



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 114 OF 2019

TIMOTHY KOSGEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the sentence of the Honourable Senior Principal Magistrate

Hon. H.O. Barasa delivered on 26th of June 2019 in Eldoret CM's Court

Criminal Case No. 4228 of 2017.)

JUDGMENT

1. The appellant was charged with the offence of **stealing by servant contrary to Section 281 of the Penal Code**. The particulars being that, on diverse dates between the 28th of October 2016 and 25th November 2016 at the Co-operative Bank Eldoret Main branch in Eldoret town within Uasin Gishu County being an employee of the Co-operative Bank stole Kshs. 4,168,000/= (Four Million One Sixty-Eight Thousand Shillings) by making unauthorized withdrawals from account number 01116087465500 the money **Anne Jepkemoi** which came into his possession by virtue of his employment.

2. The appellant denied the charge and the case proceeded for hearing with the prosecution calling 4 witnesses in support of their case, while the appellant opted to give sworn defence and did not call any witness. The appellant was found guilty, convicted and sentenced to 3 years' imprisonment.

3. The appellant being aggrieved and dissatisfied with the sentence, acting in person, filed an undated Petition of Appeal on 10th July 2019 appealing against sentence on the following grounds: -

i. That he is reformed, remorseful and has repented for he has learned the incarcerations;

ii. That he prays this honourable court to invoke the provisions of Section 333(2) of the CPC and reduce his sentence with the period he spends in custody in remand;

iii. That the honourable court invokes the Provisions of Sections 81, 82 and 83 of the CPC and admit the appellant on probation;

iv. That his family depended on him as the sole bread winner and are now suffering since his detention and subsequent conviction and sentence and prays for leniency to be able to attend to them

v. That he will always serve as a role model in the society and will avoid any event which may lead to criminal activity.

APPELLANT'S CASE

4. The appellant submitted that he is satisfied with the conviction and that he is appealing on sentence alone. He seeks to have the sentence reduced from 3 to 2 years and the Court to take into account the time he spent in remand awaiting trial or be released to serve his sentence out of prison on community service. He stated that he was jailed on 27th June 2019 and has been in jail for 1 year 3 months as at 7th September 2020.

5. The appellant submitted that he has reformed and repented while in prison; that he is a born again Christian and has been teaching Maths

and Business Studies in prison having been a teacher under PTA before he joined university. The appellant stated that he studied Business Administration Accounting option at Maseno University and graduated in the year 2010. He was an employee of Co-operative Bank of Kenya since 2011 to 2017 when he was arrested.

6. The appellant further stated that he is 35 years of age, a family man with a wife and 3 children who solely depended on him for their livelihood and since his arrest their lives have come to a standstill and the children dropped out of school. He stated that he is fully rehabilitated and is remorseful to the honourable court and the society. He urged the Court to invoke the provisions of **Section 333(2) of the Criminal Procedure Code** to direct that the period he spent in remand be computed as part of his sentence.

RESPONDENT'S CASE

7. **Mr. Onkoba** for the state submitted that the record of appeal indeed show that money was lost from an account held by the complainant with Co-operative Bank; that the money had been paid from the department of defence following the demise of her husband who was attacked in Somalia.

8. The state counsel submitted that from the record, the appellant was not able to secure a surety during the trial in the lower court and he was in remand for a period of one and a half years from the time he took plea to judgment date. The sentence provided for the offence the appellant was charged, is 7 years and the trial magistrate imposed 3 years on 26th June 2019 which was quite considerate in view of the circumstances surrounding the offence; in that money from a widow was withdrawn by the appellant.

9. The state counsel submitted that this Court has discretion to reduce sentence. He urged Court to request for a prison report on the appellant's conduct in prison and a probation report taking into views of the appellant, appellant's family and the bank while considering resentencing.

ANALYSIS AND DETERMINATION

10. I have considered submissions by both the state and the appellant herein, and wish to consider whether there are sufficient grounds to justify interferences with the sentence imposed by the trial court.

11. **Section 281 of the Penal Code** which the appellant was charged under provide as follows: -

“If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”

12. The appellant herein submits that he has reformed and urges the Court to reduce his sentence to 2 years. He further state that he is the only bread winner in his family and his children have dropped out of school due to his incarceration. He regrets the offence and he is remorseful and promises to be an example to other if released.

13. From the record the appellant was arrested on 3rd November, 2017 and presented in court on 6th November, 2017. The appellant was sentenced on 27th June, 2019. The trial magistrate in the sentence stated: -

“I have considered the amount that the accused stole, the period he has been in remand and what he has told the court in mitigation. I hereby sentence him to serve three (3) years in prison...”

14. There is no doubt that the discretion to sentence lies with the trial court and the appellate court can only interfere with sentence imposed by the trial court if it is too excessive. The Court of Appeal in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with 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 states is shown to exist.”

15. In **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa as follows: -

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

16. And in **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated as follows: -

“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 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)

17. The Supreme Court in the **Francis Karioko Muruatetu –vs- Republic [2017] eKLR** set out the following guidelines when an appellate court is considering the appellant’s appeal on re-sentencing:

“(71) As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) age of the offender;**
- (b) being a first offender;**
- (c) whether the offender pleaded guilty;**
- (d) character and record of the offender;**
- (e) commission of the offence in response to gender-based violence;**
- (f) remorsefulness of the offender;**
- (g) the possibility of reform and social re-adaptation of the offender;**
- (h) any other factor that the Court considers relevant.**

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

“25. Guideline Judgments

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

18. There is no doubt as shown by the record that the trial Court took into account the period the appellant was in prison and the Court imposed 3 years’ imprisonment for an offence which could have attracted up to 7 years’ imprisonment.

19. I take note of the fact that the purpose of sentencing is restoration, retribution, restitution among others. I also take note of the fact that the appellant stole money from an account of a widow who lost her husband in Somali. His act portrays a person who never cared the suffering that the widow and her children were to be subjected to as a result of loss of compensation for the death of their husband/father. There is no mention of payback of the money lost and if not paid by the appellant, his employer could be made to compensate the widow as a result of loss of money through unlawful act by an employee.

20. I however note that the appellant has taken imprisonment positively and has been an asset to prison and his resolve to change may positively impact the community. I have also taken into consideration, the number of people who relied on him and have been subjected to suffering as a result of his incarceration.

21. In view of the above, I am inclined to reduce imprisonment to 2 years and order that he serves one year on probation.

22. FINAL ORDERS

- 1. Sentence reduced to 2 years’ imprisonment.**
- 2. The appellant to serve probation sentence of one year upon completion of 2 years’ imprisonment term.**

Judgment dated and signed at Nakuru this 28th day of October, 2020

RACHEL NGETICH

JUDGE

Judgment dated, signed and delivered at Eldoret this 3rd day of November, 2020

HELLEN OMONDI

JUDGE

In the presence of:

Komen - Court Assistant

Miss Okoth for State

Appellant in person