IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 344 OF 2006

KENNEDY INDIEMA OMUSE …….....…… APPELLANT

AND

REPUBLIC …….....RESPONDENT

(Appeal from a judgment of the High Court of Kenya

at Kitale (W. Karanja, J.) dated 4th December, 2006

in

H.C.CR.A. NO.4 OF 2005)

****

JUDGMENT OF THE COURT

The appellant herein, ***KENNEDY INDIEMA OMUSE,*** was jointly charged with two others before the Senior Principal Magistrate's Court at Kitale on the following five counts:-

1. ***Burglary and stealing contrary to sections 304(b) and 279(b) of the Penal Code.***

2. ***Breaking into a building and committing a felony contrary to section 306(a) of the Penal Code.***

3. ***Breaking into a building and committing a felony contrary to section 306(a) of the Penal Code.***

4. ***Breaking into a building and committing a felony contrary to section 306(a) of the Penal Code.***

5. ***Stealing stock contrary to section 278 of the Penal Code.***

It should be pointed out that the appellant and his two co-accused appeared before the Senior Principal Magistrate (Mr. H.I. Ong'undi) on *23rd September, 2004* when one of the accused persons one, ***PETER ONZERE TOVOI,*** *(who was the 1st accused)* pleaded guilty to all the five counts but the appellant and another co-accused denied the charges.

The facts constituting the offences in all the five counts were narrated to the court and the 1st accused ***(Peter Onzere Tovoi)*** admitted them to be true. The learned trial Magistrate called for Probation

Officer's report which report was finally made available on *22nd October, 2004*. This report was presented to Mrs. H.M.Wandere (Resident Magistrate) who having perused the report made the following order:-

"***Probation Officers Report considered of 1st accused. He is not a first offender. Fine of K.Shs.10,000/= on each count in default 12 months in prison concurrent sentence."***

It would appear that the appellant having noted how his co-accused had been treated by being given the option to pay a fine opted to plead guilty. Hence on *21st November, 2004* the charges were read over to the appellant who readily pleaded guilty on the five counts. The facts constituting the offences in the five counts were narrated and the appellant admitted them to be true.

The appellant was consequently convicted on his own plea of guilty on all the five counts. The learned trial magistrate called for a Probation Officer's report which report was availed on *25th January, 2005*. The learned Principal Magistrate considered the Probation Officer's report and proceeded to sentence the appellant as follows:-

"***The accused mitigation, past record and our (sic) plea of guilty is considered. The Probation Officer's Report was so negative although he disowned it but it will also be considered. Court will however treat him as a 1st offender no proof of past record.***

<u>Count 1</u> – is defective accused discharged under section 35(1) of the Penal Code.

<u>Count II, III, IV</u> – he shall serve 5 years in jail for each which will run concurrently and for Count V to serve seven years in jail to run concurrently with the others."

The appellant who may have expected to be treated in the same way as his co-accused who had been given an option of a fine was naturally dissatisfied with the foregoing order in which he was ordered to serve a total of seven years imprisonment. He therefore filed an appeal to the High Court. In rejecting the appellant's appeal the learned Judge of the superior court (W. Karanja, J.) in her short judgment delivered on *4th December, 2006* said:-

"***I have heard the appellant on his appeal against the sentence. I have heard the learned state counsel on the same. He supports the sentence on all counts.***

- I have gone through the record of the trial court and also the report of the Probation Officer, which is very detailed. The same depict the appellant as a dangerous person who terrorizes the whole neighbourhood.

- I have confirmed that this co-accused was given a different sentence. Ideally the sentences would be similar but the circumstances here are very different due to the appellant's home record. For this reason, the court does not have to impose the sentence, which was imposed on his co-accused.

- From his record, I feel that he got the sentence he deserved. I have no reason to interfere with the same. The appeal against sentence is hereby dismissed. Accused to serve the full sentence imposed by the trial court."

Still dissatisfied with the foregoing, the appellant now comes to this Court by way of second and final appeal. This is the appeal that came up for hearing before us on *20th April, 2009*. The appellant who appeared in person complained that he was given a more severe sentence than what was meted out on his co-accused and yet his co-accused was not a first offender.

On his part Mr. Omutelema, the learned Senior Principal State Counsel, submitted that the learned trial magistrate was entitled to impose the sentence in view of the fact that the Probation Officer's report on the appellant was not favourable.

In this appeal we have indicated that the appellant's co-accused ***(a man with a previous conviction)*** was given what was comparatively lenient sentence while the appellant ***(a first offender)*** was given what would appear a severe sentence. In ***MACHARIA V. R. [2003] 2 E.A. 559*** this Court stated:-

"***The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogola s/o Owuor (1954) EACA 270 wherein the predecessor of this Court stated:-***

"*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 somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in* ***JAMES VS. R. (1950) 18 EACA 147*** *it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case* ***R. VS. SHERSHAWSKY (1912) CCA 28 TLR 263.***"

Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is thus not proper exercise of discretion in sentencing, for the Court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence – see ***AMBANI V. R. (1990) KLR 161***.

We know that by dint of ***section 361(1)*** of the Criminal Procedure Code this Court has no jurisdiction to entertain appeals on severity of sentence. But what is before us is not on severity of sentence but legality of sentence. In ***MARANDO V. R. [1980] Kenya L.R. 114,*** this Court held that it was wrong in principle to impose different sentence on two people who had been convicted of the same offence, except for good reason. In the present appeal, the appellant who was a first offender could be considered of better character than his co-accused who was a person with a previous conviction. The two pleaded guilty to five counts as already stated and while the co-accused was given a light sentence of paying a fine, the appellant was condemned to serve a total of ***7 years imprisonment***.

In ***AMOLO V. R. [1991] KLR 392 at p. 397*** this Court stated:-

"***As a matter of law we have, as learned principal state counsel submitted, jurisdiction to restore a sentence which has been altered on wrong principles which, we are satisfied, occurred in this case. To do so does not, we think, infringe the principles set out in section 361(1) (a) of the Criminal Procedure Code, which otherwise takes away our powers to reduce a sentence which is manifestly too severe."***

In view of the foregoing, we think that it is within our mandate to correct the disparity in sentences meted out by the trial magistrate as this relates to the principles of sentencing as opposed to the severity of sentence. Accordingly we allow this appeal to the extent of setting aside the sentence imposed and substitute the same with the sentence equivalent to the period that the appellant has served so as to result in his being released from prison today unless otherwise lawfully held.

Dated and delivered at Eldoret this 29th day of May, 2009.

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR