



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 44 OF 2018**

**JUMA OMALLA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence in Kwale CM CR. Case No. 1131 of 2016 (Hon. P. K. Mutai RM)**

**delivered on 4/5/2017)**

**J U D G M E N T**

1. **Juma Omalla (“the Appellant”)** was charged with the offence of stealing a motor vehicle contrary to **section 278 A of the Penal Code**. It was alleged that on the night of 24<sup>th</sup> and 25<sup>th</sup> December, 2016 at unknown time at Ukunda Township of Kwale County, the appellant with others not before court stole a motor vehicle, make Toyota hiace matatu registration number HCH 184 L valued at Kshs.2,720,000/- the property of Joshua Muthuri Kirianki.

2. The appellant also faced two other counts of handling the said motor vehicle contrary to **section 322 (1) (2) of the Penal Code** and fraudulent imitation of motor vehicle number plates contrary to **section 114 (1) of the Penal Code**.

3. The appellant denied the charges but after trial he was found guilty and sentenced to serve 7 years imprisonment. He has now appealed to this court against the sentence.

4. On 20/6/2019, the appellant lodged a mitigation of appeal and abandoned his challenge on conviction. In support of his appeal, the appellant submitted that he was in custody during his trial as he could not afford to raise the bond; that he had so far served 30 months in custody; that he was now remorseful and the sole breadwinner of his family and that the period he was in custody was not considered by the trial court at the time of passing his sentence. He prayed for a non-custodial sentence.

5. The prosecution opposed the appeal. Learned Counsel **Mr. Mulamula** submitted that the offence for which the appellant was convicted attracts a maximum sentence of 7 years. That his mitigation was considered by the trial court; that the purpose of sentencing is both retributive and rehabilitative. That the sentence meted out was neither excessive save that this court should take into account the time spent in custody during trial.

6. The appellant was charged with three counts of stealing motor vehicle, handling stolen property and fraudulent imitation of motor vehicle number plates as set out above. While it is expressly clear from the judgment that the appellant was convicted on count 1, it is not so with count 3. The judgment stated:-

***“The 2<sup>nd</sup> accused was found in possession. He was working on body works. The first work of changing number plate had been completed. There is clearly evidence therefore that the 2<sup>nd</sup> accused fraudulently imitated motor-vehicle number KBZ 489W. The 2<sup>nd</sup> accused is convicted under section 215 of the Criminal Procedure Code”.***

7. The conviction does not specify whether it was for count 1 only or for both counts 1 and 3. Further, it was contrary to section 169 of the Criminal Procedure Code. The error however, is curable under section 382 of the Criminal Procedure Code and it did not prejudice the appellant. Since there was no appeal on conviction, I will not disturb that part of the judgment. However, I have raised this because when it came to sentencing the, the trial court only gave one sentence of 7 years.

8. **Section 278A of the Penal Code** provides:-

***“If the thing stolen is a motor vehicle within the meaning of the Traffic Act (Cap. 403), the offender is liable to imprisonment for***

seven years”

9. On the other hand, *section 333 (2) of the Criminal Procedure Code, Cap 75 Laws of Kenya* provides:-

**“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed**

**to commence from, and to include the whole of the day of, the date of which it was pronounced, except where otherwise it is provided in this Code.**

**Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody the sentence shall take account of the period spent in custody”.**

10. It is not in dispute that the appellant was first arraigned in court on 29/12/2016. He remained in custody throughout the trial until he was sentenced on 29/12/2017. He had been in custody for an entire year.

11. When sentencing the appellant, the trial court meted out the maximum sentence as provided for under the law. I am alive to the fact that sentencing is in the discretion of the court. It cannot be disturbed on appeal unless it is shown to be excessive, unlawful or illegal. **(See Arthur Muya Muriuki v. Republic [2015] eKLR).**

12. Although the trial court indicated that it had considered the appellant’s mitigation, it nevertheless meted out the maximum sentence provided under the law. It did not consider the fact that the appellant was a first offender and that he had been in custody throughout his trial. That was contrary to *section 333 (2) of the Criminal Procedure Code* and to the *Kenya Judiciary Sentencing Guidelines, 2016*.

13. For the foregoing reasons, I will interfere with the sentence. I will set aside the sentence of 7 years meted out by the trial court and substitute therefor with a sentence of 4 years. The sentence will run from the date the trial court first sentenced the appellant.

**DATED** and **DELIVERED** at Mombasa this 6<sup>th</sup> day of September, 2019.

**A. MABEYA**

**JUDGE**