



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL 126 OF 2013

JAMES NGUGI KAMANDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the judgment conviction in Criminal case No 3012 of 2012 at the Chief magistrate's court at Mombasa by Hon. A. K. Gachie (RM)

JUDGMENT

1. The Appellant, JAMES NGUGI KAMANDE, was charged with the offence of stealing a motor vehicle contrary to section 278 of the Penal Code.

2. The particulars of the offence were that;

“On the 8th day of October, 2012 at Bombolulu area in Kisauni District of the Coast Province, the appellant jointly with others not before court, stole a motor vehicle registration number KBL 68 E make Toyota Noar valued at Ksh 3,700,000/= the property of NOELA MWAKE MWARE NACY”

3. The appellant pleaded NOT GUILTY to the offence and the matter proceeded to full hearing whereby he was convicted and sentenced to serve six (6) years imprisonment on 12th day of July 2013.

4. That appellant, being aggrieved by the sentence, filed an appeal citing mitigation grounds upon which the same should be reduced or set aside; The grounds are;

1. That he never wasted courts time as he was remorseful;

2. That he is the sole bread winner of his family;

3. That he is a 1st offender;

4. That he was forced by circumstances to commit a felony;

5. That he is an orphan;

6. That he is HIV positive whereby being in custody will be bad.

5. When the appeal came up for hearing, the appellant indicated to court that he was not contesting the

conviction but was mitigating the sentence on the grounds cited above. He stated that he had so far served 3/4 of his sentence and prayed to have his sentence reduced or set aside so he could go and join his family.

6. M/s Mutua, learned state counsel opposed the appeal against sentence and submitted that the appellant was convicted under section 278 (c) of the penal code which provides for a sentence of seven (7) years imprisonment. She stated that the appellant was convicted and sentenced to serve six (6) years imprisonment after a lengthy trial where the prosecution proved its case against him. She urged the court to note that the motor vehicle in question was never recovered and the complainant suffered a lot of anguish. She urged the court to dismiss the appeal and let the appellant serve the remainder period.

7. In considering the appeal, I am guided by the holding in the case of OKENO VRS REPUBLIC (1972) E A 32 where it was stated that;

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantlal M Ruwala vrs R (1975) E A 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and in conclusion; it must make its own findings and draw its own conclusions. Only then, can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

8. In the instant case, the appellant not having challenged the conviction that was meted against him, I will not dwell on the evidence that was adduced and relied on for this.

9. In considering the appellant’s appeal, I find that he wishes to benefit from parole hence his mitigation that he is remorseful, a 1st offender, was forced by circumstances to commit the offence, is an orphan and is HIV positive.

10. It is worth noting that the appellant was convicted for the offence of stealing a motor vehicle contrary to section 278 of the penal code which states that;

“If the thing stolen is a motor vehicle within the meaning of the Traffic Act, the offender is liable to imprisonment for seven years”

11. Having been sentenced to serve six (6) years, I find the said sentence was within the prescribed period by the law. I also find that the trial magistrate considered the gravity of the offence, circumstances of the case and the appellant’s mitigation in passing the said sentence.

12. It is also worth noting that the High court can only interfere where there was failure of justice by the lower court in meting out an unlawful sentence against the appellant, which when the law is considered, it is out rightly wrong and illegal or where in considering the circumstances of the case, the sentence is manifestly excessive.

13. I wish to advise that the only institution with capacity to validate these claims is the prisons authority, which can use these grounds to recommend to the Advisory Committee on mercy for the President to exercise his power as established by Article 133 of the Constitution of Kenya, 2010.

14. The appeal is dismissed accordingly it is so ordered.

Judgment delivered, signed and dated this 25th day of January, 2017.

D. O .CHEPKWONY

JUDGE

In the present of :

M/s Ocholla for the state

Appellant in person

C/clerk - Constance