REPULIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 67 OF 2017

SAMMY MBURU KAGUNDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence in Eldama Ravine Principal Magistrate's Court Criminal Case No. 967 of 2013 delivered on the 19th day of March, 2015 by Hon. R Yator, SRM]

JUDGMENT

1. The appellant was charged with the offence of stealing from a locked motor vehicle contrary to section 279(9) of the Penal Code. He was accused of stealing 1 motor vehicle tyre and 18 motorcycle tubes valued at Ksh.9,700/= on the nights of 6th and 7th November, 2013 at Eldama Ravine in Baringo County. The said items were the property of one James Maina Kihoro. The appellant and another are said to have accessed the goods by opening motor vehicle registration no. KBH 905P, a Toyota Corolla with a master key. At the close of the prosecution's case, the 2nd accused admitted that he was guilty and was convicted and sentenced to 5 years in prison on 19th March, 2015. Having admitted guilt, the appeal lodged is purely on his sentence as set out in section 348 of the Criminal Procedure Code. The appeal before the court is therefore **on the sentence** of 5 years imprisonment.

2. The appellant states that the learned trial magistrate failed to consider section 333 and 137I of the Criminal Procedure Code in meting out the sentence because the appellant had been in remand for one year and eight months as the case progressed.

3. Section 137I applies to the procedure on plea bargain and reads as follows:

> ***"137I. (1) upon conviction, the court may invite the parties to address it on the issue of sentencing in accordance with section 216.***
>
> ***(2) In passing a sentence, the court shall take into account –***
>
> ***(a) the period during which the accused person has been in custody."***

4. As regards the sentence of imprisonment, section 333 (2) of the Criminal Procedure Code provides as follows:

> ***"333(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 on which it was pronounced, except where otherwise 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."***

5. The appellant states that the sentence meted out was harsh and excessive and moreover, the learned trial magistrate failed to consider the appellant's mitigation that he was sickly and taking medication for Cancer and HIV. The appellant was charged under section 279 of the Penal Code where the sentence prescribed is 14 years imprisonment. A look at the judgment shows clearly that the Appellant's mitigation was heard and considered by the magistrate.

6. The Court of Appeal in ***Bernard Kimani Gacheru v. Republic*** **[2002] eKLR** stated 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 facts 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."

Remand Period

7. However, the provision of section 333 of the Criminal Procedure Code requires that the Court considers the period of remand. There is evidence from the record that the court did consider the remand period in sentencing the appellant.

8. The appellant was sentenced during the period between December 2014 and December 2015 when by Statute Law (Misc. Amendment) Act, 2014, the remission under section 46 of the Prisons Act had been removed before reinstatement by Statute Law (Misc. Amendment) Act, 2015. The appellant was arrested on 7/11/2013 and his trial concluded with the sentence on 19th March, 2015, and was therefore in pre-trial detention for a period of 1 year and 4 months. With remission, the sentence of 5 years would become 3 years and four months.

9. Although the 5 year sentence even in consideration of the fact of the Appellant's pre-trial detention cannot be termed as manifestly excessive, in view of the fact that the maximum sentence is 14 years and while it is clear that the reason she imposed that particular sentence was a deterrence for such crimes which were becoming rampant, there is no evidence that she considered the pre-trial detention in terms of section 333 of the Criminal Procedure Code and the fact that remission had during the period been removed. This court cannot rule out the possibility that the trial court labored under the mistaken belief that the appellant would be entitled to remission in the usual way.

10. If this court takes into account the period of 1 year 4 months pre-trial detention, the appellant will have been in custody for 4 years 8 months just four months shy of the full calendar period of the 5 year sentence.

Orders

11. Accordingly, for the reasons set out above, the appellant's sentence is reduced to the period of the sentence of imprisonment of 5 years already served (**3 years and four months as at 18th July, 2018)** so that the appellant is released from custody forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED THIS 19TH DAY OF JULY 2018

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia Ass. DPP for the Respondent.