REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL REVISION NO. 1 OF 2019

ALI MOHAMED MWANGO.....APPLICANT

VESRSUS

REPUBLIC.....RESPONDENT

(Being a revision to the appeal on sentence in Criminal Case No. 326 of 2011 determined on 23.12.2011 by Hon. Lucy Gitari)

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Accused present in person

JUDGEMENT

A charge of robbery with violence contrary to Section 296 (2) of the penal code was brought against the applicant on 30th May 2011. The brief particulars of the charge were that on the 15th May 2011 at Majengo Mapya in Malindi District within Kilifi County, being armed with a dangerous weapon namely a knife robbed **Benson Mumo David** of his four loaves of bread and cash Kshs.7,000/= all valued at Kshs.7,180/= and at or immediate before or immediately after the time of robbery threatened to use actual violence against the said **Benson Mumo David** using the knife.

The appellant denied the charge and pursuant to Section 107 (1) of the Evidence Act, the prosecution summoned four witness in support of the charge. It was the prosecution case that on 15.5.2011 at Majengo Mapya a shop owned by (PW 1) the appellant set out while armed with a knife and robbed (PW 1) of 4 loaves and cash totaling Kshs.7,180/=. That during executing the robbery, appellant threatened the use of force against the complainant.

Festus Mwara Daudi PW 2, also testified that on 15.5.2011 while at Majengo Mapya he saw the appellant armed with a knife entered in 1 shop where he forcibly stole 4 loaves and cash Kshs.7,000/=. PW 2 further testified that he was unable to apprehend the appellant for fear that he will attack them in reiteration.

PW 3 Kazungu Charo view was also at the shop of (PW 1) on the material day when one recognized the appellant enter inside and with use of force stole 4 loaves and cash Kshs.7,000/=.

PW 4 stated that the appellant started taking flight within the building immediately after the robbery. As they were exposed to a likelihood of injury from the appellant who was armed with a knife.

The appellant was placed on his defence where he denied any involvement with the robbery.

After evaluating the evidence in a nutshell the Learned trial Magistrate established that the prosecution proved its case against the appellant beyond reasonable doubt. The charge having been proved the appellant was found guilty, convicted and sentenced to 15 years imprisonment.

The appellant aggrieved with the order on sentence filed for revision to this court to consider whether it's appropriate to vary or substitute the sentence to a lesser period.

On consideration of the matter, I think it is now open to this court to appraise the facts and decide whether the sentence complained of was

excessive, punitive or lenient. It is also the duty of this court to consider whether the sentence has passed by a trial court is lawful and wrong in principle for the appellate court to exercise its appellate jurisdiction to interfere with the order on sentence.

The sanctity principles on this issue are to be found in the case of **Owuor S/O Ogola v R 1954 EACA 270** There is no better approach for an appellate court to interfere with sentence of a trial court other than within the following guidelines:

a. That the sentence was wrong in principle.

b. The sentence was either punitive, oppressive or manifestly excessive.

c. Inordinately low and erroneous.

The Court of Appeal, on its part, in **Bernard Kimani Gacheru v Republic [2002] eKLR** restated that:

> ***"It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the fact of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."***

The above cases outlined the threshold which every application either on appeal or revision must satisfy before an appellate court makes an entry to disturb an order on sentence.

Notably, there are key principles or factors to be taken into account by the trial court. Relying on the case of **Marcel Damien Quantre v R [2014] ScSc**

As a general proposition, I agree that the record must show that the trial court before sentencing took into account the following factors among others.

1. The nature of the offence.

2. The circumstances of the commission of the offence.

3. The personality of the accused person.

4. The age of the accused person.

5. The value of the property stolen

6. The prevalence of similar cases to the crime.

7. The previous record if any of the accused.

8. Interest of the public in protecting it from such crimes.

In this case, the appellant was arrested on 27.5.2011 and he took plea on 30.5.2011. The record indeed thus reflect the trial was commenced and appellant convicted and sentenced to 15 years imprisonment on 23.12.2011. Further, it is evident that the appellant was in remand custody as and until his conviction and sentence. Under Section 333(2) the Learned Magistrate ought to have given discount the seven months' period a fact which ought to have formed part of the sentence.

Applying the principles of this case **Marcel Damien Quantre v R [2014] ScSc** and the **Owuor S/O Ogola v R 1954 EACA 270** the aggravating factors of the offence, the mitigation and the appellant was stated to have stolen 4 loaves of bread and a cash of about Kshs.7,000/=. The Magistrate failed to factor the provisions of Section 333 (2) of the CPC and in doing so erred in principle which occasioned prejudice to the appellant.

Further, on review of this sentence, I take into account the mitigation which outweighs the aggravating factors of the offence in question on subject matter of the revision. The period the appellant has served in prison custody since his conviction, under the proportionality principle is an appropriate sentence for the offence. As a result the conviction stands affirmed whereas the application for revision succeeds to the extent of the period served.

Accordingly, the appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE