REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 41 OF 2019

(Consolidated with)

CRIMINAL APPEAL NO. 50 OF 2019

KENNEDY OMBAMBO.....1st APPELLANT

FRED WAFULA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the judgment and sentence of Hon D. Orimba (SPM) in Kangundo

SPMCC Criminal Case No. No. 130 of 2018 dated 23/08/2018)

JUDGEMENT

1. The two Appellants herein had been charged with an offence of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code with the particulars being that on the 8th day of November, 2017 at Matuu location in Matungulu Sub-County within Machakos County broke and entered a building shop of **Josphine Muli** and committed therein a felony namely theft.

2. The Appellants also faced a second count of stealing contrary to Section 279 (b) of the Penal Code. The particulars were that on 8 th day of November, 2017 at Matuu location in Matungulu Sub-County within Machakos County stole Safaricom cards, soap 1½ cartons, tea leaves 50gm Eden, 1 bag of sugar, 2 bags of rice 25 kg each, one crate of soda, 3 bundles of wheat flour, 3½ bundles of maize flour, I carton of cooking fat, 5 packets of cigarettes, 40 litres of cooking fat oil, 10 litres of paraffin, 4 dozen baking powder, 1dozen royco cubes, 1 dozen Movit all valued at Kshs.100,000/= the property of **Josphine Muli**.

3. The trial court later convicted the Appellants and sentenced them to serve **18 months** each in count one and **2 years** each in count two with the sentences running concurrently.

4. Both Appellants are aggrieved and have now appealed against sentence only. Their joint memorandum of appeal raises the following grounds:-

(a) That they are first offenders.

(b) That they are remorseful and repentant of the offence.

(c) That they seek for leniency and to be given a second chance in life.

5. The parties agreed to canvass the appeal vide written submissions. Both Appellants filed their submissions while counsel for the Respondent made oral submissions. The Appellants submissions mainly dwelt on the provisions of Section 333(2) of the Criminal Procedure Code and urged the court to order the sentence to run from the date of arrest. Reliance was placed in the case of **Ahamad Abolfathi Mohammed & Another –v- Republic [2018] eKLR** and **Musyoki Lemoya –v-Republic [2014] eKLR** where the Provisions of Section 333(2) of the Criminal Procedure Code were found to operate where accused persons had spent some time in remand custody during the trial.

Mr. Machogu learned counsel for the Respondent presented brief oral submissions. He submitted that the Appellants were arrested on 27/1/2018 and were later granted bond but they were not able to raise sureties. They were later sentenced to 18 months imprisonment in count one and two years in count two which were to run concurrently. Counsel pointed out that the Appellants were in custody for seven (7) months which should be factored.

6. I have given due consideration to this appeal. Both Appellants appear not to challenge the sentence imposed by the trial court as their only grouse is that the period spent in custody was not factored by the trial court. Learned counsel for the Respondent seems to agree with the Appellants request herein. Indeed sentencing is an exercise of discretion by a trial court and that an appellate court would not normally interfere with the same as a matter of course but with circumspection and with a judicious mind. The trial court considered the Appellants mitigation and the fact that they were not first offenders and also considered the nature and circumstances of the offence and came up with the sentences now complained of. The principles that an appellate court will act upon in exercising its discretion to interfere with a sentence imposed by the trial court are now well settled. In the case of **Kogo –v- Republic - Eldoret CR. A. No. 253 of 2003** the Court of appeal held as follows:-

> "***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 these the sentence itself is so excessive and therefore an error of principle and must be interfered with."***

Also in the case of **Ogola s/o Owuor –v- Republic [1954] EACA 270** the Court of Appeal for East Africa pronounced itself on the issue as follows:-

> "***The court does not alter sentence unless the trial judge has acted upon wrong principles or overlooked some material factors. To this end, we would add a third criteria namely that the sentence is manifestly excessive in view of the circumstances of the case."***

The charge sheet reveals that the Appellants had been charged with offences under Section 306(a) and 279 (b) of the Penal Code which attract sentence of imprisonment for 7 years and 14 years respectively. The trial court considered the Appellants mitigation and ordered them to serve 18 months and 2 years imprisonment on the counts respectively which were to run concurrently. From the submissions of both the Appellants and Respondent, it emerges that this court is now being asked to consider interfering with the sentence only to the extent that the same should factor the benefits provided by Section 333 (2) of the Penal Code which provides as follows:

> ***".....every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this code. Provided that where the person sentenced under Section (1) has prior to such sentence been held in custody the sentence shall take account of the period spent in custody."***

7. I have perused the record of the trial court and note that the Appellants were arrested on 27/01/2018 and though granted bond, none of them managed to post sureties and hence they remained in custody throughout the trial until the 23/08/2018 when they were sentenced. The trial magistrate said nothing about the period spent in custody by the Appellants during sentencing. Being guided by the above authorities, I am satisfied that the trial magistrate duly considered the Appellants mitigation. However, I find the trial court's failure to factor in the period spent in custody during the trial merits this court to interfere with the sentence. This court will be guided by the provisions of Section 364 (3) of the Criminal Procedure Code to ensure that it should not impose punishment greater than that given by the subordinate court. Looking at the circumstances of the case, I find the sentence imposed by the trial court is sufficient save only that the same should commence from the date of arrest namely 27/01/2018 as the trial magistrate did not consider the fact that the Appellants had been in remand custody for about seven months during their trial.

8. The upshot of the aforegoing observations is that the Appellants Appeal must succeed. As the sentence is to commence from 27/01/2019 and coupled with a period of remission, I find that the Appellants have already served the sentence. Consequently, the sentence by the trial court is hereby reduced to the time already served. The Appellants are hereby ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 12th day of November, 2019.

D.K. Kemei

Judge