REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 18 OF 2019

OMAR MWASAMBU MWACHIRO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original sentence in the Senior Principal Magistrate Court at Shanzu

Criminal No. 1877 of 2018 by Hon. D. Mochache (SPM) dated 17th December 2018)

Coram: Hon. R Nyakundi

Mr. Muthomi for the Respondent

Appellant in person

JUDGMENT

The Appellant was charged with burglary contrary to section 304(2) and stealing contrary to section 279(b) of the Penal Code. The particulars of the offences were that on the 26th July 2018 at Mbuyuni area in Kilifi sub-County within Kilifi County broke and entered the dwelling home of Hannington Mwachiro Jonathan with the intent to steal therein and did steal from therein box containing documents, assorted clothes, kitchenware and a suit case the property of Hannington Mwachiro Jonathan being of the value of Ksh. 39,900/-

The Appellant pleaded guilty and was convicted to 8 years imprisonment. Aggrieved by the said sentence, the Appellant filed his amended grounds of appeal reproduced verbatim that: -

1. That the learned trial Magistrate erred in law and fact by giving me an excessive sentence yet I was a first offender.

2. That the learned trial Magistrate erred in law and in fact without considering that I was convicted on a defective charge sheet.

3. That the learned trial Magistrate erred in law and fact in failing to consider my mitigation yet I pleaded guilty saving the court's time.

The Appellant filed his written submissions on 30th July 2020 in support of his appeal. He submitted that the sentence was harsh and excessive as he was a first offender and that he was remorseful and he had reformed stating that he committed the offence out of anger. He informed that one of the objectives of sentencing was rehabilitation. He informed the court that he had already benefited from vocational training and had obtained a grade 3 certificate from Manyani G.K prison which would enable him to earn a living once he was released.

Further, he submitted that he did not steal any of the alleged property but he only entered the house by force to take a suitcase containing his KCPE certificate and driving license after his stepmother, the complainant's wife, refused to grant him access. He stated that the case was instituted because he had insulted his stepmother. He alleged that he only pleaded guilty due to advice from his mother on the promise that the complainant, his father, would drop the charges. The Appellant contended that due to the plea agreement he was entitled to be sentenced to half of the prescribed imprisonment.

The Appellant submitted that the charge sheet was defective as it indicated that the offence was committed on the 26 th July 2018 while to OB indicated that the incident was reported on 26th June 2018. He further stated that he had been detained for over 24hours before being

arraigned in court after his arrest.

Mr. Muthomi advocate for the Respondent filed his submissions dated 3rd August 2020 on the same day. Mr. Muthomi submitted that the court would not interfere with the discretion of the trial court unless use of the term it acted on a wrong principle or overlooked some material factor or issued a sentence that was manifestly excessive. He relied on the case of **Macharia v Republic [2003] EA 559; Bernard Kimani Gacheru v Republic [2002] eKLR.** He urged that the trial Magistrate had considered the Appellant's mitigation and took note of the complainant's victim impact statement before sentencing and convicting the Appellant. Counsel submitted that the sentence was neither harsh nor excessive as section 279(b) of the Penal Code provides imprisonment for a term of 14 years.

Mr. Muthomi submitted that the charge sheet was not defective for duplicity for reason that the charge of burglary and stealing can be subsumed in each other and which are allowed to be charged together. He also submitted that the fact that the offence occurred during the day and not at night as indicated on the charge sheet was a minor offence curable under section 382 of the Criminal Procedure Code and it did not prejudice the accused. In support of his submission he cited the case of **Yongo vs republic [1983] KLR 319** and **Reuben Nyakango Mose & another vs Republic.**

Analysis and determination

I have considered the submissions by both parties. The Appellant has challenged the conviction and sentence on the ground that the charge sheet was defective and that the sentence was harsh and excessive.

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions as was laid out in the case of **Okeno v R (1972) EA 32.** See also **Eric Onyango Odeng' v R [2014] eKLR.**

Where an accused has been convicted on his own plea of guilt, Section 348 of the Criminal Procedure Code (CPC) states that:

> ***"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."***

The Court of Appeal in the case of **Alexander Lukoye Malika v Republic [2015] eKLR** interpreted the above section and held that: -

> ***"A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged."***

On whether the charge sheet was defective, the law on drafting a charge sheet is found under section 134 of the Criminal Procedure Code states 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."

The Court of Appeal in **Obedi Kilonzo Kevevo v Republic [2015] eKLR** laid out the test in determining a defective charge sheet and the effect of the Appellant's conviction and held that: -

> ***"The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of JMA v. Republic (2009) KLR 671, it was held inter alia that:***
>
> > "It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."

