REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 97 OF 2018

CYPRIAN AMUGUNE..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

[Being an appeal from and against the conviction and sentence passed by

Hon. B. Kasavuli, Senior Resident Magistrate dated and delivered on the

11th day of October 2018 in Winam Criminal Case No. 687 of 2018]

JUDGMENT

The Appellant, **CYPRIAN AMUGUNE**, was convicted for the offence of **Possession of Public Stores** Contrary to **Section 324(3)** of the **Penal Code** as read together with **Section 36** of the **Penal Code**.

1. He was then sentenced to imprisonment for One Year.

2. In his appeal, the Appellant has challenged both the conviction and the sentence.

3. The first point raised by him was that the Charge Sheet was defective.

4. When canvassing the appeal, Mr. R. Otieno the learned advocate for the Appellant submitted that the trial court did not follow the procedure set out in the **Criminal Procedure Code**. However, he did not specify the precise provision which the trial court failed to follow.

5. If it was because the Appellant allegedly had no access to the Charge Sheet and to the Witness Statements, it is important to place the whole issue within context.

6. The record of the proceedings shows that the Plea was taken on 11th October 2018.

7. The substance of the charge and every element thereof was stated by the Court, to the accused person.

8. The said information was provided in a language which the accused person understood.

9. The Court then asked the accused whether or not he admits or denies the truth of the charge.

10. In the first instance, the accused said that the charge was Not True. In the light of that answer, the trial court recorded a plea of *"Not Guilty."*

11. When the court informed the accused that it had entered a plea of *"Not Guilty"*, the accused said;

> ***"I said it is true your honour."***

12. In the light of that development, the court entered a plea of *"Guilty"*.

13. The prosecutor, Mrs Livette, then read out the facts upon which the charge was founded. The said facts were to the effect that on 9th October 2018 some police officers were on normal patrol duties when they received a tip-off from members of the public, that the accused had public stores.

14. The police officers went into the house of the accused, and they conducted a search. The search yielded the discovery of:

1. ***4 jungle green trousers;***
2. ***Combat jungle trousers;***
3. ***Navy Blue Belt;***
4. ***Navy Blue Rain Coat;***
5. ***Black Belt;***
6. ***Navy Blue Sweater;***
7. ***Lanyard (3);***
8. ***2 jungle hats;***
9. ***Pair of black Police boots;***
10. ***2 pairs of Navy Blue socks;***

15. The further facts were that on 10th October 2018 the police officers conducted a further search at the house of the accused.

16. On that morning, the search resulted in the recovery of;

a) One Police Woman Shirt;

b) Jungle Shirt;

c) One Lanier;

d) A pair of Badges of the Rank of Inspector of Police;

e) 7 navy blue trousers

17. All those items were produced in court, as exhibits.

18. After the facts had been read out, the accused said;

> ***"I agree with the facts."***

19. In the light of that admission by the accused, the court convicted him, on his own plea of *"Guilty"*.

20. Following his conviction, the accused was given an opportunity for Mitigation before he could be sentenced. He said;

> ***"Currently I am internal security at Kibos Sugar Company. I am a police officer currently on suspension. I have a wife who is an Inspector of***
>
> ***Police. She is called Christine Mudanya. These exhibits belong to my wife.***
>
> ***My co-workers who are in court today even saw the exhibits being delivered and they are the ones who tipped police to come and conduct a search in my house.***
>
> ***That is all."***

21. After taking into account the *"mitigation*", which constituted a negation of the earlier admission, the learned trial magistrate reversed the plea to one of *"Not Guilty."*

22. But the accused protested saying;

"I don't understand why the court is changing my plea when I have said am guilty. That is all."

23. A careful consideration of the sequence of events at the trial court, satisfies me that the learned trial magistrate complied substantially with all the procedures that govern the taking of plea.

24. The accused was informed of the charge, with sufficient detail, to enable him answer it.

25. The Appellant has failed to show this court how he alleges that the trial court failed to follow **Section 325** of the **Criminal Procedure Code.**

26. If anything, the trial court showed readiness to revert to a plea of *"Not Guilty"*, even after first entering a plea of *"Guilty."*

27. In effect, the trial court gave due consideration to the matters raised during mitigation; and after concluding that the accused had disowned his earlier plea of *"Guilty"*, the said court entered a plea of "*Not Guilty."*

28. By so doing, the trial court recognized the fact that a Motion of Arrest of Judgment may be entertained by the court at any time prior to the handing down of a sentence. Therefore, I find that the trial court complied with **Section 325** of the **Criminal Procedure Code**.

SENTENCE

The Appellant was sentenced to One Year Imprisonment. He has described the said sentence as being too harsh.

29. In his opinion, the trial court ought to have either imposed a fine on him or alternatively, the court could have called for a Probation Report.

