



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

HCCRA NO. 41 OF 2017

TONNY KIPRONO NGETICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kericho

Criminal Case No. 2516 of 2017 (Hon. B. Limo (RM) dated 16th November 2017)

JUDGMENT

1. The appellant was charged with the offence of stealing contrary to section 268 (1) as read with section 275 of the Penal Code. The particulars of the offence are that on the 15th day of September 2017 at Majengo area in Kericho within Kericho County, he stole one bed valued at Kshs.4,000/-, the property of Nancy Cherotich Chumo.

2. The appellant was produced in court for plea taking on 19th September 2017. He pleaded guilty to the offence and the facts were read to him and he confirmed that the facts were true. When called to mitigate, he stated that he had bought the bed and it was his. The trial court therefore entered a plea of not guilty, granted him bail, and fixed the matter for hearing.

3. When the matter next came up before the court for hearing on 16th November 2017, the appellant applied to change his plea, pleaded guilty to the offence, and a plea of guilty was again entered. He admitted the facts of the case when they were read by the prosecutor, who also stated that the appellant was a first offender. The appellant was then sentenced to 3 years' imprisonment in the judgment of the court dated 16th November 2017.

4. The appellant then filed the present appeal in which he argues that the trial court erred in sentencing him to a term of 3 years without considering that he was a first offender.

5. In his submissions before this court at the hearing of the appeal, he urged the court to reduce the sentence and give him a sentence of a fine as he has young children who are dependent on him. He prays that the court reduces his sentence so that he can fend for his family.

6. The state opposed the appeal. Learned Prosecution Counsel, Mr. Ayodo, noted that the accused had pleaded guilty to the charge of stealing. He further noted that the offence of stealing is a felony, and that section 275 of the Penal Code provides that anyone convicted of the offence is liable to imprisonment for 3 years without the option of a fine. His submission was that the sentence was proper and should not be interfered with.

7. I have considered the appellant's submissions on record and the response by the prosecution. I have also considered the provisions of section 268 and 275 of the Penal Code. Section 268 provides that:

(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

8. Section 275 of the Penal Code sets out the penalty for stealing as follows:

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.

9. The question is whether the provisions of section 275 stipulate a minimum mandatory sentence, and that the court does not have discretion to impose a lesser sentence where the circumstances so dictate.

10. In its decision in **MK v Republic [2015] eKLR** the Court of Appeal stated as follows:

“19. What does “shall be liable” mean in law” The Court of Appeal for East Africa in the case of Opoya vs Uganda (1967) EA 752 had an opportunity to clarify and explain the words “shall be liable on conviction to suffer death”. The Court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James vs Young 27 Ch. D. at p. 655 where North J. said:

“But when the words are not ‘shall be forfeited’ but ‘shall be liable to be forfeited’ it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced”.

We consider such to be the correct approach to the construction of the words “shall be liable on conviction to suffer death: especially when contrasted with the words of s. 184 which are “shall be sentenced to death”.

11. Similarly, while construing the provisions of the **Narcotic Drugs and Psychotropic Substances (Control) Act, Act No. 4 of 1994**, the Court of Appeal, in its decision in **Daniel Kyalo Muema vs Republic [2009] eKLR** stated as follows:

“The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs Uganda [1967] EA 752 where the Court said at page 754 paragraph B:

“It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it”.

We respectfully adopt that construction which conforms with the opinion of Mr. Kaigai and which is supported by our preceding observations. We have no doubt that the sentences of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of cannabis sativa are the maxima and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although Section 3 (2) (a) of the Act does not expressly provide for a fine, the court can lawfully in accordance with Section 26 (3) of the Penal Code sentence the offender to pay a reasonable fine in substitution for imprisonment.”

12. I am guided by the views expressed by the Court of Appeal in the above matters. A person convicted of the offence of stealing ‘is liable’, upon conviction, to a sentence of three years imprisonment. That provision, however, does not impose a mandatory minimum sentence, and the court has discretion to impose a lesser sentence, or a fine.

13. In this case, the appellant pleaded guilty to stealing a bed worth Kshs.4,000/- He sold it, then readily admitted his offence. It seems to me that the sentence of 3 years imprisonment was excessive in the circumstances, and arose from a misconception of the provisions of section 275 as imposing a mandatory sentence.

14. Does this court have the jurisdiction to alter the sentence imposed by the trial court? In **Ogolla s/o Owuor (1954) EACA 270**, the Court stated as follows:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

15. In my view, had the trial court addressed its mind to the meaning of the term ‘liable’ in a penal statute and considered it against the circumstances of this case, including the fact that the appellant was a first offender, it would not have imposed a term of imprisonment for three years.

16. In the circumstances, the appeal against sentence succeeds. The appellant has been in prison since 16th November 2017, a period of fourteen months. Given the fact that he was a first offender, I believe that the period already served is sufficient punishment. Accordingly, I allow the appeal and substitute the sentence of three years imprisonment to the time already served. The appellant shall accordingly be set at liberty unless otherwise lawfully held.

Dated Delivered and Signed at Kericho this 6th day of February 2019

MUMBI NGUGI

JUDGE