Julius v Republic (Criminal Appeal E006 of 2021)
[2022] KEHC 3080 (KLR) (31 March 2022) (Judgment)

Neutral citation: [2022] KEHC 3080 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E006 OF 2021

LW GITARI, J

MARCH 31, 2022

BETWEEN

JOSEPH MUCHOMBA JULIUS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Marimanti SRM's Court Criminal Case No. 441 of 2020 with the breaking into a building contrary to Section 306(a) of the *Penal Code* (Cap 63 of the Laws of Kenya) and Stealing contrary to Section 279 (g) of the *Penal Code*.

2. He was convicted on his own plea of guilty and sentenced to fourteen (14) years imprisonment. This appeal is basically on the sentence imposed by the trial magistrate.

The Appeal

3. The appeal is based on the grounds THAT:

   a. The Appellant pleaded NOT guilty before trial.

   b. The learned trial magistrate erred on both matters of law and facts by failing to take into account the provisions of Section 216 and 329 of the *Criminal Procedure Code* before sentencing in order to inform itself as to the appropriate and fair sentence ought to be imposed.

   c. The learned trial magistrate erred on both matters of law and facts by failing to consider that the Appellant being a first offender was entitled and qualified for benefit of the law as stipulated under Article 25 (c), 27(1)(2), and 50(2)(p) of *the Constitution* of Kenya 2010.

d. The learned trial magistrate erred in both points of law and facts by failing to apply Section 216 and 329 of the *Criminal Procedure Code* amounted to unfair discrimination of the law hence led to unfair sentence imposition.

4. The appeal was disposed of by way of written submissions.

Appellant's Submissions

5. The Appellant filed his written submissions on 1st December 2021. It was his submission that sentence meted out against him by the trial court was harsh and inhuman considering that he pleaded guilty and therefore did not waste the time and resources of the court. He urged this court consider the sentencing policy guidelines 2016 and the Appellant's mitigation factors and mete an appropriate sentence. This is demonstrated in the four grounds of appeal which are enumerated above.

Respondent's Submissions

6. The Respondent filed its written submission on February 23, 2022. It was the Respondent's submission that the sentence meted on the Appellant was lawful to the extent that the same is provided for under Section 279 of the *Penal Code*. The Respondent thus urged this court to find that the appeal lacks merit and dismiss the same in its entirety.

Analysis

7. While the heading of his Petition of Appeal indicates that the appeal was against both his conviction and sentence, the substance of the appeal reveals that the appeal is only against the sentence.

8. The imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime is one of the prime objectives of criminal law. The Court of Appeal in the case of *Thomas Mwambu Wenyi v Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Mahareshtra* [2012] 2 S.C.C 648 where the court expressed itself as follows:

> "There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

9. Section 279(g) of the *Penal Code* provides that an offender is liable to imprisonment for fourteen (14) years if theft is committed and in order to commit the offence, the offender opens any locked room, box, vehicle or receptable, by means of a key or other instrument.

Section 279 (g) of the *Penal Code* provides:

(g)

> " if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of akey or other instrument, the offender is liable to imprisonment for fourteen years."

10. On the other hand, Section 306(a) of the *Penal Code* provides that:

> " Any person who -
>
> a. breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein;
>
> b. ...
>
> is guilty of a felony and is liable to imprisonment for seven years.

11. In this case, the Appellant in his mitigation alleged that he was sickly with chest and shoulder problems and that he was an orphan. In sentencing him, the trial considered his mitigation and noted that the Appellant was a repeat offender as had a case of manslaughter and was also facing charges for assaulting a witness for the complainant in this case. The trial court also noted that the sentiments of the complainant that the Appellant was a member of a well-known gang within Chiakariga.

12. In my view, the trial court property considered sentencing by principles of deterrence and rehabilitation or reformation of the offender in meting out sentence.

    I however note sentencing was not properly done as the learned trial magistrate passed a blanket sentence of 14 years on the appellant and disregarded the fact that the appellant was charged with two distinct offences on the same charge. The charge had two limbs. These are, breaking into a building and stealing. The offences are under Section 306 (a) of the *Penal Code* and Section 279)g) of the *Penal Code*. The ingredients of the charge of breaking into a building and committing a felony are: breaking and entering in a building and committing a felony therein.

13. I am minded that the Law on framing of charges requires clarity in the charge sheet. Section 134 of the Criminal procedure Code provides as follows:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

    The appellant was charged as follows:

> " Breaking into a building contrary to Section 306(a) and Stealing contrary to Section 279(g) of the *Penal Code*."
>
> Particulars: "On the night of 27/3/2020 at Chiakariga Market in Tharaka South Sub-County within Tharaka Nithi County jointly with others not before court broke and

entered into a shop (emphasis mine) and stole from therein items as per attached list all valued at kshs.203,850/- the property of the said Julius Murithi."

