



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Criminal Appeal No.17 Of 2016

(An appeal from original conviction and sentence of Kilgoris PM'S C Criminal Case No. 1487 of 2014 by Hon. M. MUNYENDO - SITATI RM dated 21st October, 2014)

PHILIP KINYAMAL SOIT - - - -APPELLANT

VERSUS

REPUBLIC - - - - RESPONDENT

JUDGMENT

1. The Appellant herein, **PHILIP KINYAMAL SOIIT**, was charged with 2 counts of stealing stock contrary to **Section 278 of the Penal Code**. The particulars of the 1st count were that between the nights of 15th and 16th October 2014, at unknown time at Osinoni Sub-Location in Transmara West District of Narok County, stole one cow valued at Kshs. 20,000/= the property of **RUTH NABARTUNI SITANY**.

2. The particulars of the 2nd count were that between the nights of 18th and 19th October 2014 at unknown time at Osinoni Sub Location in Transmara West District of Narok County, stole one cow valued at Kshs. 15,000/- the property of **GEOFFREY MARUMPI SHIRA**.

3. The appellant pleaded guilty on both counts and was accordingly convicted and sentenced to serve 5 years imprisonment on each count which prison terms were to run consecutively.

4. The appellant has now appealed against both the conviction and sentence and has set out the following grounds of appeal in his petition of appeal:

1. That the learned magistrate erred in law and fact in holding that the appellant was guilty on own plea when the facts to the charges were incorrect.

2. That the learned magistrate erred in law and fact in holding that the sentences should run consecutively.

3. That the learned magistrate erred in law and fact in failing to hold that the plea was equivocal.

5. At the hearing of the appeal on 15th September 2016, Mr. Moritat counsel for the appellant submitted that the plea was not unequivocal owing to the discrepancy in the dates of the offence as shown in the charge sheet and the date stated in the facts as read by the prosecutor. The appellant relied on the decision in the case of **Stephen Ouma Onyango vs Republic [2016] eKLR**.

6. Mr. Moritat further submitted that even if the plea was found to have been unequivocal, the court still erred in passing consecutive sentences in view of the fact that the alleged offences and the transactions leading to the appellant's arrest occurred at the same time. According to Mr. Moritat, the sentences ought to have run concurrently.

7. Mr. Otieno, counsel for the state opposed the appeal while submitting that the plea of guilty was unequivocal as the variance in the dates that the offences were committed as shown in the charge sheet and in the facts as narrated by the prosecutor was a mistake since the appellant confirmed the facts as true while adding that he indeed stole the cows in question.

8. Mr. Otieno added that Section 348 of the Criminal Procedure Code provides that on a plea of guilty, an appeal can only lie on the legality of the sentence and not on conviction. He submitted that the sentence passed on the appellant was lawful and cannot be said to have been harsh.

9. Mr. Otieno argued that Section 14 of the Criminal Procedure Code allows for consecutive sentences where two distinct offences have been committed as was the case in the instant appeal.

10. I have considered the petition of the appeal and the rivals submissions of both parties. This being a first appeal I am under an obligation to re-consider and re-evaluate the evidence tendered before trial court afresh with a view to arriving at my own independent conclusion. **See Okeno vs Republic [1912] EA 32.**

11. In the instant case however, the appellant pleaded guilty to both counts of stealing stock and therefore the prosecution did not have to call any witnesses to prove their case. Under the above circumstances therefore, this court will have to analyze the manner in which the guilty plea was taken in order to determine whether or not it was unequivocal.

12. In this appeal, 2 issues stand out for determination namely;

a. Whether the appeal of guilty was unequivocal.

b. Whether the consecutive sentences of 5 years imprisonment on each count was lawful

13. On the first issue regarding the guilty plea, the appellant contended that the same was not unequivocal because of the discrepancy in the date of the offence contained in the charge sheet and the date disclosed by the prosecutor while reading the facts of the case. This brings me to question whether the said discrepancy in dates was such that it vitiated the guilty plea. I have looked at the typed proceedings and noted that the said facts were stated as follows:

“Between 15th and 18th October 2014 at unknown time in Osinon Transmara West District, the complainant in this case Ruth Saitany and Geoffrey Shira on 10-10-2014, Ruth Saitany whose cow was stolen in the night of 15th and 16th October 2014 received information that the accused person who is his neighbor and serial stock thief was spotted driving a cow towards Magena.”

14. From the above extract of the facts of the case, it would appear that the 1st complainant received information about her stolen cow on 10th October 2014 yet the theft in question took place 5 days later on 15th and 16th October 2014.

