



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO. E1 OF 2020

(Appeal Originating from CM's Cr. Case No. 1611 of 2019 Sentencing by Hon. S.N. Mwangi SRM)

JOHN KINGA MUTURI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant along with another were charged with the offence of ***Breaking into a building and committing a felony contrary to Section 306(A) of the Penal Code, and the Alternative charge of Handling Suspected stolen goods contrary to Section 322(1)(2) of the Penal Code.***
2. They had been arrested on 10/09/2019 and on 11/09/2019 they were taken to court for plea.
3. They pleaded guilty and a plea of guilty was entered. The facts were read to them on 01/09/2019 as follows:

“On 01/09/2019 at around 10.00hrs, the Complainant in this case left his house having securely locked it and went to church. He was later called and informed by his wife and told she had found the house broken into. He rushed home and upon checking and he found one window pane had been taken and spare keys taken which was used to open the main door.

On entering the house, he noted the following items missing:

- One TV set – Golden Tech make.
- One DVD LG make
- One Decoder – Sonnar make
- One divider and one converter
- One small radio
- 2 mobile phones
- Cash amounting to Kshs.45,000/- missing all valued at Kshs.83,300/-

He reported the case to Tumaini Police Post where investigations commenced. Complainant also informed the neighbours about the same and he be assisted with information.

Later he got information as to where his items were at and in the company of village elders went to the house of the 2 accused persons. Most of the stolen items were recovered except for Kshs.45,000/- cash and one mobile phone. Unfortunately, subjects were subjected to mob justice by members of public. Chief intervened and assisted in rescuing the 2 accused persons. Chief called police officers who rushed to the scene, arrested the 2 accused persons and took them to JM Hospital where they were admitted for one day. Recovered items were taken to Ol Kalou Police Station where they were photographed. Accused were then

charged in court. Photos of recovered items produced as exhibits.

1st Accused: Facts are true and correct

2nd Accused: Facts are true and correct

Court: It is explained to the accused persons in Swahili Language which they state they understand that if they plead guilty to the charges and facts read to them, this court will go ahead to convict and sentence them and they respond:

1st Accused Persons: I do understand that. I still do wish to plead guilty to the charges and facts read to me.

2nd Accused Person: I do understand that. I still wish to plead guilty to the charges and facts read to me.”

4. They pleaded guilty and were convicted on their own plea. The previous records were considered which indicated that they had previous convictions.

5. In mitigation, they had nothing to say.

6. They were sentenced each to serve 10 years’ imprisonment.

7. Being aggrieved by the aforesaid conviction and sentence, they lodged instant appeal and set out the 7 grounds:

i. That the Learned Trial Magistrate erred in Law in fact in convicting the Appellant on an equivocal plea of guilty.

ii. That the Learned Trial Magistrate erred in Law and in fact in convicting the Appellant on a defective charge sheet.

iii. That the Learned Trial Magistrate erred in Law and fact in failing to find that the facts read to the Appellant did not support the charges as presented in the charge sheet.

iv. That the Learned Trial Magistrate erred in Law and in facts in failing to apply the guidelines on sentencing while sentencing the Appellant and on dwelling on extraneous matters.

v. That the Learned Trial Magistrate erred in Law and facts in imposing an excessive sentence considering the nature of the offence and taking into account the probation report presented.

vi. That the Learned Trial Magistrate erred in Law and fact in imposing an excessive sentence taking into consideration the nature of the offence and taking into consideration that the Appellant was first offender with no previous records.

vii. That the Learned Trial Magistrate erred in Law and fact in imposing an illegal sentence.

8. When the matter came for hearing parties agreed to canvass same via submissions but only appellant filed but respondent did not file submissions.

APPELLANT’S SUBMISSIONS:

9. The appellant submits that the charge sheet was fatally defective, the facts did not support the charge and the plea was thus equivocal plea of guilt.

10. The Appellant was charged under **Section 306(a) of the Penal Code** which provides as follows:

“306. 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; or

b)

is guilty of a felony and is liable to imprisonment for seven years.”

