written submissions the appellant has submitted that the trial magistrate erred in matters of law and facts by failing to order that the sentence of five (5) years would run from the date of his arrest. This however was not pleaded as a ground of appeal. Although this is the case, this being a first appeal, this court has a duty to evaluate the facts and law and come up with its own independent finding. An appeal to this court from the sub-ordinate court is on both matters of facts and the matters of law. This is provided under **Section 347(2) of the Criminal Procedure Code** (Cap 75 Laws of Kenya). The court has a duty to re-evaluate the evidence which was tendered at the trial on matters of facts. See ***Okeno –v- Republic (1972) E.A 32.*** On the other hand **Article 159(2) (d)** of the Constitution mandates the court to administer justice without undue regard to procedural technicalities. It provides that -

> **"*In* exercising judicial authority the courts and tribunals shall be guided by the following principles- justice shall be administered without undue regard to procedural technicalities."**

It therefore follows that this court has to consider all matters and intervene to correct errors which were made by the trial court.

The Appellant's Submissions

8. The Appellant submitted that case against him was framed after the police failed to recover any illegal firearm which they had suspected to be in the Appellant's possession. It was further his submission that his defense was not considered by the trial court and that the charge against him was not proved to the requisite standard. Finally, the Appellant submitted that the sentence of five (5) years meted on him did not conform with the provisions of **Section 333(2)** of the **Criminal Procedure Code** as it allegedly failed to factor in the five (5) months that he had spent in custody while awaiting the determination of the trial. The Appellant thus prayed for this court to allow his appeal, quash the conviction and setting aside the sentence.

The Respondent's Submissions

9. In opposing the appeal, the Respondent submitted that the witnesses called to testify against the Appellant were independent witnesses and gave credible evidence. It was further their submission that the testimonies of the witnesses proved the case beyond reasonable doubt. Finally, the Respondent submitted that the sentence meted against the Appellant was neither harsh nor excessive and should therefore not be interfered with. The Respondent thus prayed for the appeal to be dismissed for lack of merit.

Issues arising for Determination

10. Having set out the respective parties' positions as above, it is my view that the main issues for determination by this court 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

11. 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 to 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; 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.**

12. 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 an analysis of the evidence that was adduced before the trial court against the grounds of appeal raised by the Appellant.

Whether the prosecution proved the charges against the Respondent

13. The Appellant was charged with the handling stolen property contrary to **Section 322** of the **Penal Code** defines the offence of handling stolen property. Section 322(1) provides as follows:

> **"A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so."**

14. The ingredients of the said offence were summarily stated in the case of **Tembere vs. Republic (1990) KLR 393** as follows: -

> **"...One of the important elements of the charge of handling is that the accused must know or have reason to believe that the goods were stolen.....Another vital element of the charge of handling is that the accused must dishonestly receive or retain etc.."**

Others are dishonestly receiving or retaining of the good or dishonestly undertake, or assits in their retention, removal, disposal, or realisation.

15. In this case, PW1, who was the complainant, testified that he is a loader at Marimanti market and was sleeping at the open market on the night of 5th February 2019. On waking up, he found his wallet containing his national ID card and voting card missing. He reported the matter to the police and a police abstract was issued to him immediately. Later, he was called at the office of the DCIO to collect the documents, the same having been recovered from the Appellant following his arrest by PW2. On cross-examination, PW1 stated that he knew the accused person but did not know who took his documents.

16. According to PW2, P.C. Douglas Maruti, the police were looking for the Appellant on suspicion that he was in possession of an illegal firearm and that he was peddling narcotics. On 13th February 2019, PW2 arrested the Appellant following a tip-off by an informer. The Appellant was then taken to Marimanti Police Station and PW3 conducted a routine search on him and recovered the complainant's national ID card and voting card from the Appellant's pocket. In his defence, the accused denied that he was found with any stolen items. He alleges that he was only suspected to have a firearm that was not found in his possession and was then framed with the subject offence.

17. PW2's testimony was corroborated by the testimony of PW3, the investigating officer in this case. Their evidence was consistent and pointed to the fact a Telkom sim card S/No. 89254070 00029531404 as well as the complainant's ID card and voter's card, which were all in a polythene paper, were recovered from the Appellant following a routine search on the Appellant before he was booked in. They also recovered a substance suspected to be bhang and charged him for having narcotics vide Marimanti case No. 484/42/2019 which is still pending before court.

18. According to PW2 and PW3, the Appellant first claimed that he was Peter Murithi Chabari (PW1) and on the next day after he was booked, the Appellant admitted to his real name as Patrick Kimathi Kauma. In my view, there is no doubt that complainant's national ID card and voting card were recovered from the Appellant who had every reason to have known that the same were stolen as the same had the name of PW1. In addition, the Appellant was not known to either PW2 or PW3 and there is no evidence that they had a grudge against him. I therefore see no reason why they would want to frame him as alleged by the Appellant. Thus, while it is not clear how the Appellant came to be in possession of PW1's documents, his retention of the document is proof that he is guilty of the offence of handling stolen goods. As such, it is my view that the prosecution proved its case against the Appellant to the required standard. The court considered the defence of the appellant and rejected it. Based on the evidence by the prosecution, the trial magistrate cannot be faulted for arriving at the decision to convict the appellant.

Whether the sentences meted upon the Appellant were appropriate

19. Section 322(2) of the **Penal Code** provides that:

> **"A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years."**

20. In this case, the Appellant was sentenced to serve 5 years. This was indeed a lenient sentence. However, the Appellant alleges that the trial court erred for not taking into account the time he had spent in custody while undergoing trial as required under Section 333(2) of the Criminal Procedure Code. The said section provides as hereunder:

> **"(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.**
>
> **(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."**

21. The duty to take in account the period an accused person had remained in custody in sentencing is also contained in **Clauses 7.10** and **7.11** of the **Judiciary Sentencing Policy Guidelines** provide that:

> **"7.10 The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.**
>
> **7.11 In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."**

22. The duty by the court to take into account the period that an offender has spent in custody was also acknowledged by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR and also in Bethwel Wilson Kibor vs. Republic [2009] eKLR.**

23. In Ahamad Abolfathi Mohammed & Another vs. Republic (supra) the court stated that:

> **"Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is**

reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of conviction because that amounts to ignoring altogether the period already spent in custody."

24. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be taken into account in meting out the sentence where it is not hindered by other provisions of the law.

25. In this case, the Appellant was arrested on 13/02/2019 and the sentence was meted out against him on 17/07/2019. He was in custody since the time he was arrested. Thus, he spent 5 months in custody before the conclusion of the case. This was however not taken into account by the trial court during sentencing. As such, it is proper, in my view to conclude that the trial court did not apply the provisions of Section 333(2) of the Criminal Procedure Code.

26. 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."

27. From the above legal provisions and authorities, it is therefore my view that this court has a duty to interfere with the sentence so as to conform with the provisions of **Section 333(2) of the Criminal Procedure Code** by factoring in the 5 months the Appellant spent in custody while undergoing trial.

Conclusion

28. I find that the appeal against conviction is without merits. I therefore order as follows:-

29. 1) The appeal against conviction is dismissed.

2) As regards the sentence. It will be as follows: Five years imprisonment to run from 13/2/2019. This will reduce the sentence by five months.

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

L.W. GITARI

JUDGE

4/11/2021

Judgment read out in open court.

L.W. GITARI

JUDGE