REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NUMBER 96 OF 2019

DAVID KORIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Original Conviction and Sentence in Iten Senior Principal Magistrate's Court

Criminal Case Number 330 of 2019 delivered on 30th May 2019 by Hon. C. R. T. Ateya (SRM)

J U D G M E N T

1. The appellant pleaded guilty to three counts of **Stealing Contrary to Section 268 as read with 275 of the Penal Code.**

COUNT 1

STEALING CONTRARY TO SECTION 268 AS READ WITH SECTION 275 OF THE PENAL CODE.

DAVID KORIR: On the diverse dates between the months of March and May 2019 at unknown time at Iten Township market within Elgeyo Marakwet County stole 60 kgs of Beans (Nyayo Beans) value at Kshs. 7,500/= the property of LINAH KEMBOI

COUNT II

STEALING CONTRARY TO SECTION 268 AS READ WITH SECTION 275 OF THE PENAL CODE.

DAVID KORIR: On the diverse dates between the month of March and May, 2019 at unknown time at Iten Township Market within Elgeyo Marakwet county did stole 40 kgs of Beans (yellow Green) valued at Kshs. 5,000/= the property of CAROLINE KIMUTAI.

COUNT III

STEALING CONTRARY TO SECTION 268 AS READ WITH SECTION 275 OF THE PENAL CODE.

DAVID KORIR: On the diverse dates between the months of March and May, 2019 at unknown time at Item township market within Elgeyo Marakwet county stole thirty (30kgs) of beans Nyayo beans valued at Kshs. 3,000/= the property of ANITA JELAGAT.

2. He was convicted and sentenced to serve two (2) years imprisonment in each count.

3. The learned trial magistrate directed that the sentences run consecutively making a total of six (6) years imprisonment.

4. The appellant was aggrieved. He filed this appeal seeking review of the sentence on the ground that he was remorseful, repentant and rehabilitated from the period he had been in custody. He urged this court to consider a non-custodial sentence.

5. In his oral submissions he urged the court to substitute the order of the learned trail magistrate with one that would enable him to serve the sentence concurrently.

6. Mr. Masisa for the prosecution did not have any serious opposition to the application, only seeking that the sentence be substituted with a

concurrent sentence of three (3) years, arguing that the appellant was lucky to have received a lesser sentence in view of the three (3) years sentence provided for by **Section 275 of the Penal Code** which states:

> "S. 275. General punishment for theft
>
> 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."

7. The issue for determination is whether this is a case appropriate for interference with the sentence.

8. I have carefully considered the record. A Probation Officer's Report was sought by the learned trial court, prior to the sentence and the appellant was found to be unsuitable for a non-custodial sentence.

9. Section 354 of the Criminal Procedure Code gives this court the power, on appeal against sentence to *"increase, reduce or alter the nature of the sentence"*. **Section 14 of the Penal Code** gives the court discretion to direct that sentence to run concurrently in a case such as the appellant's. It states:

> (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose;
>
> and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
>
> (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.
>
> (3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—
>
> > (a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or
> >
> > (b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.
>
> (4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence."

10. This application of **Section 14 of the Penal Code** was discussed at length by *Khamoni J* in **George Mwangi Chege & 2 Others vs Republic [2004] eKLR.** For clarity I quote him here:

In **paragraph 495 of Halsbury's Laws of England** it is stated:

> **"A person sentenced on several charges, whether on separate indictments or on different counts in one indictment, may be sentenced to more terms than one of imprisonment and these terms may be directed either to run concurrently with one another or to be consecutive, so that one commences on the expiration of another. Consecutive sentences of borstal training should never be passed.**
>
> **Where sentence of imprisonment is passed on a person already serving a sentence for another offence, the court may impose a sentence for the subsequent offence to run concurrently with, or to commence at the expiration of, the existing sentence**.
>
> **As a general rule, consecutive sentences should not be such as to result in an aggregate term wholly out of proportion to the gravity of the offences, looked at as a whole.**
>
> **Concurrent sentences are frequently passed so that if an appeal is successful on one or more counts of an indictment, but not all, the appropriate sentence appears on the counts which are upheld. It is also necessary to pass concurrent sentences on counts for offences the maximum sentence for which is less than the sentence deemed appropriate for a more serious offence charged on another count."**
>
> That is the "rule" or "practice", and I would like to refer to it as the "rule" because in this country it emanates from Section 14 and Section 333(2) of the Criminal Procedure Code, applies both to felonies and misdemeanors, so that where the prisoner is convicted of several offences on different counts of the same indictment or on different indictment, the court as a general rule has power to direct that the sentences shall run consecutively or concurrently. It is good law for a sentence of imprisonment to be ordered to commence from and after the termination of an imprisonment to which the prisoner had been before sentenced for another offence. It is also good law to order those sentences or their respective parts to run concurrently...

There is also trail of judgments that indicate that the practice and principle is that;

> **"if a person commits more than one offence at same time in the same transaction save in exceptional circumstances the sentences imposed should run concurrently"**

11. In determining whether to interfere with the sentence herein I must bear in mind the guidance in the principles which have been firmly settled as far back as 1954, in the case of **Ogolla s/o Owuor, (1954) EACA 270** on when an appellate Court will act in exercising its discretion to review or alter a 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". 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**)." *See also in* **Omuse - v- R** *(Supra) while in the case of* **Shadrack Kipkoech Kogo –v- R., Eldoret Criminal Appeal No.253 of 2003** *the Court of Appeal stated thus: -*
>
> "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 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)"**

I must also answer the question is whether the offences committed by the appellant can be said to be *"…. a series of Acts so connected together by proximity of time, in criminality in criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction...."* as was pointed out in **Republic vs Saidi Nsabuga s/o Juma and Another (1941) EACA** and **Nathan vs Republic (1965) EA 777.**

12. The appellant is alleged to have committed the offences within the same period of time and at the same place. Though there are different complainants those series of actions were clearly connected.

13. The offence of theft carries a maximum sentence of three (3) years imprisonment. Taking into consideration the sentiments of the Court of Appeal in **Peter Mbugua Kabui vs Republic [2016] eKLR** where the court stated:

> "We further observe that **Section 14 of the Criminal Procedure Code** stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. "

In this case the aggregate sentence of six (6) years imprisonment appears excessive does appear excessive as it exceeds by far what the appellant would serve if he was facing just one count of theft of that amount and value of beans. , But more specifically, the facts of the case militate against such a harsh sentence including the fact that the appellant was a first offender. The other allegations of his committing other offences remained mere allegations in the POR.

14. In the circumstances, I find that this is a case where this court is empowered to interfere with the discretion of the learned trail magistrate decision on account of the sentence being so harsh as to amount to a miscarriage of justice.

15. I am of the view that the fair and just thing here would have been an order that the sentences run concurrently. Consequently, the order of the learned trail magistrate is reviewed in the following terms; **the two (2) years imprisonment on each count, to run concurrently**.

16. Right of Appeal 14 days.

Dated, signed and delivered virtually this 9th November, 2020.

Mumbua T. Matheka

Judge

In the presence of

Koech: Court Assistant

Appellant Present

Respondent N/A though notified