In **B N D v Republic [2017] eKLR** the court held that: -

> ***"29. The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective... There is no question in my mind that the Accused Person clearly understood the charges facing him well enough to understand the ingredients of the crime charged so that he could fashion his defence. In this case, he understood it well enough to offer an explanation when the facts were read out to him.***

30. Hence, as our case law has established, the test for a defective charge sheet is a substantive one, not a formalistic one and when it is used here it establishes that the charges gave fair notice to the Accused Person to the charges he was facing, and the trial was fair in a substantive sense. No miscarriage of justice was occasioned by the typographical error in the charge sheet."

I have perused the record of the trial court and note that the charge sheet indicates that the date of the offence was on 26th July 2018 while the facts of the case as read out by the prosecutor refer to 26th June 2018 as the date of the offence. I am satisfied in the present case that the contradiction as to the date of the offence did not prejudice the Appellant and that no miscarriage of justice has been occasioned as a result. The charge sheet and the particulars of the offence were read out to the Appellant and he responded and proceeded to participate in the trial process. The typographical error cannot make the charge sheet defective or the conviction a nullity.

Section 382 of the Criminal Procedure Code provides; as follows: -

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

I find that the contradictions in the charge sheet did not materially affect the proceedings in the trial Court, and is curable under section 382 of the Civil Procedure Code.

On sentence, the Appellant was charged with one offence containing two limbs, burglary and stealing. Each of the two limbs carries different maximum sentence of 10 years and 14 years respectively. However, the trial Magistrate gave one omnibus sentence of 8 years instead of two different sentence for each.

On whether the sentence was harsh and excessive, it is well established that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances as was emphasized by the Court of Appeal in **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR** where it stated: -

> ***"As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000 this Court stated thus:***

It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

(See also Wanjema v. Republic [1971] E.A 493)."

Section 304(2) of the Penal Code which provides that: -

> ***(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.***
>
> ***c) (2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.***

While section 279(b) of the Penal Code provides:

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.

It is trite that the court in sentencing should taking into consideration the mitigating factors as well as aggravating factors. The Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** pronounced itself thus: -

> ***To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:***
>
> > ***(a) age of the offender;***
> >
> > ***(b) being a first offender;***

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

The Judiciary's Sentencing Policy Guidelines 2016 sets out a list of aggravating and mitigating factors in paragraphs 23.7 and 23.8 respectively while paragraph 23.9.4 of the guidelines outlines the determination of a sentence where there are mitigating and aggravating circumstances and states: -

In view of aggravating and mitigating circumstances, the determination of the term of the custodial sentence shall be as follows:

> ***4. Presence of both aggravating and mitigating circumstances: Where both exist, the court should weigh the aggravating and mitigating circumstances and where mitigating circumstances outweigh the aggravating ones, then the court should proceed as if there is a single mitigating circumstance. Where aggravating circumstances outweigh the mitigating circumstances, then the court should proceed as if there is a single aggravating circumstance.***

While sentencing the Appellant the trial Magistrate stated that: -

Mitigation factors are considered. The accused seems to have grown into a serious criminal. He does not want to work. He is now 32 years old. He seems to have refused to get a job and has decided to steal from his father the law frowns upon such behaviour. Parents are supposed to be respected. I would therefore sentence the accused person to 8 years imprisonment so that the can benefit from vocational training.

The trial Magistrate in sentencing erred by stating that the Appellant had grown into a serious criminal which was not supported by any fact before the court, the prosecution having stated that he was a first time offender. Additionally, the trial Magistrate should have taken into consideration the fact that the Appellant pleaded guilty saving the court's judicial time. I note that the prosecution never informed that the court whether the items that were stolen were recovered and that this seems to be a family feud where the complainant, who is the Appellant's father seemed fed up with his son's behaviour.

Additionally, the facts of the offence as read out indicate that the offence occurred at 10:00am during the day instead of 10:00 p.m as specified in the charge sheet. It is therefore clear that the Appellant should have been charged with housing breaking that provides for a maximum sentence of 7 years instead of burglary, which has a maximum sentence of 10 years.

I would therefore agree with the Appellant that the 8 years sentence was too harsh. Taking the above facts into consideration, I hereby set aside the sentence for 8 years and substitute it with a sentence of 3 years on the offence of house breaking and 4 years for the offence of stealing to run from the date of Judgment.

Orders accordingly.

Right to appeal 14 days.

Judgment delivered, dated and signed at Malindi this 18th day of December, 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

The Appellant in person

Mr. Onyango for the State