REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 1384 OF 1987

BETWEEN

MWANZA SAYEKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from original conviction and sentence in Criminal Case No 4550 of 1987 of the Chief Magistrate's Court at Nairobi, J A Mango Esq)

May 22, 1989, the following Judgment of the Court was delivered.

The appellant was convicted in the court below for doing an Act prejudicial to the interests of the Republic of Kenya contrary to section 3 (1) (c) as read with section 2(2) of the Official Secrets Act Cap 187.

He originally appealed against conviction, but that appeal has been withdrawn in the light of recent developments in the law. His appeal is now urged against sentence.

He was sentenced to 7 years imprisonment by the learned Chief Magistrate. Mr Ocharo criticizes that sentence on the basis that the appellant is a young man, aged, he says, only 25, as opposed to 28 as calculated by the learned Chief Magistrate, and that he had only reached Form 1 in secondary, as opposed to having a full secondary education, as the learned Chief Magistrate thought. We do not see that that makes much difference.

Mr Ocharo also points out that the appellant is a first offender, which the learned Chief Magistrate had well in mind. He feels that not sufficient weight was given to the fact that the appellant must have cooperated with the Police, or that he pleaded guilty and indeed he does not mention these factors in his notes on sentence although he must have been aware of them as they had only just been rehearsed before him, and the fact of cooperation was very clear from the plea and the facts, although whether he bore these matters in mind it is difficult to say from the record.

The main criticism which Mr Ocharo levels against the learned Chief Magistrate arises from his note on

sentence which reads in part “an offence which I don’t consider forgiveable”.

Mr Chunga argues that at the time that was said the learned Chief Magistrate was considering the request of the appellant to be put on Probation and it was to that consideration only that these remarks were addressed. With respect we do not think so.

We ourselves consider that the learned Chief Magistrate was quite right to use expressions of disgust at the behaviour of someone who was “ready with his eyes seeing to sell his country for a paltry sum of money”, and to consider the seriousness of the offence accordingly, but we do not think that any offence can be said to be unforgiveable, since the whole idea of imprisonment is for the offender to rehabilitate and reform, with an additional element of retribution, and for society thereafter to forgive.

We think that the use of such strong language while trying to exercise a judicial discretion in a proper way is unwise, whilst applauding the thoughts which prompted that language. For ourselves we think that the decision made, that Probation was not suitable in these circumstances was right.

But as to the sentence passed, it must be borne in mind that to be prosecuted under this section involves the very sentiments the learned Chief Magistrate expressed. His words added nothing, although his sentiments, and ours, were patriotic and laudable.

The section allows a maximum imprisonment of 14 years. The appellant was sentenced to half of that, and the learned Chief Magistrate clearly gave credit for certain matters.

The principles of sentencing are well known and have been judicially considered on a number of occasions.

In *Ogalo s/o Owoura v R* (1954) 21 EACA 270 the principle was stated that 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. The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower court has acted upon some wrong principle or overlooked some material factor, or the sentence is manifestly excessive in view of the circumstances of the case. These principles are adopted by the High Court in its appellate jurisdiction. It was further pointed out that courts were not bound by precedent in sentencing, but that the appellate court was afforded some sort of yardstick by precedent when considering whether the sentence was manifestly excessive or not.

In *Nilsson v R* [1970] EA 599 Harris J pointed out that the fact that the appellant pleaded guilty to the charge, and that he had no previous conviction should be considered.

In *Wanjema v Rep* [1971] EA 493 which was a case on causing death by dangerous driving, and in which it was pointed out that imprisonment was only appropriate where there is some element of deliberate risk taking or evidence of conscious negligence, the general principles above set out were reiterated. It was further pointed out that it was extraneous matter which should not be relied upon for the Magistrate to say that he had issued a warning the previous week as a reason for imposing a heavy sentence.

In *Shiani v Rep* [1972] EA 557 it was held by the Court of Appeal that it was not for the prosecutor to tell the court of his views as to the seriousness of the offence. He is required simply to put the facts before the court.

In *Wanyoni v Rep* [1980] KLR 116 an example was given of how the period of detention before the trial should be taken into consideration when sentence is assessed.

In this case it is quite clear that the appellant was a first offender and had pleaded guilty. He had further cooperated with the police in their enquiries and we could add that to the matters Harris J mentions as matters to be taken into account. Those matters were obvious at the time the learned Chief Magistrate was sentencing the appellant, apart from the additional grounds which were before us.

We accept the proposition by Harris J in *Nilsson's* case that a plea of guilty from a first offender requires recognition as a matter of principle, although we would not necessarily subscribe to the reasons Harris J gave

for adopting such a principle which were administrative only.

In our view the reason for recognizing such factors is that they show that the accused has accepted his offence, and that is the first step to rehabilitation, which is the main object of sentencing in the first place.

We would have wished that the Prosecution had resisted the temptation to comment on sentence in this case, but we think that the comment was so brief, and so much in tune with what the learned Chief Magistrate was already thinking that no injustice was caused.

But what strikes us about his case is the thoroughly amateur way in which this offence was committed.

We were clearly not dealing with the professional spy ring at which we expect the maximum sentence was aimed. The efforts of the appellant and those from Uganda who recruited him could be considered comically inept if the Security of the State were not involved. And we think that this is a relevant factor which the learned Chief Magistrate missed in his quite understanding patriotic zeal.

It is in our view important to establish where in the scale of sentencing relevant to the offence before the court lies, before applying the relevant considerations which might mitigate the offence, and we do not think from reading the learned Chief Magistrate's notes on sentence that he did that.

The facts of this offence showed that, even though the offence itself was plainly serious, of its kind it was an offence lower, rather than higher in the scale of sentencing for that offence.

And on looking at all the facts and the sentence passed in that light we do not think that enough credit was given for the mitigatory matters, resulting in a excessive sentence with which we ought to interfere applying the principles in *Owoura's* case.

On the other hand, we think that it ought to be made clear what will happen to those who sell their country for thirty pieces of silver, or any other sum and so we shall not interfere to the extent we might. Appeal against conviction is therefore dismissed (for the avoidance of doubt).

Appeal against sentence succeeds to the extent that the sentence will be reduced to 4 years.

Dated and delivered at Nairobi this 22nd day of May , 1989

PORTER **TANK**

JUDGE **JUDGE**