REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL 28 OF 2016

(CORAM: F.M. GIKONYO J.)

***From the* conviction and sentence by Hon. W. Juma, CM, in Narok CMCCRC No. 1094 of 2016 on 12th July 2016**

ROBERT MULELO MASIKE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Charge.

[1] The Appellant herein with 2 others were jointly charged with the offence of **house breaking contrary to section 304(1)(b) and stealing contrary to section 279 (b) of the Penal Code**. The particulars of the offence are; that on 26th day of June 2016 at Ngei Estate of Narok Township in Narok North sub county, within Narok county jointly broke and entered the building used as a dwelling house by Francis Yaile and while therein stole 2 pairs of men's shoes valued at kshs. 6,000/=, 1 Sony radio valued at kshs 17,000/=, 1 black bag valued at kshs 2500/= assorted Narok county income collection receipts valued at kshs.10,000/= and cash Kshs. 97,000/= all valued at Kshs. 144,500/= the property of the said Francis Yaile.

[2] They were charged with the alternative charge of **handling stolen goods contrary to section 322(1) as read with section 322(2) of the penal code.** The particulars of the offence are; that on 5th July 2016 at Kailet hotel in garage area of Narok township in Narok north sub county within Narok county otherwise than in the course of stealing dishonestly undertook the retention of one black bag for the benefit of Robert Mulelo Masika and Wesley Kirui knowing or having reason to believe it to be a stolen good.

[3] Count II was a charge of **having suspected stolen property contrary to section 323 of the penal code. T**he particulars of the offence being; that on 5th July 2016 at Narok township in Narok north sub county within Narok county having been detained by no. 86313 CPL Walter Wandawa as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code, had in possession 1 mattress and 2 bed sheets reasonably suspected to have been stolen or unlawfully obtained.

Appellant's submission

[4] The Appellant submitted that his appeal was on mitigation only and that he seeks leniency in sentencing following an order of the supreme court in ***Supreme Court of Kenya Petition No. 15 & 16 of 2015: Francis Karioko Muruatetu and Wilson Thirimbu Mwangi*** where the court declared mandatory sentences unconstitutional.

[5] He beseeched the court to consider that; (1) he is the sole bread winner in his family; (2) being a young man his life is greatly affected by the imprisonment; and (3) while in prison he has taken full advantage of the rehabilitative programs offered in the correction al facility.

[6] He urged further that sentencing should be guided by the provisions of ***Article 50(2).***

[7] Thus, it was his submission that the sentence meted on him was too harsh and excessive in all circumstances, and should be set aside. He also submitted that as he has already served, he deserves some mercy upon him and be released from prison. The appellant prays that his appeal be allowed; conviction and sentence be set aside and quashed or his sentence reduced.

[8] The appellant has relied on the following authorities:

1. **Constitional of Kenya 2010**

2. **Francis Karioko Muruatetu and Another Petition No. 15 And 16 Of 2015**

3. **Guyo Jarso V Republic 2018 CR APP No. 5 of 2013**

4. **Evans Wanjal Wanyonyi, Hccr App No. 174 Of 2015 CR File No. 312 of 2018**

5. **Christopher Ochieng Vs Republic (Kisumu) CR APP No. 93 Of 2014**

Respondent's submission

[9] M/S. Koina, the prosecution counsel, submitted that the appellant pleaded guilty to the main charge. Facts were tendered to the effect that they broke into that house and stole from therein. He confirmed the facts to be correct. The court convicted him on his own plea of guilty.

[10] For the offence of house breaking contrary to Section 304(10 (a) he was sentenced to serve five years' imprisonment and for the offence of stealing contrary to section 279(b) of the Penal Code he was sentenced to serve 10 years' imprisonment. The sentences were to run concurrently.

[11] The prosecuting counsel argued that charges in this case were well framed. The charge sheet was neither duplex nor defective as the offences were founded on the same facts. That being the case the appellant's right to a fair trial were not violated. The prosecution counsel cited the case of ***David Chwea V Republic 2015 eKLR*** where the court interpreted section 304(1) of the penal code.

[12] She continued to argue that, from the proceedings the charges were read to the appellant in Kiswahili. The appellant did not raise any objection to the use of Kiswahili and went ahead to plead guilty. The appellant understood the charges read to him and he admitted the charges by entering a plea of guilty. When the facts were tendered, he also participated by stating that it was true he broke and stole from the complainant's house. Upon conviction on his own plea of guilty, the appellant was granted an opportunity to tender his mitigation before sentencing which was duly noted. The learned counsel relied on the case of ***Simon Kangethe V Republic (2014) eKLR.***

[13] It was also her submission that from the record of the proceedings of the trial court, the plea of guilty was unequivocal hence no error on the face of the record.

[14] On the sentence, the learned counsel submitted that the sentence provided for the offence is imprisonment for a term of 14 years. The appellant was not a first offender and was also serving a probation sentence for a similar offence at the time of sentencing.

[15] In conclusion, the Respondent submitted that the conviction was safe and the sentences meted were appropriate in the circumstances. Accordingly, she urged the court to dismiss the appeal and uphold the conviction and sentence.

