Kavete v Republic (Criminal Appeal 78 of 2018)
[2019] KEHC 12494 (KLR) (10 July 2019) (Judgment)

Neutral citation: [2019] KEHC 12494 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 78 OF 2018

DK KEMEI, J

JULY 10, 2019

BETWEEN

MUNYAO KYALO KAVETE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence of Principal Magistrate Court at Kithimani in Criminal Case No. 1759 of 2016)

JUDGMENT

1. The appellant was arraigned in court jointly with 2 other accused persons before the Senior Principal Magistrate's Court at Kithimani with one offence namely:

   Count1

   Stealing motor vehicle contrary to section 278(a) of the *Penal Code* whose particulars were that on the 19th of December, 2016 at Matuu Township in Yatta Sub-county within Machakos County jointly stole a motor cycle registration number KMDV 895G Make Haojin valued at Kshs 95,000/- the property of William Kumukeka Matieka.

2. The appellant was arraigned before the trial court on 23.12.2016 where the count was read, explained and he subsequently pleaded guilty to the charge.

3. The learned trial magistrate upon complying with the procedure and prosecution presenting the facts on each count proceeded to convict appellant on his own plea of guilty. The appellant was sentenced to two years imprisonment.

4. The appellant appealed to this court in a petition dated 17.7.2016 seeking an order of consolidation of the counts from 3 to one and that there be review of the sentence.

5. It is evident from the record in respect of Cr. Case No. 1759 of 2016 held at Kithimani Senior Principal Magistrate's Court that there was only one count in the charge sheet and the trial and indictments were heard and determined with appropriate orders on sentences made by the trial court in respect of the said count.

6. The appellant on appeal submitted and relied on the provisions of Section 37 of the *Penal Code* that the sentence be consolidated and reduced. In his submissions the appellant drew the attention of this court that he was sentenced to 6 years. The prosecution conceded to the appeal.

7. The issue for determination in this appeal is for this court to exercise discretion and order consolidation of sentence imposed in Cr. Case No. 1759 of 2016 to run concurrently with other sentences imposed by the same court in 1758 and 1760 of 2016. His main ground being that he is remorseful and repentant and now saved and thus a consideration for this court to set aside the sentence; would it be a relief in view of the circumstances he finds himself in.

8. This being a first appeal I am duty bound to evaluate the record so as to satisfy myself that the plea of guilty was taken in a proper manner. The trial court convicted the appellant on his own admission upon the charge and facts being presented by the prosecution.

9. I have perused the record and applying the legal principles in the case of Adan v Republic[1973] EA 445 do find that the plea taken by the trial court was unequivocal. I am further guided by the provisions of Section 348 of the *Criminal Procedure Code* Cap 73 of Laws of Kenya. It provides as follows:

> " No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence."

10. I find no reason to interfere with the order on conviction and in any event the same is not in issue in so far as this appeal is concerned.

11. The appellant filed this appeal seeking to invoke the court's jurisdiction to revise the sentences imposed by the trial court against him. He seeks the court's leniency in exercising discretion and urges the court to allow him to serve the concurrent sentences with other ongoing custodial sentences not in issue and whose court record is not in this court. The appellate jurisdiction to interfere with sentence imposed by the trial court is always limited and there are very clear circumstances to warrant intervention.

12. The principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogolla & S/O Owuor v Republic [1954] EACA 270 where the court stated:

> " The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v Republic [1950] EACA pg 147, it is evident that the judge has acted upon wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."

13. In the case that the appellant cited of Shadrack Kiproech Kogo v Republic CR. AppealNo. 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 that a wrong principle was applied or that short of those, the sentence itself is so excessive and therefore an error of principle must be inferred."

14. The appellant has urged that the sentences be consolidated or be set aside all altogether. From the evidence before the court, the provisions of the law under which the appellant has been charged and convicted gives the following respective punishments:

> " Count 1: Stealing motor vehicle contrary to section 278 (A) if the *Penal Code*.
>
> The offender is liable to imprisonment for 7 years.

15. I note that the legality of the sentence imposed against the appellant has not been challenged. The court is not able to determine whether the appellant committed more than one offence in the same transaction and from what is available the trial court sentenced the appellant to 2 years out of the possible (7) years imprisonment and because there is no material deduced from the record or memorandum of appeal to dissuade this court that the 2 years was manifestly excessive as to occasion an injustice.

16. The appellant's appeal seems to allude to other offences which he seeks this court to consolidate the sentences. However this court has not been furnished with the relevant records for perusal. The only lower court file from Kithimani courts is SPM Cr case number 1759 of 2016. It would seem that the appellant might have confused some facts and it is highly likely that his appeal could have been a case of a copy and paste job hurriedly prepared by other persons not the appellant himself. Be that as it may this court notes that the appellant's co-accused in the case were later acquitted after the complainant withdrew the complaint. It would then appear that it is the appellant who was left with the baby so to speak as he is the only one who went to jail. Even though the appellant pleaded guilty to the charge unlike his colleagues, he should now be given a chance to enjoy his freedom like his colleagues. Already the appellant has served close to nine months in jail. As his colleagues are now enjoying their freedom, I find it is fair and just that the period already served be deemed as sufficient punishment for the crime committed by the appellant herein.

17. In the result I find the appellant's appeal has merit. The same is allowed. The sentence of two years imprisonment is hereby substituted with the period already served. The appellant is set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 10TH DAY OF JULY, 2019.

D. K. KEMEI

JUDGE