REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 95 OF 2019

JACKSON MAINGI MUTETI......APPELLANT

VERSUS

REPUBLIC.................................RESPONDENT

JUDGEMENT

1. The appellant herein, **Jackson Maingi Muteti,** was charged with the offence of breaking into a building and committing a felony Contrary to Section 306(a) of the ***Penal Code***. The facts were that on the 20th day of May, 2019 at Kavovi Village, Kathekai Location in Machakos Sub-county within Machakos County, he broke and entered a building namely store of **Leonard Mutinda Kyuu** and did steal one wheelbarrow, a piece of metal rod and a piece of metal tube all valued at Kshs 3,000.00 the property of **Leonard Mutinda Kyuu**.

2. On 31st May, 2019, he was presented before **Hon. B J Bartoo, SRM** and when the charge was read to him, he admitted the offence and a plea of guilty was entered against him after he also agreed that the facts were correct. After the mitigation by the appellant, the mater was fixed for mention on 7th June, 2019 for the probation officer's report to be filed. On 7th June, 2019, the matter was however placed before **Hon. E. H. Keago, SPM** who, in sentencing the appellant, stated as follows:

> **"On the basis of the report filed, the accused is sentenced to serve 3 years for each limb. The sentence to run concurrently. Right of Appeal within 14 days."**

3. First and foremost, there was no reason why the matter was placed before **Hon. Keago** instead of **Hon. Bartoo**. Secondly, the appellant was only charged with one count yet the sentence states that he was sentence to 3 years for each limb and that the sentences were to run concurrently.

4. Section 200(2) of the ***Criminal Procedure Code*** states that:

> **(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.**

5. It is therefore clear that another magistrate can only pass sentence in a matter in which judgement has been delivered by another magistrate where the former magistrate ceases to exercise jurisdiction in the matter. In this case it was not stated the circumstances under which **Hon. Keago** passed the sentence on the appellant in a matter in which the appellant had been convicted by **Hon. Bartoo**. It is this confusion that must have led to the sentence being passed against the appellant which was clearly not linked to the offence with which the appellant was charged. Clearly there was a mistrial.

6. In conceding the appeal, **Miss Mogoi**, learned prosecution counsel urged the court to order for a retrial. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

> **"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to**

blame, it does not necessarily follow that a retrial should be ordered;......"

7. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi vs. R [2012] eKLR**: -

> **"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:**
>
> > **'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered…In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'**
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> **That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:**
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> > **'…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.'"**

8. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi vs. Republic (1983) KLR 522** and **Fatehali Maji vs. Republic (1966) EA, 343** the view expressed was that: -

> **"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."**

9. Makhandia J. (as he then was) in the case of **Issa Abdi Mohammed vs. Republic [2006] eKLR** opined that: -

> **"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."**

10. In this case the appellant was sentenced to serve 3 years imprisonment on 7th June, 2019, almost 9 months ago. Section 306 of the ***Penal Code*** under which the Appellant was charged states as follows:

> **Any person who -**
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> **(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**
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> **(b) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.**

11. Sir Henry Webb C.J. in **Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64** had this to say on the proper construction of the words "**liable to**":

> **"The wording used throughout the code is "*shall be liable to*" but a consideration of the various sections shows in our judgment, that the use of the words "*shall be liable to*" does import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."**

12. The predecessor of the court went further in **Opoya versus Uganda [1967] EA 752** at page 754 where **Sir Clement DeLestang V.P**. picked up the conversation *inter alia* thus:

> **"It seems to us beyond argument that the words "*shall be liable to*" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."**

13. A similar position was adopted in **D W M vs. Republic [2016] eKLR** where the Court held that:

> **"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."**

14. Therefore, bearing the totality of the above principles in mind, it is my view that the use of the words "***is liable to imprisonment for seven years***" in section 360 of the ***Penal Code*** gives room for the exercise of judicial discretion. As stated above in imposing the sentence the court seems to have been under the wrong impression that the appellant faced more than one count which was not the case. This court cannot rule out the possibility that that impression may have influenced the trial court in imposing the sentence. In **Shadrack Kipchoge Kogo vs. Republic Eldoret Criminal Appeal No. 253 of 2003** the Court had this to say:-

> **"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.**

15. In **Geoffrey Kamau Kahuthu vs. Republic [2009] eKLR**, the appellant, was upon his own plea of guilty to a charge of housebreaking contrary to Section 304(1) and stealing contrary to Section 279(b) of the ***Penal Code*** convicted and sentenced to 30 months imprisonment on each limb and the sentences were ordered to run concurrently. He appealed against that sentence and submitted that he had reformed and prayed for the reduction of the sentence. He stated he was one of those affected by the post-election clashes and as a result of his imprisonment his family was in dire need of help. After considering his submissions and given the fact that the stolen radio was recovered and the appellant had served about a half of the sentence imposed upon him, **Maraga, J** (as he then was) reduced it to a term that secured his immediate release.

16. Based on the sentence in **Geoffrey Kamau Kahuthu vs. Republic [2009] eKLR**, and taking into consideration that the appellant was a first offender who had pleaded guilty and the stolen items were recovered and the appellant's mitigation was that he was induced by another person who was working within the premises, it is my view that no useful purpose will be served by ordering a retrial.

17. In the premises, I allow the appeal, set aside the conviction, quash the sentence and direct that the appellant be at liberty unless otherwise lawfully held.

18. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 11th day of March, 2020.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey