REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 7 OF 2016

DALMAS OMBOKO ONGARO…….APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

(***Appeal against conviction and sentence of Busia Chief Magistrate's Court in Criminal Case no. 2678 of 2015 by Hon. Hannah Ndung'u, Chief Magistrate***)

JUDGMENT

1. The Appellant, Dalmas Omboko Ongoro was on his own plea of guilty sentenced to serve six months imprisonment for the first count of creating disturbance in a manner likely to cause a breach of peace contrary to Section 95(1)(b) of the Penal Code and three years imprisonment for the second count of malicious damage to property contrary to Section 339(1) of the Penal Code. The trial magistrate ordered the sentences to run concurrently. He appeals against both conviction and sentence.

2. When the appeal came up for hearing on 11th July, 2016 the Appellant indicated that he would rely on his grounds of appeal and the submissions on record.

3. A perusal of the grounds of appeal filed on 22nd January, 2016 discloses that the Appellant is of the view that he did not commit any offence. He also asserts that the sentence imposed on him was harsh in the circumstances of the case.

4. In his submissions filed on 30th June, 2016, the Appellant appears to abandon his challenge to the conviction and concentrates on pleading for a reduction of sentence. He submits that the fact that he pleaded guilty to the offence ought to have been taken into account in passing sentence. He asserts that he is remorseful and has learnt his lesson. He further states that he committed the offence due to alcoholism, peer pressure and ignorance of the law.

5. Mr. Obiri for the State opposed the appeal in respect of the sentence for the second count but conceded that the sentence for first count was harsh as the maximum sentence had been imposed by the trial court. He stated that the sentence for the second count was reasonable and proper considering that the maximum sentence for the offence with which the Appellant is charged is five years imprisonment and he had been sentenced to serve three years imprisonment.

6. A perusal of the proceedings that took place before the trial court clearly shows that the Appellant was convicted on his own plea of guilty. The procedure for a conviction on a plea of guilty was followed by the trial court. The magistrate cannot therefore be faulted for the conviction. The Appellant was indeed wise in abandoning this ground of appeal as the same had no merit. The challenge on the legality and

regularity of the conviction therefore fails.

7. The other ground of appeal is whether the sentence imposed was proper. In **Bernard Kimani Gacheru v Republic [2002] eKLR,** the Court of Appeal summarized the remit of an appellate court on sentence as follows:

> **"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."**

8. Those principles which were extracted by the Court of Appeal from the decision of the Court of Appeal for East Africa in the case of **Ogola S/o Owuora v Reginum [1954] 21 E.A.C.A. 270** and that of the High Court in the case of **Wanjema v Republic [1971] E.A. 493** remains true to date. They will guide this Court in considering the appeal against the sentence.

9. In order to arrive at a conclusion that a sentence imposed by the trial court was harsh, the appellate court must have a basis for reaching such a conclusion. In my view, this Court has to consider whether the trial court properly applied the sentencing principles in imposing sentence.

10. The principles of sentencing were summarized at page 86 paragraph B of the **Judiciary Bench Book for Magistrates in Criminal Proceedings** (published by the Kenyan Judiciary in 2004) as follows:

> **"In determining what is the appropriate sentence to mete out, the Court has to consider such factors as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person, the fact that the maximum sentence is intended for the worst offenders of the class for which the punishment is provided, etc. (*Makanga v R. Criminal Appeal* No. 972 of 1983 (unreported)). The Court may also consider the value of the subject matter of the charge (*Mathai v R* [1983] KLR 442) and whether there has been restitution of the property by the accused (*Hezekiah Mwaura Kibe v R* [1976] KLR 118)."**

The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism.

11. In the case at hand, the magistrate had ordered for a probation report on the Appellant and the same was negative. A perusal of the probation report does indicate that the Appellant had been jailed twice before.

12. At this stage it is important to note that the information contained in a probation report on the previous records of an accused person should be treated with caution for two reasons. First, Section 142 of the Criminal Procedure Code, Cap 75 provides the procedure for proving previous convictions. The relevant part of that Section states:

> **"(1) In any trial or other proceeding under this Code, a previous conviction may be proved, in addition to any other mode provided by any law for the time being in force-**
>
> > **a) by an extract certified, under the hand of the officer having the custody of the records of the court in which the conviction was had, to be a copy of the sentence or**

order; or

b) by a certificate signed by the officer in charge of the prison in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered, together with, in either case, evidence as to the identity of the accused person with the person so convicted.

(2) A certificate in the form prescribed by the Minister given under the hand of an officer appointed by the Minister in that behalf, who has compared the finger prints of an accused person with the finger prints of a person previously convicted, shall be prima facie evidence of all facts therein set out if it is produced by the person who took the finger prints of the accused."

13. Secondly, and related to the first reason, is that an accused person is not given an opportunity to confirm or deny the alleged conviction. At pages 68 to 70 of the Judiciary Bench Book for Magistrates in Criminal Proceedings (supra) it is stated that:

"The procedure followed by the Court in assessing sentence is as follows:-

(i) After convicting the accused the Court will first call upon the prosecution to give a factual statement on the accused and in particular whether the accused has any previous convictions, and if so, the nature, date, sentence imposed, and the date when accused was also released from prison…. This information does not have to be given on oath.

(ii) The accused should then be given an opportunity to deny or qualify the information presented by the prosecutor and to state further facts in mitigation. When something alleged by the prosecution is denied or disputed, the Court should make a finding on its truth by following the normal procedure of a trial.

The prosecution must produce evidence on oath, which should be subjected to cross-examination. Further evidence to contradict the prosecution may be presented. In *Thathi v R* [1983] KLR 354 the High Court emphasized that previous convictions must be read to the accused who must be asked whether he or she accepts them. The accused must know what is alleged against him or her and have the opportunity to deny it. If the prosecution wishes to continue to rely on the previous conviction, evidence must be called to confirm them.

(iii) Where the prosecution alleges previous conviction, the Court should specifically ask the accused whether he or she admits or denies them and this should be noted in the record. Where the accused denies previous conviction, the conviction must be proved…."

14. In the matter at hand the probation report clearly recommended that a non-custodial sentence was not ideal for the Appellant. In imposing a custodial sentence, the magistrate acted correctly since a probation report should not be ignored without the reasons being stated in the court record. Therefore, the choice of three years imprisonment on the second count cannot be faulted as it was arrived upon after considering the Appellant's social background.

15. However, there is no explanation as to why the maximum sentence of six months imprisonment on the first count was imposed. As already stated, without taking the necessary steps, the magistrate could not have used the probation report to reach the conclusion that the Appellant had previous convictions. The prosecutor had already gone on record that the Appellant was a first offender. The Appellant ought to have been treated as such considering that he was not given an opportunity by the court to comment on the contents of the probation report. Considering the principles of sentencing already stated, a maximum sentence for the first count was too harsh in the circumstances. I would thus agree with the appellant and

allow the appeal on count one by reducing the sentence from six months imprisonment to three months imprisonment.

16. As for the second count, there is no reason for faulting the sentence imposed by the magistrate. The appeal in respect of the second count fails. As the sentences were correctly ordered to run concurrently, this decision does not change the fate of the Appellant as he is expected to serve three years imprisonment.

Dated, signed and delivered at Busia this 15TH day of Sept., 2016.

W. KORIR,

JUDGE OF THE HIGH COURT