REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 23 OF 2018

ALINOOR BILLOW ABDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the sentence of Hon. J. W. Wandia, RM in

Malindi CM Criminal Case No. 344 of 2018, Republic v Alinoor Billow Abdi)

JUDGEMENT

1. The Appellant, Alinoor Billow Abdi, was charged with the offence of bringing prohibited articles into a prison contrary to Section 59(1) of the Prisons Act, Cap. 90. The particulars of the charge stated that on 6th February, 2018 at Malindi Main Prison in Malindi Sub-County within Kilifi County, the Appellant, jointly with others not before court, without lawful authority did bring into Malindi Main Prison prohibited articles to wit 16 Safaricom unregistered sim cards in contravention of the said Act.

2. The Appellant pleaded guilty to the charge and was fined Kshs.100,000 in default to serve 12 months imprisonment. Before the trial magistrate rose she observed that the sentence imposed was not in compliance with the Prisons Act and proceeded to substitute the earlier sentence with a fine of Kshs.2,000 and in addition imprisonment for six months.

3. The Appellant being aggrieved by the sentence has appealed to this court on the grounds that:-

> **"1. The learned magistrate erred in law and in fact by meting out an illegal sentence to the Appellant.**
>
> **2. That the learned magistrate erred in law by purporting to revise her own orders of the illegal sentence as the trial court was rendered *functus officio.***
>
> **3. That even after purporting to revise the earlier sentence, the learned magistrate erred in law by meting out an excessive sentence to the Appellant."**

4. This appeal is therefore limited to the legality of the sentence and or the excessiveness of the same.

5. A perusal of the submissions filed on 19th October, 2018 by counsel for the Appellant shows an attempt to claim that the plea was equivocal. I must, however, state that this was not one of the grounds of appeal.

6. On the issue of the sentencing and the sentence imposed, counsel for the Appellant submitted that there are two sentences on the record and it cannot be said what the actual sentence is. It is the Appellant's case that having meted the first sentence, the trial magistrate was *functus officio* and could not take any further action on that sentence. It was therefore urged that the second sentence was irregular.

7. As for the original sentence, counsel for the Appellant submitted that the same was illegal and the trial magistrate had indeed admitted this fact by trying to amend the sentence.

8. On the amended sentence, counsel for the Appellant cited the decisions in the cases of **Joel Maina Gachimu v Republic [2009] eKLR** and **Rael Kemunto v Republic [2016] eKLR** in support of the submission that a trial magistrate cannot revise a sentence as such power belongs to the High Court.

9. Finally, counsel for the Appellant submitted that even if this court was to find the amendment of the sentence proper, the said sentence was excessive since the Appellant was a first offender. According to counsel, there was no reason for imposing the maximum sentence on the

Appellant.

10. Responding to the appeal, counsel for the Respondent submitted that the conviction was safe. She, however, agreed with counsel for the Appellant on the illegality and irregularity of the sentence.

11. As already indicated, this appeal is limited to the legality of the sentence imposed by the trial court. The relevant part of the proceedings of 23rd April, 2018 is as follows:-

> **"Court**
>
> **The accused to pay fine of Kshs.100,000 or be imprisoned for 12 Months.**
>
> **J. N. Wandia, RM**
>
> **23.4.2018**
>
> **Later**
>
> **Court**
>
> **Without having left, and in the presence of both the accused and the prosecution, I find that my earlier sentence is not as per the Prisons Act and amend it to:**
>
> **The accused is hereby sentenced to pay a fine of Kshs.2,000 and serve an imprisonment term of 6 months.**
>
> **Right of Appeal 14 days.**
>
> **J. N. Wandia, R.M.**
>
> **23.4.2018"**

12. In **Joel Maina Gichimu** (supra) where the sentence of the appellant was changed from probation to imprisonment after 4 months, the Court held that:-

> **"That was irregular; as by passing the initial sentence, the court had washed its hands of the matter and could not therefore substitute that sentence with any other sentence. In other words the court had by passing the probationary sentence become *functus officio*. It was thus not open to it to recall previous sentence and instead impose 3 years imprisonment. To that extent therefore the proceedings were a nullity."**

13. A perusal of the proceedings shows that the trial court changed a sentence that it had pronounced. The trial magistrate reviewed a sentence imposed earlier. The magistrate having discovered that she had imposed an illegal sentence ought to have placed the matter before a judge for revision of the sentence.

14. In the circumstances of the case I find that the magistrate exercised powers she did not have. I find the proceedings relating to the sentencing of the Appellant irregular and a nullity. In the circumstances, the proceedings in so far as they relate to sentence are set aside so that a legal and proper sentence can be imposed.

15. In his mitigation the Appellant had prayed for forgiveness. The Appellant was charged for breaching Section 59(1) of the Prisons Act, Cap. 90. The punishment provided for the offence created by Section 59(1) is **"imprisonment for a term not exceeding six months or to a fine not exceeding two thousand shillings or to both such fine and such imprisonment."**

16. Although I have found the amendment of the sentence to have been unlawful, it is important to state that even if the trial magistrate had jurisdiction to review an already pronounced sentence, she proceeded on the wrong footing. There is nothing on record explaining why the trial magistrate found it necessary to impose both the maximum prison sentence and the maximum fine for a first offender who had sought forgiveness.

17. In paragraph 7.18 at page 21 of the Judiciary's Sentencing Policy Guidelines, it is stated that:-

> **"Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending."**

18. The factors to be taken into account when deciding whether to impose a custodial or a non-custodial sentence are listed in paragraph 7.19 on the same page of the guidelines. One of the factors to be considered is the criminal history of the offender. On this issue it is stated that:-

"Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentences in the absence of other factors impinging on the suitability of such a sentence. Repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstances."

19. Those are the principles the trial magistrate ought to have considered when sentencing the Appellant. She did not do so. She went ahead and gave the maximum sentence to a first offender without any justification as to why a non-custodial sentence was not appropriate in the circumstances of the case. It is appreciated by this court that the Appellant was sneaking into a prison 16 unregistered Safaricom sim cards which could have been easily used to commit crimes. A maximum fine of Kshs.2,000 is therefore grossly inadequate in such circumstances. However, it is upon the lawmakers to consider whether such a punishment is still adequate in this time and age when prisoners are using modern technology to coordinate the commission of crimes outside the prison walls. That notwithstanding, the sentencing principles required the trial magistrate to impose a non-custodial sentence.

20. Even if the revision of the sentence by the trial court was legal, and I have found that it was not legal, the same was reached in total disregard of the sentencing principles. One of the grounds upon which an appellate court can interfere with a sentence imposed by the trial court is where, like in this case, the sentence is imposed in contravention of the principles of law. The sentence being the maximum sentence and being imposed on a first offender was harsh in the circumstances of the case.

21. The outcome of this appeal is that the same succeeds to the extent that the sentencing proceedings are quashed. The conviction is however sustained. This court has an obligation to impose the proper sentence.

22. The Appellant had served 16 days imprisonment before being released on bond pending appeal. For an offence which attracts a fine of Kshs. 2,000, that punishment is sufficient and adequate in the circumstances of the case. I find the 16 days served by the Appellant prior to his release on bail pending appeal to be sufficient punishment. He is therefore a free man and the cash bail he deposited in this Court in order to secure his freedom awaiting the outcome of this appeal will be refunded to him.

Dated and Signed at Nairobi this 6th day of May, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 13th day of June 2019

R. Nyakundi,

Judge of the High Court