REPUBLIC OF KENYA

Thuo v Republic

Court of Appeal, at Nakuru September 24, 1985

Hancox, Nyarangi JJA & Platt Ag JA

Criminal Appeal No 126 of 1984

(Appeal from the High Court at Nakuru, Masime J)

September 24, 1985, Hancox, Nyarangi JJA & Platt Ag JA delivered the following Judgment.

The appellant Evanson Thuo has appealed a second time in each of two cases, and his appeals Nos 126A and 126B of 1984 have been consolidated.

In each case the appellant pleaded guilty to burglary and theft. In No 126A he was sentenced to five years imprisonment and to suffer two strokes of corporal punishment, while in No 126B he was sentenced to five years imprisonment together with ten strokes of corporal imprisonment. The result was that the appellant would undergo ten years imprisonment and twenty-four strokes of corporal punishment. That is so because the charges in each case fell under Section 304(2) of the Penal Code as far as the first limb is concerned, and Section 279 (5) of that code on the second limb. In each of these sections the punishment prescribed is a period of imprisonment together with corporal punishment. The learned magistrate therefore was obliged to impose corporal punishment on each limb of the offence in each case. But that meant that he would be liable to a potentially higher maximum of corporal punishment, than if simple theft had been charged in either or both of the cases, as section 275, carries with it a term of imprisonment.

It is in this aspect of these appeals that the question of law lies, which the appellants had asked the High Court to consider on first appeal. It must be said that section 304(2) of the Code contains all the power to impose corporal punishment that the Magistrate needed, without imposing further strokes on a second limb. However we cannot say that he exceeded his total powers as laid down in section 7 of the Criminal Procedure Code in imposing twenty-four strokes. But this course of accumulating strokes on each limb in several cases may sometimes lead to an unfortunate result.

The learned judge dismissed the first appeal summarily. Looking at the grounds of appeal before him, although there is a reference to his conviction, nevertheless it was the consecutive nature of the sentence which the appellant put forward for consideration. For instance in No 126A, the appellant stated that five years imprisonment plus two stokes of the cane on each limb to run concurrently with the term in Criminal Case No 2679 of 1983 was very excessive. In appeal No 126B the appellant said that 5 years imprisonment with 20 strokes was excessive. The question of imprisonment of each limb of the charge can be dealt with by concurrent terms, but corporal punishment is not subject to concurrent orders.

It is clear that the appellant was attacking the imposition, firstly, of consecutive terms of imprisonment imposed in these two cases, and secondly, the number of strokes increased by charging the second limb under section 279(b) of the code. On the first point, the two offences were separated by several months. It was not wrong in law for consecutive terms to be imposed. On the second point, it might be contrary to sentencing principle to impose strokes twice for the one fact common to both limbs that it was a dwelling-house that was into.

It is therefore manifest that the appellant was not complaining against severity of the sentence simpliciter, which would bring the cases clearly within the judge’s powers under section 352(2), but because the two custodial sentences were consecutive and that the corporal punishment was cummulative. The imprisonment may have been proper, and Mr Etyang, for the state has said that it was because the

offences were separated by a period of time. But the Appellant was by reason of the summary rejection not heard on that aspect of the case. Had the appeals been before the judge at the same time it is quite probable that he would have admitted them to hearing at least on the issue of corporal punishment.

Sentence is clearly not a matter falling for this court to determine within its powers under section 362 of the Criminal Procedure Code. But for the reasons stated the records are remitted to the High Court to hear and determine the first appeals, the summary dismissal of them being hereby set aside, in consequence of section 361 (2) of the Criminal Procedure Code, and with the direction that the materials in the circumstances of the case raised issues for determination on the appeal especially with regard to the charges on the second limb, resulting in the accumulation of strokes. 