



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 29 OF 2018

(An appeal from the judgment of the Senior Resident

Magistrate, Garissa in CR. Case No. 92 of 2018 dated 5/4/2018)

MOSES MUTUA MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted on his own plea of guilty on three counts of housebreaking and stealing contrary to Section 304(1) and stealing contrary to Section 279(b) of the Penal Code where three different complainants lost property valued at Kshs. 12,500/=, Kshs.6,350/= and Kshs. 12,500/=respectively. The appellant was sentenced to serve seven (7) years for each of the three counts to run concurrently.

2. The appellant filed a memorandum of appeal after conviction and sentencing on the following grounds: -

1) The crucial witness whereby were not brought to court to give their evidence contrary to section 150 of the CPC.

2) That the learned court magistrate failed to consider the rule of the law when convicting me on contradictory and inconsistent evidence of the prosecutions witnesses Contrary to section to section 163 of the CPC.

3) That the learned trial magistrate further fell in matter when convicting me without considering that prosecution admitted the evidence which were in collaboration.

4) That the learned trial court magistrate erred both in law and fact when convicting and sentencing me without considering that I have parents and am first offender whereby he should have shown lenience.

5) That the learned trial court magistrate erred both in law and fact when convicting and sentencing me without considering my defence which was strong enough to rebut the prosecution evidence.

6) That trial court magistrate erred in both law and facts when convicting and sentencing me without considering that the prosecution relied on families' witnesses.

7) For he can't recall what happened during proceeding judgment, he request this Honorable Court for my law court proceeding for more supportive grounds and be present during hearing of this appeal.

3. The appeal came up for hearing on 21st September, 2020. The appellant told the court that he broke the law without knowing, and that he had denied the charges and then admitted the same. He sought forgiveness, stating that he has been in custody for 2 years and 5 months.

4. The state through Counsel Mr. Mulati opposed the appeal. He submitted that the sentence was legal and urged the court to uphold conviction and sentence and dismiss the instant appeal.

5. I have carefully considered the record of the trial court herein; it is clear to me that the procedure of taking a plea of guilty was strictly adhered to by the trial court. The charge was read out to the appellant in the language he understood and he replied affirmatively. He also affirmed that the facts and the information about his previous convictions were correct.

6. I find that an unequivocal plea of guilty was entered. At no time during the entire plea taking and mitigation process did the appellant raise any objection about what had been said about him or the offence before the court.

7. Additionally, the appellant was given a chance to mitigate before sentence, where he told the court that he has children and a wife, and it is clear that he did not say anything that can be construed to have meant that he had recanted his earlier plea of guilty.

8. Furthermore, the appellant grounds of appeal seem to allude to a trial that was undertaken and witnesses testifying, however this was not the case as the appellant pleaded guilty and therefore, they seem removed from the circumstances of this case save for the ground on sentence. In his submission in support of his appeal, the appellant took a tone of a plea for the leniency of this court by urging forgiveness.

9. **Section 348 of the Criminal Procedure Code** prohibits an appeal from a plea of guilty in the following words: -

“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.”

10. In view of the above section and the fact that the appellant has confirmed his guilt to this court, the appeal on conviction fails.

11. On sentence, **Sections 304 (1) and 279 (b) of the Penal Code** under which the appellant was charged. The said 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.

12. The trial court sentenced the appellant to seven (7) years as provided above, which is the maximum, noting that the offence was serious. In this case the appellant was a first offender, and it is trite that the maximum and minimum sentences provided under statutes are no longer binding on the court as was held in the supreme court decision in *Francis Muruatetu case*.

13. In view of the foregoing, I find that a sentence of 3 years would be sufficient, since the appellant is a first offender and seems remorseful of his offence. This would be reasonable, fair and lawful in my view.

14. Thus, the court makes the following orders;

i) The appeal on conviction fails and conviction is upheld.

ii) The sentence imposed by the trial court is set aside and the same is substituted with a sentence of 3 years' imprisonment from the date of sentence by trial court.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF OCTOBER, 2020.

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C. KARIUKI

JUDGE