



**REPUBLIC OF KENYA**  
**IN THE HIGHCOURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 89 OF 2013**

**LESIT, J.**

*(Being an appeal from sentence contained in the judgment of Hon. W. Ngumi (Ag. Senior Resident Magistrate) in the Principal Magistrates' Court at Makadara Criminal Case No. 245 of 2013 delivered on 24<sup>th</sup> May 2013)*

JAMES NGARUIYA KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGMENT**

1. The Appellant was charged with two counts of stealing from a person contrary to **Section 279(a)** of the Penal Code and one count of assault causing actual bodily harm contrary to **Section 251** of the Penal Code. The particulars of the offence on the first count were as follows:

**That on the 3<sup>rd</sup> day of February 2013 at about 4.30 a.m. at Githunguri Township in Githunguri District within Kiambu County, stole a mobile phone make Nokia T15 valued at Ksh. 2,800 the property of John Kamau Wangare from the person of the said John Kamau Wangare**

2. On the second count, the particulars of the offence were:

**That on the 9<sup>th</sup> day of February 2013 at about 10.45 p.m. at Githunguri Township in Githunguri District within Kiambu County, stole a mobile phone make Techno T20, wrist watch make citizen and Ksh. 2,400 all valued at Ksh. 4,700, the property of George Kinaru Moko from the person of the said George Kinaru Moko.**

3. On the third of count of assault causing actual bodily harm, it was alleged in the particulars of the charge:

**That on the 3<sup>rd</sup> day of February 2013 at about 4.30 a.m. at Githunguri Township in Githunguri District within Kiambu County, unlawfully and willfully assaulted Joseph Muchina Mugure thereby occasioning him actual bodily harm.**

4. The Appellant was convicted and sentenced to serve 6 years imprisonment on the first count, 4

years on the second count and 1 year imprisonment on the third count. The trial court ordered that the sentences for the first and second counts to run consecutively, while the sentences in respect of the second and third counts should run concurrently.

5. The Appellant now appeals to challenge the legality of the sentence meted by the trial Court. He states that the sentence was harsh and excessive. He urged this to consider his mitigation and grant him a non-custodial sentence for the remainder of the sentence served. The state opposed the appeal. Ms. Kimiri for the Respondent submitted that the sentence was lawful and not excessive in the circumstances.
6. The guiding principle on issues of sentencing is that it is a matter for the discretion of the trial court. An appellate court will normally not interfere with the lower courts exercise of discretion unless it is apparent that the trial court relied on a wrong principle of the law or has overlooked material factors, or where the court finds that the sentence is manifestly harsh and excessive. (See **Ogolla s/o Owuor v. Republic (1954) EACA 270, and Wanjema v. Republic [1971] E.A 494**)
7. In this case, the Appellant prayed for a non-custodial sentence urging the trial court to consider that he was young and had children and parents to support. He also urged that he had four years and 11 months to go to complete his sentence.
8. The Appellant was charged with three counts of offences. Where a person commits several offences at the same time in one transaction, the practice is that a concurrent sentence is prescribed for those offences.
9. **Section 14.** (1) of the Criminal Procedure Code provides as follows:

**“ 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 therefor 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.”**

10. I am aware of the decisions in **BMN v Republic Court of Appeal Criminal Appeal No. 97 of 2013 (2014) eKLR** where the court advocated that concurrent sentences can be called for where the accused is charged with several distinct offences. That does not remove the courts power to order for such sentences to run concurrently as section 14 of the CPC clearly sets out.
11. In the instant case, the offence in Count I was distinct, from the offences under Count II and III, the latter having been committed in one transaction. Therefore sentences in respect of Count I and II were ordered to run consecutively, while the sentence in Count II and III were to run concurrently. The Appellant is required therefore to serve ten (10) years imprisonment for these offences. I find that the trial court acted lawfully in directing how the sentences should run.
12. However in so doing, the Appellant will serve more than three quarters of the maximum sentence provided under the law for the offence of stealing from person. The offence of stealing from a person attracts a maximum sentence of fourteen (14) years while the offence of assault causing actual bodily harm is punishable with a maximum sentence of five (5) years.
13. The record shows that the Appellant was a first offender. He gave mitigation in which he pleaded for leniency on account of his youthful age and the dependants he has. In all fairness more than three quarters of the sentence for a first offender is not good exercise of discretion especially where there were no aggravating factors involved as in this case. Being a first offender, the sentence of ten years imprisonment in the aggregate was harsh in all the circumstances of the case.
14. For the above reasons, I find the sentence was excessive in all the circumstances of the case. I will allow the appeal by setting aside the sentences ordered and in substitution thereof sentence the Appellant to 3 and a half years imprisonment in count 1 and 2 and in count 3 to one years imprisonment. The prison terms will run concurrently from date of sentence in the lower court.

**DATED AT NAIROBI THIS 4<sup>th</sup> DAY OF JUNE 2015**

**LESIIT, J.**

**JUDGE**