30. The Appellant relied on the decision of **STOIC JUMA WAFULA Vs REPUBLIC, CRIMINAL APPEAL NO. 124/2010** (at Bungoma), in which the Appellant's sentence was reduced from 2 years imprisonment, to a non-custodial sentence.

31. In that case, the Appellant had been convicted for being in possession of public stores.

32. I note that the learned appellate Judge expressed the view that after giving consideration to the Appellant's mitigation, she came to the conclusion that a sentence of 2 years imprisonment was *"a bit excessive"*.

33. The Judge stated that the trial court ought to have considered a non-custodial sentence.

34. And, as the Appellant had already served 7 months in jail, the appeal court sought a Probation Inquiry, with the intention of substituting the imprisonment with a non-custodial sentence.

35. The other case cited by the Appellant was that of **AMOS MWENGEA MUTUA Vs REPUBLIC (MSA) HIGH COURT CRIMINAL APPEAL NO. 61 OF 2015**.

36. In that case the learned Judge noted that an appellate court could alter the finding, maintain the sentence, reduce or increase the sentence.

37. However, the said court also made it clear that the court could only exercise its discretion when determining an appeal against sentence, if the court was satisfied that there was sufficient reason to warrant a change in the sentence.

38. The court reiterated that an appellate court should not alter the sentence merely on the ground that if he was the trial court, he might have passed a sentence which was different from what the trial court had handed down.

39. In the case of **DOUGLAS MBURU MACHARIA Vs REPUBLIC (Kajiado) HIGH COURT CRIMINAL REVISION NO. 9 OF 2017**, the court reiterated that an appellate court ought not to find fault with the sentence that was handed down by the trial court unless it was shown that the trial court had acted on some wrong principle or that the trial court had overlooked some material factor.

40. First, it is to be noted that that case was one of Revision; it was not an appeal.

41. The trial court had sentenced the accused to six (6) months imprisonment.

42. However, as the learned Judge noted;

> ***"The provisions of section 30(1) of the Traffic Act prescribes a default sentence of three months in default of a fine.***
>
> ***The issue at stake, as raised by the Applicant is where did the learned trial magistrate import the extra three (3) months to mete out a six (6) months imprisonment period."***

43. Apart from that obvious error in the length of the custodial sentence, the learned Judge also noted that;

"The learned trial magistrate erred in law in not first considering the option of a fine, but opted for a custodial sentence of six (6) months."

44. If the sentence prescribed by statute stipulated that the court ought to first give consideration to a fine before considering custodial sentence, it would be an error for the trial court to sentence an accused person to imprisonment, without first giving due consideration to the suitability and appropriateness of sentencing an accused to a fine.

45. **Section 324** of the **Penal Code**, under which the Appellant was convicted, does not specify the sentence to be imposed.

46. However, the said statutory provision makes it clear that the offence of possession of public stores was a misdemeanor.

47. Pursuant to **Section 36** of the **Penal Code**, when no punishment is specifically provided for any offence under the **Penal Code**, any misdemeanor shall be punishable with imprisonment for a term not exceeding 2 years or with a fine or with both.

48. The sentence was thus left to the discretion of the trial court, provided that the said discretion was applied within the stipulated parameters.

49. The accused could be imprisoned for a period not exceeding 2 years, or he could be fined, or he could be both fined and imprisoned.

50. The trial court herein imprisoned the Appellant for One Year. That sentence was well within the law.

51. The Appellant has not demonstrated why or how the sentence could be deemed harsh.

52. I also find that the trial court was not shown to have either taken into account irrelevant factors or to have failed to take into account any relevant factors when it was handing down the sentence.

53. Therefore, I find no basis in law for interfering with the lawful sentence which was imposed by the learned trial magistrate.

54. Finally before concluding this judgment, I feel obliged to point out that the offence for which the Appellant was convicted is deemed to have been proved when it was shown that the accused person was in possession of public stores.

55. The prosecution does not need to show that the public stores had come into the hands of the accused through an unlawful process, such as theft.

56. If there be reasonable suspicion that the public stores had either been stolen or unlawfully obtained, the accused would only escape conviction if he provided an account to the satisfaction of the court, about how he came to have possession of such stores.

57. In this instance, when the court recorded a plea of *"Not Guilty"*, the Appellant would have none of it. Instead, he insisted that he had pleaded *"Guilty"*.

58. And even during mitigation, the accused did not give any account that could have satisfied the court about how he had got possession of the public stores.

59. In the event, the appeal lacks merit, and it is therefore dismissed in its entirety.

DATED, SIGNED and **DELIVERED** at **KISUMU** this **7th day** of **March** 2019

FRED A. OCHIENG

JUDGE