14. As for the ingredients of the charge under Section 279(g) of the *Penal Code*, these are: -Opening any locked room, box, vehicles or receptacle by means of a key or other instrument.

The offender is liable to imprisonment for fourteen years.

15. The appellant pleaded guilty and the facts which were read to him are as follows:-

"On 27/3/2020 in the morning, the complainant went into his MPESA shop at Chiakariga market as is usual. He opened and found there was a lot of light inside. He checked and discovered the roof had been cut open and somebody gained entry. The shop items were scattered all.

On taking inventory, he discovered that items listed on charge sheet had been taken. He called OCS Chiakariga who sent officers to scene and found the shop broken into. Investigations ensued and Joseph Muchomba was suspected since members of the public had noticed him that he was having unusually a lot of money. On 30/3/2020 PC Simiyu and P.C Wachira together with informers organized a patrol and proceeded to the house of Muchomba, the main suspect.

On seeing police, accused took off and police searched his house where they recovered on list number two attached to the charge sheet. Some of them belonged to complainant and others were unknown to complainant. Police later laid an ambush and re-arrested accused on 24/6/2020 after he had been arrested by members of public and led to charges before court.

ITEMS BELONGING TO COMPLAINANT:

1. Cash money in different denominations – Kshs.12,340/- PEX 1
2. Airtel and Safaricom Airtime for Kshs.11,540/- _EX2
3. GD LITE LAMP- PEX3
4. 2 TECNO T 30 MOBILE PHONES- PEX 4 (a) and (b)
5. One mobile phone A14 Itel PEX 5
6. Itel Phone Battery – PEX 6
7. GSM- C8 Mobile Phone – PEX 7
8. Tecno Mobile battery – PEX8 and
9. Multi charger – PEX9

PEX 4 a) and b), 5,6, 7 and 8 belonged to customers at the complainant's shop.

OTHER ITEMS:

1 Bar soap (Tiger) – PEX 10 and

A Tecno Mobile phone S/No.IMEI860831009808137 – PEX 11.

That is all."

16. According to this facts the entry into the shop was gained through cutting the roof. The facts stated that the building was an 'Mpesa Shop'. It also shows that cash money and other items were stolen from the shop. The facts adduced did not support a charge under Section 279 (g) of the *Penal Code*.

17. It is my view that a charge under Section 306(a) of the *Penal Code* is complete where it is established that the building was a shop, entry was gained by breaking into that building/shop and a felony of stealing was committed therein. It was not necessary to charge the appellant under Section 306(a) and 279(g) of the *Penal Code* under the same charge. Section 306 (a) discloses an offence and provides that a person who commits an offence under the Section is liable to imprisonment for seven years.

20. I find that the charge as preferred was defective for charging the appellant with two distinctive charges and the facts not supporting one of the charges. The Court of Appeal in *Yougo v Republic* [1983] KLR 319 stated as follows with regard to a charge that is not disclosed by evidence and is therefore defective-

> " In our opinion, a charge is defective under Section 214 (1) of the *Criminal Procedure Code* where:
>
> a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
>
> b. It does not for such reasons accord with the evidence given at the trial; or
>
> c. Gives a misdescription of the alleged offence in its particulars."

21. The question is whether the defect in the charge is curable. It is my considered view that the defect is curable under Section 382 of the *Criminal Procedure Code*. The Section Provides:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

22. The charge disclosed one offence which is breaking into a building which should have been framed as follows:-

> " Breaking into a building and committing a felony contrary to Section 306(a) of the *Penal Code*."

23. The punishment under this Section is seven (7) years. The particulars and the facts which were read in court supported the offence under Section 306(a) of the *Penal Code*. I must also point out that where a charge discloses two distinct offences, a sentence must be passed on each distinct offence followed with an order that either the sentence will run concurrently or consecutively. The sentence by the learned trial magistrate was therefore improper as it did not specify the sentence on each limb. The sentence of fourteen (14) years was unlawfully as Section 306(a) provides for a maximum sentence of seven years.

The appellant was prejudice as the sentence imposed was unlawful in view of the charge and the facts. In the circumstances I find that this appeal succeeds.

I order that:

1) Section 279(g) of the *Penal Code* is deleted from the charge.

2) The sentence of the learned trial magistrate is set aside.

3) The appellant is sentenced to imprisonment for seven (7) years to run from 6/7/2020 the date he was remanded in custody to await trial.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 31ST DAY OF MARCH 2022.

L.W. GITARI

JUDGE

31/3/2022

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

31/2/2022