ANALYSIS AND DETERMINATION

Court's duty

[16] The duty of first appellate court is to evaluate the evidence afresh and come to own conclusions, except, it must give allowance of the fact that it neither saw nor heard the witnesses. See**: R vs. OKENO [1977] EALR 32**. In this exercise, the court is not however, beholden or compelled to adopt any particular style. Nonetheless, the court must avoid mere rehashing of evidence or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern is to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such is a style that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed.

[17] I am aware of section 348 of the CPC which states: -

> ***348.*** **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.**

[18] Nonetheless, although this appeal seems to be on sentence alone, there is an element which tends to challenge the plea of guilt entered herein. Accordingly, the court should determine: -

1. **Whether the plea of guilt entered herein was unequivocal;**

2. **Whether the charge was defective or duplex;**

3. **Whether the trial a court considered the mitigation of the appellant; and**

4. **Whether the sentence meted on the appellant is manifestly excessive in the circumstances.**

Whether charge duplex or defective

[18] Under section 135 of the CPC: -

> **135.(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.**
>
> **(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.**
>
> **(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.**

[19] The appellant with others were charged with house breaking and stealing therefrom contrary to section 304(1) and 279 of the Penal Code, respectively. I have examined the charge sheet herein; it was framed in accordance with the rules set out in section 137 of the CPC and *offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character*. Accordingly, the charge sheet is not duplex or defective. Even if there was an error of form in the charge sheet, it would be cured under section 382 of the CPC unless the defect has occasioned a failure of justice. Section 382 of the Criminal Procedure Code provides that a conviction may not be quashed for an error not going to the root of the case as follows:

> **"382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings**
>
> 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.

Was the plea unequivocal?

[20] This question entails two things; the manner the plea was recorded and the nature of the plea recorded. The procedure for taking of plea is set out in section 207 of the Criminal Procedure Code and was elaborated in ***Adan v. R*** (1973) EA 445, as follows:

> **"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;**
>
> **(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
>
> **(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
>
> **(iv) If the accused does not agree the facts or raises any questions of his guilt his reply must be recorded and change of plea entered;**
>
> **(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."**

[21] The record shows that: -

> **(i) The charge and all the essential ingredients of the offence was explained to the accused in Kiswahili-a language he understands;**
>
> **(ii) The accused's own words recorded as reply to the charge are ''ni kweli'' which is an admission, and so, a plea of guilty was recorded;**
>
> **(iii) The prosecution immediately stated the facts which the court recorded in succinct details and the accused was given an opportunity to dispute or explain the facts or to add any relevant facts;**
>
> **(iv) The accused agreed the facts and stated that the facts are true, and that he broke into the house and stole; there was no change of plea.**
>
> **(v)The court then recorded a conviction on own plea of guilt and a statement of the facts relevant to sentence together with the accused's reply.**

[23] From the record, the procedure was duly adhered to and the plea was unequivocal.

Of sentence

[24] The offence for which the accused was charged is house breaking contrary to section 304(1) (b) and stealing contrary to section 279(b) of the penal code. the sections provide as follows:

> **Section 304 (1) Any person who**
>
> **(a). breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or**
>
> **(b). having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years**.
>
> **Section 279 (b)- if the thing is stolen in a dwelling house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house; the offender is liable to imprisonment for fourteen years.**

[25] The maximum sentence provided is 7 and 10 years for house breaking and stealing, respectively. The appellant was sentenced to serve 5 years and 10 years for house breaking and stealing, respectively. The appellant claims these sentences were harsh and manifestly excessive. What does the law say?

[26] The predecessor of the Court of Appeal 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."**

[27] The Court of Appeal, on its part, in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

> **"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."**

[28] Therefore, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

[29] After conviction, the appellant was given an opportunity and asked for pardon for he committed the offences under the directions of the 3rd accused. The trial court noted his mitigation and also took into account the fact that the accused is not a first offender and that he was under probation for a similar offence- revocation of which had been sought already in file number 714 of 2016. The trial stated clearly that these crimes are prevalent in the area and need to be discouraged. This brings me to the subject of objectives of punishment.

[30] The Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015,** stated:

> **"In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR,* where the High Court held that the objectives include: *"deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."* The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:**
>
> > **"Sentences are imposed to meet the following objectives:**
> >
> > ***1.* Retribution: To punish the offender for his/her criminal conduct in a just manner.**
> >
> > **2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**
> >
> > ***3.* Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
> >
> > ***4.* Restorative justice: To address the needs arising from the criminal conduct such as loss and damages.**

Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. **Community protection: To protect the community by incapacitating the offender.**

6. **Denunciation: To communicate the community's condemnation of the criminal conduct."**

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."

[31] The appellant planned with others to break into the house and steal therefrom. He is not first offender. Such, conduct should be prevented. In the circumstances of this case, deterrent sentence was most appropriate. Accordingly, the sentences imposed were not excessive. In the upshot, I dismiss the appeal. Right of appeal 14 days.

Dated, signed and delivered at Narok through Microsoft Teams Online Application this 11^{d} day of February 2021

F. GIKONYO

JUDGE