



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 49 OF 2018

(From original conviction and sentence in Criminal Case No. 97 of 2018

of the Senior Principal Magistrate's Court at Wangu'ru).

ABDALLAH JUMA NJOROGE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellant Abdallah Juma Njoroge was convicted for the offence of Trafficking in Narcotic Drugs contrary to **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994** and sentenced to serve Five years in jail. He was also convicted for the offence of having or conveying suspected stolen property contrary to **Section 323 of the Penal Code** and sentenced to serve Two years in jail. The sentence was ordered to run consecutive (sic).

2. The appellant was dissatisfied with the both conviction and sentence and filed this appeal. However, when this appeal came for directions, the appellant applied to withdraw the appeal. He urged the court to consider the appeal on the sentence. He prayed that the court do order the sentence to run concurrently.

3. The State did not oppose the application. The appeal was marked as withdrawn. This is the ruling on an application by the appellant to order the sentence run concurrently.

4. The brief circumstances of this case are that on 20/2/2012 the appellant was arrested by No. 2008048507 APC Boniface Lifuthi (PW-2-) and No. 208351 Senior Sergeant David Kiiru (PW-2-) Police Officers from Kutus AP Post who were on patrol. Upon being searched, 53 ½ rolls of cannabis were recovered on the loop of his belt on the left side packed in a black polythene bag. The police decided to go to his house and conduct a search.

5. Police recovered a bag under the bed and inside they recovered one bundle of cannabis, a rolling flag, two bags of rolling papers and two pen knives. Police also recovered one flat screen TV and Power plug, Sonaya Sub-woofer and three speakers which police suspected to be stolen as the accused had no receipts to prove ownership. The appellant was then charged.

6. The issue before me now is sentencing.

The Court of Appeal in the Case of **Nelson –v- Republic 1970 E.A** which followed **Ogola Son of Ounora –v- R (1954) E. A CA 270** stated the circumstances under which an appellate court will interfere with the sentence. It stated:-

*“The principle upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with discretion exercised by the trial Judge unless as was said in **James –v- Rex (1950) 18 E. A. C. A 147** it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third (3rd) criterion, namely that the sentence is manifestly excessive in view of the circumstances of the case.”*

In **R –v- Shershewaty (1912) C.C.A 287.LR 364”**.

7. A Judge exercise discretion when passing sentence. The appellate court will only interfere with the exercise of that discretion if the trial magistrate acted on some wrong principle, overlooked some material factors or that the sentence was manifestly excessive.

8. The Judiciary has put in place the sentencing policy guidelines which should now as far as possible guide the courts when sentencing those convicted. These policies are proportionality, equality, uniformity, consistency and impartiality and others.

9. General rules on sentencing where one is charged with two or several counts and is convicted there must be a separate sentence for each offence. Omni bus sentences are illegal.

10. **Section 14 of the Criminal Procedure Code** provides for sentence in cases of conviction of several offences at one trial, the sentence consisting of imprisonment shall commence, the one after the expiration of the other in the order the court may direct. The court exercises discretion to order the sentence to run concurrently. In exercising that discretion the guiding principle and as a general rule, sentences relating to offences committed in the same transaction should be served concurrently. The Court of Appeal in the case of **Peter Mbugua Kabui –v- R. Cr. Appeal No. 66/2015** stated that:-

“As a general principle the practice is that if an accused person commits a series of offences at the same time in a single act/transaction, a concurrent sentence should be given. However, if separate and distinct offences are committed, in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

11. What determines whether to order the sentence to run concurrent is the circumstances of the case and whether the offences were committed in the same transaction. **Section 7(1) of the Criminal Procedure Code** provides that:-

“a subordinate court of the first class held by a Chief Magistrate, Senior Principal Magistrate, Principal Magistrate or a Senior Resident may pass a sentence authorized by law for any offence triable by the court.

In addition **Section 12 of the Criminal Procedure Code** provides that:-

“Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.”

12. In this case the trial Magistrate passed the sentence(s) which is provided under the law. The appellant has not challenged the sentence on any of the principles laid down in the case of **Ogola –v- Owuor (supra)**. He seeks the discretion of this court to order the sentence to run concurrently.

13. The offences for which the appellant was convicted were committed in the same transaction. The trial Magistrate ought to have applied the general rule on sentencing the appellant of the offences committed in the same transaction. Since she did not I have to interfere with the sentence.

I order as follows:-

1. The application has merits.
2. The order for the sentence to run consecutively is set aside.
3. I order that the sentence imposed by the trial Magistrate shall run concurrently from the date of the sentence.

Dated at Kerugoya this 6th day of November 2019.

L. W. GITARI

JUDGE