



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

CRIMINAL APPEAL 147 OF 2018

RICHARD WAMBUA MUTINDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the sentence of Hon. P.K. Mutai (RM) in

Criminal Case No. 484 of 2017, delivered on 7th July 2017

at the Principal Magistrate's Court at Kwale)

JUDGMENT

1. The Appellant was charged with and convicted by the trial Court of two offences committed with another accused person, on his own plea of guilty. The two counts were first, breaking into a building and committing a felony, contrary to section 306(a) of the Penal Code. The particulars were that on 3rd July 2017 at Two Fishes area in Diani location, Kwale County within Coast region, with others not before the court, he broke and entered a building namely a store of Two Fishes Hotel, and stole from there two air conditioners valued at Kshs 80,000/=.

2. The second offence was that housebreaking contrary to section 304(1)(b) and stealing contrary to section 279(b) of the Penal Code, the particulars of which were that on the 1st July 2017 at Kibundani area in Diani location, Kwale County within Coast region, jointly with others not before the Court, he broke into and entered the house of Matano Abdallah Mwarima, with intent to steal therein and did steal one Samsung T.V 32 inches, a remote control, and a USB cable, all valued at Kshs 34,488, the property of Matano Abdallah Mwarima.

3. The Appellant was sentenced to three years imprisonment for each count, and the sentences were to run consecutively. The Appellant has now preferred this appeal against the sentence only. During the hearing of the appeal, the Appellant relied on his Petition of Appeal, Grounds of Mitigation and written submissions he filed in Court on 12th February 2018.

4. The Appellant stated that he was a first offender and was very remorseful. Further, that he has the responsibility of caring for his old mother who is now suffering in his absence. He urged the Court to allow that the sentences of 3 years on each of the two counts to run concurrently.

5. Mr. Masila, the learned Prosecution counsel, relied on written submissions dated 4th December 2018 and filed on 6th December 2018 by Sarah Ogwenyo, a Prosecution counsel. Reliance was placed therein on section 348 of the Criminal Procedure Code, and the decision in **Benard Kimani Gacheru –vs- Republic (2002) eKLR**, for the submission that sentencing is at the discretion of the trial court, and depends on the facts of each case. Further, that the appellate court will not easily interfere with the 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.

6. According to the Prosecution, the offence under which the Appellant was convicted provides for imprisonment for 7 years, and he was convicted to 3 years upon pleading for leniency. Therefore, that the sentence of three years for each count is not manifestly excessive.

7. I have considered the Appellant's mitigation and the submissions by the Prosecution. The issues for determination by this court are whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive, and whether the said sentence is amenable to reduction and /or variation.

8. Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-

“ In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence”.

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270**, wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

9. The Appellant was convicted of the offence of breaking into a building and committing a felony, contrary to section 306(a) of the Penal Code, which provides for a sentence of imprisonment for seven years. He was also convicted of the offence of housebreaking contrary to section 304(1)(b) and stealing contrary to section 279(b) of the Penal Code which offences carry sentences of seven years imprisonment and fourteen years imprisonment respectively. The sentence of three (3) years imprisonment meted on the Appellant for each count was therefore lawful, to the extent that it is provided for by the said provisions of the Penal Code.

10. The Appellant has in this regard sought a concurrent sentence. The applicable principles as regards concurrent sentences were laid down in **Ondiek vs R (1981) KLR 430**, where it was held that the practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances, the sentences imposed ought to run concurrently. Likewise, in **Nganga vs R, (1981) KLR 530**, the High Court held that concurrent sentences should be awarded for offences committed in one criminal transaction.

11. In the present appeal, the offences that the Appellant was convicted of were committed on two separate days, and in two separate transactions. Therefore, the above principles as regards concurrent sentences are not applicable to the Appellant, and the trial magistrate did not err in finding that he was to serve the sentences consecutively. However, and this finding notwithstanding, I find that the sentences meted by the trial magistrate were excessive, in light of the value of the items which were stolen, and given that the trial Court record shows that the Appellant was a first offender.

12. Arising from the foregoing reasons, the Appellant's conviction for the two counts of breaking into a building and committing a felony, contrary to section 306(a) of the Penal Code; and housebreaking contrary to section 304(1)(b) and stealing contrary to section 279(b) of the Penal Code is upheld, since he is not challenging the conviction. However, the sentence of three (3) years imprisonment for each count is set aside, and substituted with a sentence of one (1) year imprisonment for each count to run consecutively from the date of conviction by the trial Magistrate.

13. Given that the Appellant has already served a sentence of 18 months imprisonment since his sentencing on 7TH July 2017, I consequently order that he be, and is hereby set at liberty forthwith unless otherwise lawfully held.

14. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2019.

P. NYAMWEYA

JUDGE