15. I have looked at the hand written proceedings of the lower court and noted that the date 10/10/2014 is not clear as the digit 0 on 10 has been altered and appears as 8, 0 and 9 at the same time. One cannot therefore say with absolute certainty that the magistrate meant to write 10th, 18th or 19th October 2014.

16. It is my finding that this discrepancy in the dates which may be a typographical error on the part of the court, did not affect the appellant's guilty plea in any way. The dates that the crimes were committed

were clearly spelt out to the appellant in the facts of the case. The appellant was found red-handed in possession of the said stolen cows and his photographs taken with the cows were produced as exhibits. The appellant was very clear in his response to the said facts when he responded:

“The facts are correct. These are the cows I had stolen.”

17. In the case of **P. Foster (Hallege) Ltd vs Roberts (1978) 2 All ER 751, 754-755** it was held thus:

“For a plea to be equivocal, the defendant must add to the plea of guilty qualification which if true, may show that he is not guilty of the offence charged. The company had added no qualification to their pleas which were therefore unequivocal.”

18. In the case of **Adan vs Republic (1973) EA 445**, the steps to be undertaken in recording a guilty plea were stated as follows:

“When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused’s reply must of course, be recorded.”

19. In the instant case, the appellant admitted the charge and confirmed the facts as read to him to be correct. I find that in those circumstances, the plea was unequivocal, the existing error on the date on which the complainant received the information about the appellant notwithstanding.

20. I am convinced that the trial court took the plea in strict compliance with **Section 207 (2) of the Criminal Procedure Code** and in line with the principles of recording a guilty plea is set down in the celebrated case of **Adan vs Republic (supra)**.

21. The circumstances in the instant case are distinguishable from those in the case of **Stephen Ouma Onyango & Another vs Republic (supra)** as in the cited case, the appellant pleaded guilty to an offence committed on 1st June 2011 while the facts related to an offence allegedly committed on 1st July 2011. In the instant case however, the date the offence was committed as per the charge sheet was the same as the date shown in the facts.

22. Turning to the 2nd issue of the validity of the sentence passed on the appellant, the appellant argued that the sentences ought to have been concurrent and not consecutive.

23. **Section 354 (3) (b) of the Criminal Procedure Code** provides as follows:

“In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence.”

24. The principles guiding the court’s exercise of discretion to review or alter sentence were set out in the case of **Ogalo S/O Owuor vs Republic (1954) EACA 270** as follows:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly well established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a

different sentence and it will not ordinarily interfere with the discretion exercised by the trial judge unless as was said in James Vs Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.”

25. In the instant case, the appellant was charged and convicted of the two counts of stock theft contrary to **Section 278 of the Penal Code**. **Section 278 of the Penal Code** provides as follows:

“If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”

26. It was argued by the appellant that the two imprisonment sentences meted out on him should run concurrently and not consecutively.

27. Section 14 of the Criminal Procedure Code sets out the principles to be applied for sentences to run concurrently or consecutively as follows:

“(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—

(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.”

28. The general principle and practice of the courts has been that where an accused person commits a series of offences at the same time in a single act and/or transaction, a concurrent sentence should be given. In instances where separate and distinct offences are committed, in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

29. In the case of **Ngang’a vs Republic (1981) KLR 530**, the court held that concurrent sentences should be awarded for offences committed in one criminal transaction. Similarly, in **Ondieki vs Republic (1981) KLR 4320**, it was held that except in exceptional circumstances, if a person commits more than one offence at the same time in the same transaction, the sentence imposed ought to run concurrently.

30. In the instant case, I note from the particulars in the charge sheet that there are two offences of stock

theft alleged to have been committed by the appellant on different dates and against different complainants. The record however shows that the offences took place in the same sub-location and that the transaction that led to the arrest, charging and conviction of the appellant for the two offences was one transaction.

31. The appellant was found in possession of the two stolen cows on the same date and at the same time. It is therefore my finding that the trial court erred in imposing consecutive imprisonment sentences for the two offences.

32. Turning to the length of the prison term, I find that even though **Section 278 of the Penal Code** provides for a maximum sentence of 14 years imprisonment, I still find that the prison term of 5 years was still harsh and excessive in the circumstances of the case, considering the fact that the appellant pleaded guilty to the offences was reported to be a first offender, and high school student aged 18 years old. The stolen cows had also been recovered.

33. I accordingly allow the appellants appeal against the sentence only. His appeal against the conviction is dismissed. Consequently, I set aside the consecutive sentence of 5 years for each count of stock theft and substitute it with a sentence of 3 years for each count which sentences shall run concurrently from the date of his conviction in the trial court.

Dated, signed and delivered in open court this 9th day of November, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Appellant in person for the Appellant
- Omwoyo Court Clerk