



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 35 OF 2019

ABDI ADEN MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence delivered by Hon. Cosmas Maundu (CM) on 30/9/2019 in Garissa Chief Magistrate's Court Criminal Case No. 752 of 2019)

JUDGMENT

1. The appellant Abdi Aden Mohamed herein was charged with two counts namely; Burglary contrary to Section 304(2) of the Penal Code and Stealing contrary to Section 279(b) of the Penal Code.

2. The Appellant pleaded guilty to both counts.

The particulars of the 1st count are that on the night of 23rd and 24th of September 2019 at Ifo Refugee Camp with others not before court, he broke and entered the dwelling house of **Nyanchien Nguot Chuol** with intent to steal.

3. The particulars of the 2nd count are that on the night of 23rd and 24th September 2019 at Ifo Camp in Dadaab Sub-County within Garissa County jointly with others not before court, having entered the dwelling house of **Nyanchien Nguot Chuol** stole from the house one black bag, one slasher, one wrist bangle, seven bedsheets, several utensils all valued at Kshs.8,000/-.

4. The appellant appeals against the sentence having been convicted on his own plea of guilt and imprisoned for 5 years each for each of the offence. The sentences were to run concurrently.

5. The grounds of appeal include inter alia:

- The fact that the accused is a first offender.
- The sentence imposed is harsh and excessive.

In his submissions that was very brief the appellant prayed for reduction of the sentence.

6. Mr. Mulati for the State on his part sought to have the sentences upheld.

7. It is settled law that the matter of sentencing rests at the discretion of a trial court and an appeal court should only interfere where the trial court misdirects itself on principle or the sentence is manifestly excessive so as to cause an injustice.

8. In **Bernard Kimani Gacheru vs Republic [2002] eKLR** the Court of Appeal had this to say on the subject:

“It is now settled law, following several authorities by this court and the High Court that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive on the circumstances of the case, or the trial court overlooked some material factor, or acted on a wrong principle. Even if, the Appellate Court might itself would not have passed that sentence and feels that the sentence is heavy 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.”

9. Aside from the above the guidelines on sentencing policy speaks of the need to **“address the over utilization of custodial sentences and**

to promote the use of non-custodial sentence.”

The guidelines also speaks to the need for proportionality and state as follows:

“The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighed in view of actual, foreseeable and intended impact of the offence as well as the responsibility of offender.”

10. In this case the appellant broke into a dwelling house and stole goods worth Kshs.8,000/- some of which were recovered. The question is whether the sentence passes is commensurate with the offence as indeed several of the stolen items were recovered.

11. In sentencing the trial court observed:

“I have considered what the accused has said in mitigation. However, these offences are serious. From the facts accused ought to have been charged with robbery with violence.”

Was the court’s mind clouded?

12. All in all, I am of the view that the sentences were disproportionate to the actual offence committed. Both were excessive and harsh and to that extend the appeal succeeds.

13. The sentences are accordingly set aside and instead appellant is jailed for a period of 2 years on each count from the date of the trial court’s sentence and the two jail terms will run concurrently.

DATED AND DELIVERED AT GARISSA THIS 17TH DAY OF DECEMBER, 2020.

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ALI ARONI

JUDGE