



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL 18 OF 2018

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. W. Juma (C.M) in Narok CMCR No. 1799 of 2016 on 5th July 2018)

KIMUTAI LANGAT.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Charge.

1. The appellant was charged with house breaking contrary to Section 304 (1) and Stealing contrary to Section 279(b) of Penal Code. It is alleged that on the 6th day of November 2016 at Siyabei area in Narok North sub- county within Narok county, jointly before court broke and entered the dwelling house of Thomson Kipapei with intent to steal therein and did steal therein one sony television, one gas cylinder, one camera, one nokia mobile phone, assorted clothes and one radio face all valued at Kshs. 70,000/= the property of the said Thomson Kipapei.
2. The appellant was convicted and sentenced to serve five years' imprisonment. Sentence to run concurrently.
3. Being dissatisfied with the said conviction and sentence he preferred an appeal as set out in his grounds of appeal.
4. On 24/11/2020 parties agreed to canvass this appeal by way of filing written submissions. From the record only the respondent filed.

Appellant's grounds of appeal

- i. The Appellant stated that he pleaded not guilty.
- ii. That the trial magistrate erred in law and facts by convicting the appellant and failed to note that there were no stolen item that connected the appellant with the present case.
- iii. That the learned trial magistrate erred in law and fact when she relied with witnesses' evidence and failed to consider that it was full of contradictory and uncorroborated.
- iv. That the learned trial magistrate erred on matters of law and fact by not considering that the possession availed by the prosecution was not connected with the appellant in any way.
- v. That the learned trial magistrate erred in law and fact by shifting the burden of proves on the appellant and failed to note that the case was frame up.
- vi. That the learned trial magistrate erred in law and fact when convicting the appellant of sound evidence and the sentence is too harsh and excessive on the circumstances.
- vii. That the learned trial magistrate erred in law and fact by dismissing the appellant defence which was plausible as adduced.

viii. That he prays to be present during the hearing and final determination of this appeal.

ix. That he prays to be supplied with the trial court proceedings and its judgment to enable him adduces better grounds of appeal.

5. Ultimately, he prayed that this appeal be allowed; conviction and sentence be set aside and quashed, and an order for re trial.

6. On 19/04/2021 the Appellant orally submitted to this court that his only prayer before this court is for time spent in prison to be taken into account.

Respondent's submission

7. Ms. Torosi, the prosecution counsel, submitted for the state that, it is not true the there was no stolen item that connected him to the offence committed. On the material date, complainant and his family had gone to church and upon return he found his house broken and property stolen. The complainant got friends comprising of church members to track the foot marks of the suspects, tracking their shoes, boots and rubbers. The tracks led them to a forest where they found an equity card and in that location the stolen TV set 32 inch was recovered. An ambush was laid for whoever was to come and pick the TV as it appeared hidden. The complainant left the group guarding the place at about 7.00p.m. The appellant was arrested.

8. PW3 corroborated PW1 and PW2 and that there was not contradictions at all in their testimony. PW3 corroborated PW1 and PW2 who participated in the arrest of the appellant who had gone to the place where the stolen TV set was hidden. PW2 corroborated PW1 and stated that they laid ambush where they found the stolen television set. That they were able to arrest the appellant who had come aboard a motorcycle and headed to the place where the TV set was.

9. The appellant was connected to the offence committed as he went back for the things he had stolen and hidden but was arrested in the process by PW2 and PW3.

10. There was no case of mistaken identity or frame up against the appellant. Prosecution witnesses denied that the appellant was a mere road user. They said he was with other two people, Cyrus Maina who was arrested with him but attempted to escape on a motorbike and Sururu who fled. The appellant was found in the company of Sururu who was a very positive connection to the house of PW1, the complainant. Sururu had worked for the complainant. It was not a mere coincidence that the house of PW1 had been broken into and the appellant and Sururu were using that road at about the same time.

11. The sentence meted on the appellant by the trial magistrate court was legal and in accordance with the law.

12. The defence of the appellant did not challenge the prosecution's evidence.

13. The counsel for the Respondent submitted that the conviction and sentence was safe as against the Appellant and urged the court uphold it.

ANALYSIS AND DETERMINATION

Court's duty

14. As first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I should however bear in mind that I neither saw nor heard the witnesses. See **Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.**

15. I have carefully considering the submissions of the respective parties and the record of appeal, as well as the oral submission by the appellant to the effect that he has only one prayer before this court that he wishes to pursue, to wit, time spent in custody to be taken into account in the sentence. Accordingly, the main issue left for this court to consider is:

i. Whether the time spent was taken into account by the trial court. This is an essential element in sentencing as it prevents imposition of more severe sentence.

16. The appellant seeks to avail himself the benefit of time spent in custody prior to conviction under Section 333(2) of the Criminal Procedure Code; the section provides that: -

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) Every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis mine).”

17. Court's duty under section 333(2) of the CPC has been further explained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) thus:

“The provision to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period

of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

18. Of section 333(2) of the Criminal Procedure Code, the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR.* (See also *Bethwel Wilson Kibor vs. Republic [2009] eKLR*) was categorical that court should give real effect to the said provision.

19. In my understanding, the requirements in Section 333(2) of the CPC pertains to fair trial and justice; ensures that a person gets appropriate sentence. Thus, non-adherence with the section may result into the person serving a more severe sentence than is required in law; such sentence is illegal and not consistent with the right to a less severe sentence enshrined in Article 50 (2)(p) of the Constitution.

20. Similarly, failure to give full effect to section 333(2) of the CPC rattles the right to protection and benefit of law guaranteed under Article 27(1) & (2) of the Constitution which provides that:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. [Underlining mine]

21. Daringly stated, a sentence that does not give any effect to Section 333(2) of the CPC leaves the period served in custody unaccounted for, thus, a deprivation of freedom arbitrarily or without a just cause contrary to Article 29(a) of the Constitution which provides that:

Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

22. This school of thought bases its arguments on rights, and posits that non-adherence with Section 333(2) of the CPC may found a cause of action under Article 23(1) of the Constitution which provides that

The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

23. For completeness of the argument, Article 165(3)(b) of the Constitution provides that:

Subject to clause (5), the High Court shall have—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

24. Accordingly, the instant application deserves evaluation by the court in so far as time spent in custody is concerned. From the record, the appellant was arraigned in court on 8/11/2016. He however, escaped prison and was re-arrested and produced in court on 20/11/2017. His conviction was 5/07/2018.

25. In the upshot, the sentence herein shall run from the date of his re- arrest and production in court on 20/11/2017.

26. IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 24TH DAY OF NOVEMBER, 2021

F. GIKONYO M.

JUDGE

In the presence of:

1. Appellant

2. Ms. Torosi for Respondent

3. Kasaso - CA