



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 62 OF 2017

[FORMERLY ELDORET HCCRA NO. 26 OF 2015]

RICHARD KIPTOO TOROITICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 321 of 2014 delivered on the 12th day of February, 2015 by Hon. S.O. Temu, PM]

JUDGMENT

1. The appellant appeals from a conviction and sentence of imprisonment for seven years for the offence of entering a dwelling house with intent to commit a felony contrary to section 305 of the Penal Code. The particulars of the offence were that he “on the 26th day of April 2014 in Baringo Central district within Baringo County, entered the dwelling house of R.J with intent to commit a felony namely rape. ”
2. The appellant pleaded guilty to the charge in proceedings recorded as follows:

REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT KABARNET

CRIMINAL CASE NO. 321 OF 2014

REPUBLIC.....DPP

VERSUS

RICHARD KIPTOO TOROITICH....ACCUSED

PROCEEDING

29.4.14

CORAM BEFORE HON. E. BETT SRM

PROSECUTOR- MARETE

COURT CLERK- MERCY

INTERPRETATION- KISWAHILI

ACCUSED PRESENT - SELF

Court- the substance of the charge(s) and every element thereof is stated by the Court to the accused person in the language that he/she understands, who on being asked whether he/she admits or denies the charge(s) he/she replies:-

Accused - it is true

Court prosecutor- on 26.4.14 at about 11.00p.m the complainant in this case **REGINA CHEROTICH** was asleep when she was awoken up by some unusual noise she heard somebody touching the head board. She woke up and saw the accused and she screamed and which scream attracted her brother and the public. The accused was arrested and taken to Kabarnet police station where he was charged.

Accused- it is true

Court- plea of guilty entered.

Court prosecutor- I do not have previous convicts.

Accused- the last time I was in Court I was only charged with creating disturbance and given a probation sentence for 2 weeks. I completed my probation n sentence last month. The other case for assault was dismissed.

Court- the accused admits he has a previous conviction. The prosecution to get all previous convictions of the accused and the case be mentioned for further orders on 12.5.2014. The accused to be remanded in custody.

E. BETT AG SRM

14.5.14

CORAM BEFORE HON. S.O. TEMU [PM]

PROSECUTOR- AMBOGA

COURT CLERK- MERCY

ACCUSED ABSENT

Court- production order to issue. Mention 16.5.14.

S.O. TEMU [PM]

16.5.14

CORAM BEFORE HON. S.O. TEMU [PM]

PROSECUTOR- CPL AMBOGA

COURT CLERK- MERCY

ACCUSED - PRESENT

Court- the prosecution and the probation officer to avail records for the accused person before sentence. Mention 2.6.14.

S.O. TEMU [PM]

2.6.14

CORAM BEFORE HON. E. BETT SRM

PROSECUTOR- MARETE

COURT CLERK- JOAN

ACCUSED PRESENT

Court- the accused persons has a previous conviction in criminal case 143.14. the offence was drunk and disorderly and was sentenced to 2 weeks community service at public health office.

He is also having a previous convictions in criminal case 508 of 2011 Burglary and stealing was sentenced to serve 2 years imprisonment.

Accused – it is true.

Mitigation-

I committed the act due to alcoholism.

Court- I have considered the accused mitigation and in particular that it is alcoholism which drive him to commit this offences.

However, the accused despite severally appearing in Court and being handled strict penalties seems not to have learnt of how to co-exist well with his neighbors. The previous conviction of Burglary and stealing is almost similar to the current offence. His action of sneaking into the bed of the complainant and attempting to careless her is not only shocking to the complainant but also outrageous on the part of the accused.

As such I am for view that looking into consideration for foregoing a more deterrence sentence would be necessary and also save the society of the all constants threat to peace and security. As such he shall serve 7 (seven) years imprisonment.

E. BETT AG .SRM

12.2.15

CORAM BEFORE HON. S.O. TEMU [PM]

PROSECUTOR- MARETE

COURT CLERK- DAISY

ACCUSED PRESENT - SELF

Prosecutor- the accused was convicted to serve (7) years in case no. 321/14 on 3.6.14 but he escaped before commencement of the sentence.

Sentence should start running as from today when he was arrested and brought to Court.

S.O. TEMU [PM]

Court- the accused's sentence in case No. 321/14 to commence today 12.2.15. Fresh committal warrants to be prepared.

S.O. TEMU [PM]

12.2.15.

3. On appeal the appellant pleaded with the Court to reduce the sentence to enable him go and take care of his two children who now were under the care of his epileptic mother. The DPP opposed the appeal and pointed to the previous convictions of the appellant to justify the deterrent sentence and urged the Court to dismiss the appeal and let the appellant serve his sentence in full. It was also pointed out that the appellant had upon conviction and sentence escaped from custody for which offence, in KBT PMCCr. Case No. 127 of 2015, he had been upon plea of guilty convicted and sentenced to serve imprisonment for two years commencing after completion of the sentence herein, which commenced upon his arrest on **12th February 2015**.

4. The appellant had appealed from the conviction and sentence seeking a retrial on two grounds set out in the Petition of Appeal, that the trial Court had erred in not following the correct procedure of taking the plea agreement under section 207 of the CPC; and that he did not understand the language which was used during the hearing.

5. Having considered the evidence presented before the Court as required of this first appellate Court by the principle of **Okeno v. R.** (1972) EA 32, I find that there was evidence to prove the charge of entering a dwelling with intent to commit a felony as charged. Although the appellant's words of admitting the charge and facts of the case were not recorded in the language of the appellant, I find that the Court had complied with the procedure for plea taking as set out in **Adan v. R** (1973) EA 445 as follows:

- i. The charge and all the essential ingredients of the offence should be explained to the accused in his own language or in a language he understands;
- ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
- iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

iv. If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

v. If there is no change of plea a conviction should be recorded and a statement of the facts relevant to the sentence together with the accused's reply should be recorded.

6. The language of interpretation was shown as Kiswahili, and there being no indication on the record that the appellant had objected to the use of Kiswahili as a language of interpretation which he did not understand, this Court will dismiss the ground as an afterthought. Indeed, by the same language of Kiswahili, the accused had taken the proceedings for charge and response to the same and to the facts set out in support of the charge.

7. There appears to be something of unfairness in that it was the trial Court which called for record of previous convictions, and adjourned for that purpose, the prosecution already having said it had no records on the accused. The accused, however, admitted the past conviction.

8. Be that as it may, this Court considers, and feels justified to interfere with the sentence on the principle of *Wanjema v. R* (1971) EA 493 that the sentence is excessive in the circumstances of the case. Despite his status as a repeat offender, the sentence of imprisonment for seven years as the maximum sentence for offence under section 305 of the Penal Code is on the higher side given the conventional sentences given for the same or similar offences.

9. I consider a sentence of imprisonment for four years to meet the needs for deterrence in the case.

Orders

10. Accordingly, for the reasons set out above, the Court makes the following orders pursuant to section 354 (3) (b) of the Criminal Procedure Code:

a. The sentence of imprisonment for seven (7) years for the offence of entering into a dwelling house with intent to commit a felony is reduced to imprisonment for four (4) years from the date of commencement of the sentence on **12th February 2015**.

b. For avoidance of doubt, the sentence herein does not affect the conviction and sentence and manner of execution thereof in Kabarnet PMCCr. Case No. 127 of 2015 from which no appeal was apparently preferred.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF MARCH 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.