Okuto alias Denoh v Republic (Criminal Appeal E028 of 2024) [2024] KEHC 13159 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13159 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E028 OF 2024

KW KIARIE, J

OCTOBER 30, 2024

BETWEEN

DENNIS ONYANGO OKUTO ALIAS DENOH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in Criminal case NO. E100 of 2024 of the Principal Magistrate's Court at Ndhiwa by Hon. B. W. Murangasia–Resident Magistrate)

JUDGMENT

1. Dennis Onyango Okuto, alias Denoh, the appellant herein, was convicted after pleading guilty to housebreaking and stealing contrary to sections 304 (1) and 279 (b) of the Penal Code.

2. The appellant, along with others not before the court, committed the offence at 1800 hours on the 15th day of March 2024 at Ratanga Primary School, Central Kwabwai location, Ndhiwa sub-county within Homa Bay County, with others not before the court, jointly broke into the dwelling house of Bonface Ochieng Otieno and stole a solar panel, 2kgs of maize flour in a bucket, two basins of charcoal, three chair cushions and four a sandal all valued at Kshs. 3,500/=, the property of the said Bonface Ochieng Otieno.

3. The appellant was also charged with a second count of handling stolen property. It was found that on the 27th day of March 2024, otherwise, in the course of stealing, he retained one solar panel, a plastic pail, three chair cushions and a sandal, knowing or having reasons to believe it was stolen property.

4. In count one, the appellant was sentenced to five years imprisonment, and in count two, to three years imprisonment. The sentences were ordered to run consecutively. He was aggrieved and filed this appeal against the sentence. His prayer was that the sentences run concurrently.

5. The appeal was conceded to by the state. He argued that he ought to have benefitted from a noncustodial sentence.

6. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence before the lower court afresh and drawn my conclusions, bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of Okeno vs Republic [1972] EA 32.

7. Section 348 of the Criminal Procedure Code provides as follows:

> No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

8. The prosecution erroneously duplicated the two counts. What was indicated as the second count ought to be an alternative to count one. Upon conviction in count one, the court should have made no findings on the alternative charge. This was prejudicial to the appellant.

9. I, therefore, quash the conviction in count two and set aside the sentence imposed therein.

10. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to do so. Nelson vs Republic [1970] E.A. 599 as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. 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 v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! 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 v Shershewsity (1912) C.CA 28 T.LR 364.

11. The appellant had several other convictions for similar offences. Section 304 (2) of the Penal Code provides as follows:

> If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.

12. Given the previous record, the sentence meted out cannot be said to be excessive. I will not, therefore, interfere with the sentence.

13. The appeal has succeeded, as observed hereinabove.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF OCTOBER 2024

KIARIE WAWERU KIARIE

JUDGE