



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & KANTAL, J.J.A)

CRIMINAL APPEAL NO. 48 OF 2017

BETWEEN

GMB.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 17th June, 2015

in

HC.CR. Revision No. 16 of 2015)

JUDGMENT OF THE COURT

Whatever his current character may be, the record of this appeal shows that on 8th June 2012, the appellant **GMB** was an audacious con artist and a clever thief. On that day, he came up with a simple but devastating ruse. Holding himself out as a Doctor Nyamweya working with the Kenya Medical Research Institute (KEMRI), he boldly strode into the premises of Nairobi Aviation College at Kahawa House. There, he spun the altogether believable tale that he was offering internships at KEMRI and requested a group of students to accompany him there.

Soon, an excited group of six students were aboard the appellant’s vehicle minibus Registration Number KBJ 910R bearing the name of Kimisa Sacco, while armed with a pen and a laptop computer each, as he had instructed them. On getting to the site of the promised internship, the six hopefuls were instructed to disembark from the minibus and go into a building, while leaving their laptops in the bus. They dutifully did so but, while they were in the building, the appellant got into the van, took hold of the laptops, transferred them into a salon car, and drove off.

When the students returned to find the appellant gone and with him their laptops, the reality dawned on them that they had been duped and stolen from, which they reported to the Central Police Station.

The appellant was eventually arrested and charged with 6 counts of stealing contrary to **section 268** as read with **section 275** of the **Penal Code**. To his credit, he entered no contest to the charges readily admitting them and accepting as true the facts read to him, whereupon he was convicted on his own guilty pleas to all six counts.

Even though he declared himself remorseful and reformed, and had led a reflective life while in prison, where he had gotten saved and became a spiritual leader and sought leniency as he was on Anti-Retro-Viral (ARV) treatment, the trial magistrate was unimpressed. Terming him a smooth talking individual who twice took advantage of young people by dangling the false mirage of internship to entrap and steal their laptops, she found him undeserving of mercy and sentenced him to a fine of **Kshs. 50,000** for each count thus totalling **Kshs. 300,000**. In default he was to serve 3 years imprisonment for each count. And the sentences were to run consecutively.

Stunned and aggrieved by that turn of events which saw him facing an 18-year jail term in prison, the appellant first sought revision at the High Court. He pleaded remorsefulness, and reform. He bemoaned a litany of ailments and the suffering of his family as a consequence of his incarceration and sought a non-custodial sentence.

All that did not find favour with Kimaru, J. who, by a ruling dated 7th June 2015, declined to interfere with the sentence, which he found to have been in the discretion of the trial magistrate and properly exercised. The Judge also held that the non-recovery of the stolen laptops

militated against a favourable finding and was unpersuaded that the appellant had turned a new leaf. He dismissed the revision application.

Further aggrieved, the appellant has filed this appeal in which he complains, in the main, that the learned Judge erred in not considering and ordering that the sentences should have run concurrently seeing as that the appellant was first offender; and not considering that his mitigation was not considered, in contravention of various provisions of the **Criminal Procedure Code**.

When we heard the appeal virtually due to the Covid-19 Pandemic, the appellant appeared in person and reiterated those complaints. He pleaded with the Court to find that he had reformed in the 7 years he had been in prison, and to show mercy to him given that his wife fled and left their 3 children in the care of their grandfather. He pledged to be a good citizen and a role model committed to nation-building were he to be released.

For the Republic, learned Counsel **Mr. O'Mirera** contested the very competency of this appeal on the ground that as it relates, according to him, to severity as opposed to legality of the sentence imposed, then by dint of **section 361 (1)** of the **Criminal Procedure Code**, a second appeal does not lie. He went on to state that the case had aggravating circumstances in that the appellant chose as his victims students and job-seekers.

We have given this appeal anxious and careful consideration. We agree with Mr. O'Mirera that a second appeal challenging severity of sentence cannot be entertained since the **Criminal Procedure Code** confines such appeals to matters of law only and severity of sentence is expressly declared to be a question of fact. But is the appeal herein really about severity of sentence? We respectfully do not think so.

What we are called upon to determine, which was also the matter before the learned Judge, is the propriety and legality of the consecutive term sentences imposed in the circumstances of this case. It is not in dispute that the offence of simple stealing attracts a maximum sentence of three years' imprisonment under **section 275** of the **Penal Code**. That would be the case whatever the thing stolen and whatever the value, number or amount. The differentiating factor would be whether the stealing occurred as a single, indivisible transaction or diverse and distinct transactions. The former would, in the eyes of the law, attract concurrent sentences while the latter could call for consecutive term sentences, all at the discretion of the court, though a reading of **section 14(1)** of the **Criminal Procedure Code** seems to suggest that the default position for distinct offences is consecutive sentences;

“(1) ...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 one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.”

(Our emphasis)

This is also in harmony with **section 12** of the Code which provides that a court may pass a lawful sentence *combining any of the sentences* it is authorized by law to pass.

We reiterate that an appellate court should interfere in sentences only when it is shown that the sentencing court acted on wrong principles; or overlooked material factors; or the sentence in itself is so manifestly excessive as to amount to an error of principle calling for interference. See **OGOLA s/o OWUOR vs. REPUBLIC [1954] EACA 270**; **SAYEKA vs. REPUBLIC [1989] KLR 306**.

Regarding the propriety of the consecutive jail sentences imposed on the appellant, it is enough for us to say that this Court has spoken quite clearly and consistently on what a court should consider before imposing consecutive or concurrent jail terms. In **BMW vs. REPUBLIC [2014] eKRL**, after making reference to the High Court decisions of **ONDIEK vs. REPUBLIC [1981]KLR 430** and **NGANGA vs. REPUBLIC [1981] KLR 530** as well as the former Court's judgment in **SAWEDI MUKASA c/o ABDULLA ALIGWAISA [1946] 13 EACA 97**, this Court pronounced that;

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act of transaction, a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the courts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”

We agree with that proposition which was also accepted and applied in **WILLIAM KIMANI NDICHU vs. REPUBLIC [2015] eKLR** which also had addressed the pivotal differentiating issue as follows;

“The former Court of Appeal had defined the phrase ‘same transaction’ in REX vs. SAIID NSUBAGA c/o JUMA & ANOR [1941] 8 EACA 81 and revisited it again in NATHANI vs. REPUBLIC [1965] EA 777, where the court said tht the proper construction of the phrase ‘same transaction’ is that;

‘If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effort as to constitute one transaction, that the offences constituted by these series of acts are committed in the course of the same transaction.’”

See also **PETER MBUGUA KABUI vs. REPUBLIC [2016] eKRL**. Looking at the facts of this case as stated by the prosecution and readily admitted by the appellant, it seems to us quite beyond contest that the theft of the six laptops was so proximate in time, impelled by the same streak of criminality and criminal intent, and occurred in one act of deceit and driving off, as to doubtless constitute *a single transaction*.

We think, with respect, that had the learned Judge and the trial court examined the case before them on the basis of the nature of the transaction, they would doubtless have arrived at the conclusion that it was a single transaction, which should have called for an order that the sentences run concurrently. That this critical aspect was not considered was a serious non-direction and omission amounting to an error of principle. It led to the imposition and maintenance of a sentence that was manifestly excessive and palpably prejudicial to the appellant, calling into question its legality and inviting our interference.

The result of our consideration of this appeal is that it is meritorious and we allow it. We set aside the order that the sentence in the six counts run consecutively and substitute therefor an order that the same run **concurrently** from the date the appellant was first sentenced.

Dated and delivered at Nairobi this 18th day of December, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR