



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIHARA KARIUKI (PCA), KARANJA & OTIENO-ODEK, J.J.A

CRIMINAL APPEAL NO. 66 OF 2015

BETWEEN

PETER MBUGUA KABUI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nairobi (Achode, J.) dated 21st May, 2014

in

H.C.C.R.A. NO. 316 of 2011)

JUDGMENT OF THE COURT

Peter Mbugua Kabui (appellant) was charged before the Thika Chief Magistrate's Court with three counts of sexual assault contrary to **Section 5(1)(b)(2) of the Sexual Offences Act No. 3 of 2006**. In the alternative, he was charged with three counts of committing indecent acts with a child contrary to **Section 11 of the Sexual Offences Act No. 3 of 2006**.

He pleaded not guilty to all the charges and the matter proceeded to full hearing in which the State called a total of eight witnesses, with the appellant making an unsworn statement of defence.

In her judgment rendered on 10th November 2011, the learned Magistrate convicted the appellant on two of the alternative charges, but acquitted him on the other counts. She then sentenced the appellant to ten (10) years imprisonment on each of these counts, and ordered that the sentences to run consecutively. It is important to note that the offences in question were said to have been committed on different dates against different complainants. Being aggrieved by the convictions and sentences, the appellant moved to the High Court on appeal.

The High Court (Achode, J), heard the appeal, and after re-appraising the evidence adduced before the trial court, found the two counts proved beyond reasonable doubt.

On the issue of the sentences running consecutively, the learned Judge found that as the incidents giving

rise to the offences in question were committed on different dates on different children, the learned trial Magistrate order was lawful and also justified. The learned Judge consequently declined to upset both conviction and sentence and dismissed the appeal.

The appellant has now moved to this Court on 2nd appeal. In his amended memorandum and grounds of appeal dated 9th February 2016, the appellant stated that:-

“I would like to amend the previous/earlier grounds of appeal, basically in the issue of sentencing but not severity of the imposed sentence under section 361(1) plain and (2) stated (sic).”

Asked to explain what he meant by this statement, the appellant told the court that he was not challenging either the conviction or the sentence. His appeal, he emphasised, was only on the issue of whether the sentences should run consecutively. In his written submissions which he tendered to Court, he states that both courts below failed to comply with the provisions of **Section 12 and 14 of the Criminal Procedure Code**.

His plea to this Court is that we make an order that the two sentences run concurrently, and further that we order that the sentence takes into account the period the appellant spent in remand.

In response to these submissions, Mr. Kivihya, learned Assistant Director of Public Prosecutions opposed the appeal primarily on the basis that the complainants were different and the offences were committed on diverse dates. He urged us to dismiss the appeal.

We have considered these able submissions along with the applicable law. It bears repeating that this is a second appeal and that being so, this Court can only entertain points of law. (See **Chemagong vs. Republic [1984] KLR 213** and **Reuben Karari s/o Karanja vs. Republic 17 EACA146**).

We also reiterate that pursuant to **Section 361(1) and (2) of the Criminal Procedure Code**, severity of sentence is a question of fact. The appellant herein does actually appreciate that position in his written submissions. His plea, however is that the sentences be made concurrent instead of consecutive as they stand now. The gist of this appeal is therefore whether the sentences meted on the appellant ought to run concurrently and not consecutively.

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court are now old hat. The predecessor of this Court, in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263).” See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)”

In the more recent case of **Kenneth Kimani Kamunyu -vs- R. (2006) eKLR**, this Court reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

In the instant case, it is not in dispute that the appellant was charged with several separate counts under the **Sexual Offences Act**. Upon conviction, the trial court sentenced the appellant to 10 years

imprisonment on each count and directed the sentences to run consecutively. The issue for our determination is whether the sentence meted out to the appellant is illegal or unlawful, harsh or excessive as provided for under the ***Sexual Offences Act*** or in any other statute. For us to make a determination of this issue, we hereby explore the relevant statutory provisions and case law on the subject.

Section 12 of the Criminal Procedure Code stipulates that:-

“Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.”

Section 14 of the Criminal Procedure Code provides for circumstances in which a court can direct sentences to run concurrently or consecutively. **Section 14** provides in

part as follows:-

“(1) Subject to sub-section (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.

- 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 less or***
 - b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.”***

Section 7 (1) of the Criminal Procedure Code stipulates that:-

- a. a subordinate court of the first class held by a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.***
- b. a resident magistrate may pass any sentence authorized..... or under the Sexual Offences Act.***
See also the High Court decision in **Ali Abdi Shabura –v- Republic- H.C.CR.A No. 90 of 2007.**

In the case of **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97**, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

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/transaction a concurrent sentence should be given. However, if 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.

In the instant case, the offences were not committed at the same time and in the same transaction; they occurred on diverse dates. Furthermore, the acts complained of were perpetrated against different complainants. Thus we find that the trial court and the High Court did not err in directing or ordering a consecutive term of imprisonment for the conviction in the two counts.

It is our considered view that the exception in **Section 14 (3) of the Criminal Procedure Code** is inapplicable to this case in light of the provisions of **Section 7 (1) of the Criminal Procedure Code**. We further observe that **Section 14 of the Criminal Procedure Code** stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totaling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful? We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same.

This is one case which in our view the sentence meted out was commensurate with the offences committed by the appellant.

In sum, having considered the grounds of appeal raised by the appellant, and the rival submissions of the appellant and the learned Assistant Director of Public Prosecutions, *vis a vis* the law applicable, we find this appeal devoid of merit, and the same is hereby dismissed.

Dated and delivered at Nairobi this 11th day of March, 2016.

P. KIHARA KARIUKI, (PCA)

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR