



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL NO. 93 OF 2019**

**NICKSON WATTA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgement of Hon. M. Munyekenye, PM, delivered on 27/06/2019*

*in Criminal Case No. 232 of 2019, in the Principal Magistrate's Court*

*t Webuye, R v. Nickson Watta)*

**JUDGEMENT**

1. The appellant was appealed against his sentence of four (4) years imprisonment in respect of the composite charge of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code (Cap 63) Laws of Kenya.
2. The appellant was convicted on his own plea of guilty to the said charge.
3. The respondent has supported the sentence.
4. In this court the appellant has raised four grounds of appeal in his petition.
5. In a coalesced form the grounds of appeal are as follows. He pleaded guilty, since he was a pauper and a layman in law. He is remorseful and is the sole bread winner of his family. Finally, he promises to be a law abiding citizen and that the sentence imposed was harsh and manifestly excessive.
6. The facts in support of the charge were as follows. On 2/5/2019 the complainant (Osborne Osore) was sleeping in his house. He received a phone call from the appellant that there were people walking in his compound. The complainant woke up. He looked around and did not see anyone. He went to sleep; although stones were being thrown at the roof of his house. He then went to sleep. At 4.00 am the complainant heard noises in the next room. He then went to that room and found the appellant removing household goods through a hole that had been dug through the wall.
7. When the complainant saw him the appellant ran away through the hole. The complainant told his neighbours, who woke up. The appellant also responded and went to the home of the complainant.
8. The appellant was then arrested and charged with this composite offence.
9. Some of the assorted household goods were recovered, which included sufurias, cups, and plates; all of which were produced in court as exhibits in court. In his mitigation, the appellant told the court that the complainant had not paid him for four (4) months. He further told the court that:

***“He has just put the issues on me. I was the whistle blower.”***

10. Thereafter upon the application of the prosecutor the court ordered the stolen goods returned to the complainant. This was after the appellant told the court that he had no claims over the stolen goods.

11. The court called for a probation officer's report. The court found that a non-custodial sentence such as placing the appellant on probation or C.S.O. was not suitable; since it might have been difficult to implement as the appellant was a person without fixed abode.
12. Thereafter the court sentenced the appellant to four years' imprisonment on each limb of the composite charge; which sentences were ordered to run concurrently.
13. I have considered the submissions of both parties.
14. It is clear from the mitigation of the appellant that the plea of guilty was not unequivocal. The appellant told the court that he had worked for the complainant for four months in regard to which he had not been paid. He also told the court that the stolen goods had been put upon him and that he was a whistle blower. This was fatal to the order of conviction.
15. Furthermore, the court failed to inform the appellant the penalty to be imposed following his plea of guilty, which is mandatory before recording an order of conviction. This was equally fatal.
16. In the circumstances, I find that the trial of the appellant was fundamentally flawed.
17. The only issue before me is whether I should order a re-trial before a court of competent jurisdiction pursuant to this court's powers under section 354 (3) (a) (i) of the Criminal Procedure Code (Cap 75) Laws of Kenya. In this regard, I find that the exhibits which are the subject matter of the instant proceedings were ordered released to the complainant on 28/05/2019. The record of the proceedings shows that the investigating officer released them to the complainant on 1/7/2019. In the circumstances, it will not be possible to order a re-trial in the absence of the exhibits (stolen goods). The reason being that the exhibits will not be available for trial purposes.
18. The instant appeal shows the danger of ordering the release of the exhibits before the time of entering an appeal has expired. It is important to bear in mind that the exhibits produced at trial are part of the evidence of the court. Their premature release may impede the hearing and disposal of the appeal. In its re-assessment of the evidence, the High Court is required to view those exhibits and make its own independent findings.
19. In accordance with the provisions of section 178 (1) (4) (a) (b) of the Criminal Procedure Code, exhibits which are not disputed should not be released unless the time for appealing has expired and in a case where an appeal has been filed, until the appeal has been heard and determined. I may add that if the exhibits are in dispute an order of restitution should not be made. Instead the matter should be left to a court exercising civil jurisdiction to hear and determine it. Furthermore, if the exhibits are ownerless, the doctrine of *bona vacantia* will apply, but such doctrine does not apply where the owner is unknown. See *Aggrey Mukele Hilimuka v Republic, Criminal Appeal No. 106 of 2018*, (High Court registry at Bungoma).
20. Furthermore, I also find that the appellant has been in remand and prison custody since 03/05/2019, which is now over one year.
21. In passing, I must point out that the initial decision of the trial court to impose a no-custodial sentence was the best approach for this case. That court declined to do so after it found that it was going to be difficult to implement a no-custodial sentence such as probation or C.S.O.; since the appellant was a person of no fixed abode. The hands of the court were not tied. The would have still proceeded to impose a sentence of a conditional discharge under section 35 (1) of the Penal Code.
22. In the premises, the appeal succeeds with the result that the conviction and sentence are hereby set aside.
23. The appellant is hereby ordered set free unless held on other lawful warrants.

Judgment signed, dated and delivered at Narok this 25<sup>th</sup> day of August, 2020 through video link in the presence of the appellant and Ms. Nyakibia for the Respondent.

**J. M. BWONWONG'A.**

**J U D G E**

**25/08/2020.**