11. The particulars of the charge on the other hand provided that:

“On the 1st day of September, 2019 at Thamba Village Ol Kalou within Nyandarua County, jointly broke and entered the

dwelling house of FRANCIS KIRANGU THAGICHO with the intent to steal and did steal from therein one TV set make Golden Tech, one DVD make L.G., one Decoder make Sonner, two mobile phones, cash Kshs.25,000/- a small rotto all valued at Kshs.83,300/- property of the said FRANCIS KIRANGU THAGICHO.”

12. The facts read were that the Appellant broke into the Complainant’s dwelling house where he committed a theft. under Section 306(a) of the Penal Code which provides as follows:

“306. Any person who:-

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; or

.....

is guilty of a felony and is liable to imprisonment for seven years.

13. A dwelling house is not one of the premises provided for under **Section 306(a) of the Penal Code** and the facts as presented apparently did not support the charge preferred against the Appellant. The question is whether the defect in the charge sheet is curable?

14. As on sentence, even assuming that the facts were in support of an offence committed under **Section 306(a) of the Penal Code**, the punishment provided for therein is a sentence of 7 years.

15. It therefore follows that the sentence of 10 years imposed by the learned trial Magistrate was illegal and the same cannot stand.

16. An offence committed under **Section 304(1) of the Penal Code** which deals with a dwelling house provides for a sentence of 7 years.

17. The learned trial Magistrate did not take into consideration that the Appellant pleaded guilty saving the court’s precious judicial time and instead proceeded to give consideration to extraneous matters while imposing the harsh sentence of 10 years.

18. If the appeal on conviction shall not succeed, the court is urged to set aside the sentence of 10 years and impose a favorable sentence under the supervision of a probation officer to rehabilitate the Appellant.

DETERMINATION

19. The twin issues herein are whether the charge was fatally defective and whether the sentence was illegal?

20. There is a defect that is already apparent in the charge sheet in the sense that the particulars of the charge indicated that the *“On the 1st day of September, 2019 at Thamba Village Ol Kalou within Nyandarua County, jointly broke and entered the dwelling house of FRANCIS KIRANGU THAGICHO with the intent to steal and did steal from therein one TV set make Golden Tech, one DVD make L.G., one Decoder make Sonner, two mobile phones, cash Kshs.25,000/- a small rotto all valued at Kshs.83,300/- property of the said FRANCIS KIRANGU THAGICHO.”*

21. The facts read were that the Appellant broke into the Complainant’s dwelling house where he committed a theft.

22. Appellant was found in possession TV set make Golden Tech, one DVD make L.G., one Decoder make Sonner, two mobile phones, cash Kshs.25,000/- a small rotto all valued at Kshs.83,300/- property of the said FRANCIS KIRANGU THAGICHO.”, which disclose an offence under section 304 (1) of the Penal code.

23. I am minded in this respect that the law on the framing of charges requires clarity in the charge sheet as stated in section **134 of the Criminal Procedure Code** 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.”

24. The Court of Appeal in **Yongo vs Republic [1983] KLR, 319** did hold that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

“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) it gives a mis-description of the alleged offence in its particulars.”

25. I am of the view that the defect in the present appeal is one that is curable under section 382 of the Criminal Procedure Code, as there is only one offence disclosed by the charge, under Section 304(1) of the Penal Code which deals with a dwelling house whose ingredients have been enumerated in the particulars in the charge sheet and facts read to appellant which offences require specific ingredients to be proved, and which attract same penalty under the law.

26. In addition, as shown above, the said offence is supported by the particulars. Lastly, it is my view that there was no prejudice caused to the Appellant in this regard as it was clear what offence or sentence was applicable to him and even what he admitted.

27. Thus the ground on defect of the charge fails and court upholds conviction but under section 304 (1) of the penal code.

28. On sentence, the maximum penalty under Section 304(a) of the Penal Code, as provided for therein is a sentence of 7 years.

29. The sentence of 10 years was thus in excess of what the law provided for thus the court will interfere with sentence. Thus the court makes the following orders;

(i) The conviction is upheld but under section 304(1) of the penal code.

(ii) The sentence is reduced to 5 years' imprisonment to run from 30/9/2019

Dated, Signed and Delivered at NYAHURURU this 28th day of October, 2021.

.....

CHARLES KARIUKI

JUDGE