REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. E015 OF 2020

SIMON MBOGO NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant moved this court vide a petition of appeal which was filed in this court on 16.12.2020 and emanating from the original conviction and sentence in Siakago Magistrate's Court Criminal Case No. 589 of 2018. The appellant indicates on the first ground of appeal that the same is against sentence only. He states that the trial court erred in both facts and law by failing to consider that he was a first offender and thus he was entitled and qualified for a soft and lenient sentence; in imposing a harsh sentence without considering the probation report; without considering that he was qualified for a non-custodial sentence; and without considering other methods of punishing an offender such as community service order or a fine.

2. He thus prayed that the appeal be allowed and the sentence substituted with a lesser sentence and a reasonable fine and that this court be pleased to impose an order rendering the rest of the appellant's sentence to fall under Community Service Order.

3. At the time of hearing of the appeal, the appellant made oral submissions and prayed that the time he spent in custody be considered. Ms. Mati the Learned Counsel for the state in opposing the appeal also made oral submissions to the effect that the appellant is a beneficiary of the least severe punishment taking into account the seriousness of the offence he was facing. Further that he was released on bond on the 19.09.2018 having been arrested on 17.09.2018. In a rejoinder, the appellant reiterated his earlier submissions.

4. As I have already stated, the appellant's appeal is challenging the sentence by the trial court as being excessive. However, it seems like he abandoned the said appeal and proceeded to prosecute a petition he filed after filing this appeal and being Petition No. E008 of 2021 filed in court on 28.01.2021. In the said petition, he seeks that the court do consider the time he spent in custody and he invokes section 333(1) of the Criminal Procedure Code. He states in the petition that he was arrested on 1.04.2018 and as such the sentence ought to run from that date and not the date of his sentence (27.11.2020). He relied on the case of **Abdul Aziz Odour & Stephen OmondiWanyama –vs- Republic Criminal Appeal No. 18 and 102 of 2018.**

5. It is clear from the record that the appellant seems to be arguing the said petition as opposed to the appeal. I will therefore proceed to consider the said petition and the appeal together. This is on the basis that the two are directed to the sentence of the trial court. Despite the petition having not been fixed for hearing, this court nonetheless has revisionary jurisdiction under sections 362- 365 of the Criminal Procedure Code. Section 362 provides that this court **may call for and examine the record of any Criminal proceedings before any Subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.**

6. Under section 364, the revisionary powers can be exercised where the trial court's record has been called for or which has been reported for orders, or which otherwise comes to the knowledge of this court. This section in my view allows this court to revise orders of the subordinate courts *suo moto*. In my view, both parties having submitted on the issue of the trial court's failure to consider the time spent in custody, it is prudent and not prejudicial to determine the said issue despite the petition having not been fixed for hearing.

7. I have perused through the trial court's record and I note that the appellant herein was arraigned in court on 10.09.2018 and having been arrested on 7.09.2018. He was admitted to bail on the said 10.09.2018 and released on bond on 19.09.2018. He was then convicted on 24.11.2020 and on which date the trial court cancelled bond pending sentencing. The appellant was sentenced on 27.11.2020 to three years imprisonment. It is clear as such that the appellant spent a total of 12 days in custody before the sentencing. (9+3). However, the appellant deposed as to having been arrested on 1.04.2018 and which is not true.

8. *Section 333 (2)* of the *Criminal Procedure Code* stipulates in no uncertain terms that in passing sentence, the trial court should consider the period the convict had spent in custody prior to the date sentence was imposed. The provision states as follows:

> ***"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."***

9. The Court of Appeal in ***Ahamad Abolfathi Mohammed & Another –vs- Republic, [2018] eKLR*** when interpreting the aforesaid section emphasized that "taking into account'' the period spent in custody meant reducing the sentence passed by the period spent in custody during the trial.

10. The Learned Justices of the Supreme court of Uganda in the case of **Bukenya –vs- Uganda (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 (29 January 2013)** stated that;

> ***"Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement.*** *(emphasis mine).*

11. The trial court did not make notes as to having considered the said period. It is important to note that the section is coached in mandatory terms and failure to comply with it amounts to an error of law which this court is obligated to correct in the exercise of its revisionary jurisdiction. I say this noting that twelve days in prison is not such some little time to be ignored. It means that if the same is not deducted from the sentence imposed by the trial court, the appellant herein will have to spend excessive sentence and which in my view is unlawful and thus can be said to be illegal detention. As such the 12 days should be deducted from the sentence the appellant is serving.

12. Despite the appeal herein having been listed for hearing, the parties did not submit in support of the appeal herein as to how the sentence by the trial court was excessive. However, I have perused the record and I note that the trial court gave the appellant an opportunity to mitigate and wherein the court noted that it had considered the said mitigation and the offence. It then proceeded to sentence the appellant to three years imprisonment.

13. Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 which is the section under which the appellant was convicted provides for the punishment of a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life.

14. The appellant is challenging the sentence by the trial court as being excessive and prayed that he ought to be sentenced to a fine or Community Service Order. It is trite that this court's powers when it comes to appeal against a sentence are limited. This court cannot interfere with the 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 stated is shown to exist. This is because sentencing is a matter that rests in the discretion of the trial court. (See **Bernard Kimani Gacheru vs. Republic [2002] eKLR).**

15. The appellant did not prove that the sentence by the trial court warrants review on the basis of any of the conditions as are set in **Bernard Kimani Gacheru's case.** The appeal against the sentence as such fails.

16. As such considering all the above, I make the following orders;-

> ***1)*** *That the sentence the appellant is serving is hereby revised and in doing so twelve (12) days are deducted therefrom being the total number of days he spent in custody.*
>
> ***2)*** *The appellant shall therefore serve a sentence of 2 years, eleven months and 18 days commencing from the date of sentence by the trial court (27.11.2020).*
>
> ***3)*** *The appeal herein as was instituted by the petition of appeal filed in this court on 16.12.2020 fails and the same is dismissed.*

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF NOVEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

....for the Respondent