



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 71 OF 2017

ANTHONY KILONZO MUTUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant herein, **Anthony Kilonzo Mutuku**, was, together with two other accused persons, charged with two counts the offence of Housebreaking Contrary to Section 304(1)(b) and Stealing Contrary to Section 279(b) of the **Penal Code**. In count I the facts were that on 7th December, 2016 at Kyanda Village, Mua Hills Location within Machakos County, the appellant jointly with others broke and entered the building used as a dwelling house by **Julius Nyerere** and stole one mattress, one radio, make Sony, one bed cover, radio cassettes, one DVD machine lake LG, one electric kettle, one iron box, a *panga* and pliers all valued at Kshs 26,000.00 the property of **Julius Nyerere**.

2. In count II, the particulars were that on the 23rd day of December, 2016 at Kyanda Village within Machakos County, the appellant jointly with others broke and entered the building used as a dwelling house by **William Matolo** and stole one blanket, two bedsheets, 1 kg maize flour, one litre cooking oil, ½ kg sugar, ½ kg salt, one knife and one toothpaste all valued at Kshs 16,000.00 the property of **William Matolo**.

3. Upon being arraigned in court the appellant pleaded guilty to both counts. After taking the mitigation, the court proceeded to sentence the appellant in respect of count I to “serve 3 years imprisonment on each limb of the charge. Sentence to run concurrently”. Similarly, in respect of Count II “serve 3 years imprisonment on each limb of the charge. Sentence to run concurrently”. However, the sentence in counts I and II were to run consecutively.

4. The appeal is only against sentence. In the appellant’s submissions the appellant urged the court to consider the fact that he was deeply remorseful, was a first offender and a potential citizen in his youth with no parents. According to him he had reformed since his incarceration. He therefore prayed for a non-custodial sentence.

5. Opposing the appeal, **Ms Mogoi**, learned prosecution counsel submitted that though the appellant was sentenced to serve three years for each count section 304(1) of the **Penal Code** prescribed a sentence of 7 years while section 279 prescribed a sentence of 14 years. It was therefore submitted that the three years to which the appellant was sentenced on each count was lenient hence the court must have considered his mitigation.

6. I have considered the record. It is not clear what mitigating circumstances the learned trial magistrate considered. Instead it was his view that the appellant was a dangerous criminal. There is no evidence from the record of the facts from which this conclusion was arrived at. Apart from that the appellant was only convicted of two counts. However, from the sentence, it would seem that the court considered that each count comprised of two offences and sentenced the appellant on each of the said offences. Dealing with similar circumstances, **Musinga, J** (as he then was) in **Paul Kinuthia Thiga vs. Republic [2005] eKLR** expressed himself as follows:

“The particulars of the offence in the first count of house breaking and stealing showed that the appellant and his accomplices broke into the house of the complainant and stole her goods on 21st July, 2003. These two offences were committed in a single act and our law prohibits an offender from being punished twice for the same offence. The trial magistrate should not have ordered two separate sentences as that was tantamount to punishing the appellant twice for the same offence. In **MUIRURI VS REPUBLIC [1973] E.A. 86 the appellant was convicted and sentenced on two counts, shop breaking and theft as the first count and robbery as the second count. On appeal, the conviction and sentences on the first**

count was quashed because theft was an ingredient of both offences which arose out of a single act. In this appeal, the appellant should have been sentenced to 10 months imprisonment only and it was not right for the trial court to sentence him to 10 months for each limb of the offence and to order that the two sentences run consecutively.

I therefore allow the appeal and set aside the additional sentence of 10 months imprisonment. As the appellant has been in jail for more than 10 months, I order that he be set at liberty forthwith unless otherwise lawfully held.”

7. Section 304 of the *Penal Code* 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.

8. Whereas the appellant was charged under section 304(1)(b), the particulars of the charge and the facts seem to have been in respect of an offence under section 304(1)(a). In my view section 304(1)(a) deals with three scenarios. The first scenario is where a person breaks and enters into building, tent or vessel used as a human dwelling with intent to commit a felony therein. The ingredients here are that the person must break and enter into a building, tent or vessel. That building, tent or vessel must be one that is used as a human dwelling and the entry therein must be with the intention of committing a felony therein. Therefore, even without committing any offence therein, the offence thereunder is complete as long as the intent is proved. However, section 304(1)(b) applies where the person, being already inside the building, tent or vessel used as a human dwelling with intent to commit a felony therein, breaks out thereof. Therefore, once it is proved that a person was inside the building, tent or vessel used as a human dwelling and harbouring the intention of committing a felony, breaks out thereof, the offence is complete without necessarily committing an offence. The last scenario is still under section 304(1)(b) but here, the person, being already inside the building, tent or vessel used as a human dwelling with or without intent to commit a felony therein, does commit a felony therein and breaks out thereof. So under section 304(1)(a), the breaking is for purposes of gaining ingress while section 304(1)(b), the breaking is for purposes of egress. In this case, both in count I and count II the entry was for purposes of ingress and without anything else that constituted an offence of housebreaking. The facts do not disclose that there was a breaking out after the appellant gained entry in order for an offence under section 304(1)(b) to be deemed to have been committed. Therefore, the offence under section 304(1)(b) having been completed, the act of stealing after the said entry in my view ought not to have been charged in the same count as that constituted another offence that ought to have been under a separate count. I am supported in this view by the decision in Rashid Salim vs. Republic [2000] eKLR where the court opined that:

“Under second schedule of the Criminal Procedure Code the mode of charging burglary with theft together is prescribed. It is anomalous though as it charges burglary and theft in one count. It is a principle of law or of practice that in any charge each offence charged must be grounded in one specific count. It is therefore wrong practice to charge burglary (Housebreaking) together with theft.”

9. In my view, this was the dilemma that the learned trial magistrate found himself in when confronted with two distinct offences in one count. It was, in my view, what led him to sentence the appellant twice in respect of each count. If the learned trial magistrate could be in that dilemma can it be said that the appellant was not prejudiced by the manner in which the offences were framed? I don't believe so.

10. Section 135(2) of the *Criminal Procedure Code* states the manner of framing joinder of counts in a charge or information and provides as follows:

“Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.”

11. Therefore, where more than one offence is charged in the same count, it would amount to duplicity. In Saina vs. Republic, [1974] EA, 83 where the accused was charged in a single count with house breaking, theft and handling stolen property, on appeal, the High Court was of the view that the charge was an incurable illegality.

12. According to *Black's Law Dictionary*, 9th Edition at page 578, *duplicity* is defined as, “The charging of the same offence in more than one count of an indictment or, the pleading of two or more distinct grounds of complaint or defence for the same issue.” According to *Archbold, Criminal Pleading, Evidence and Practice, 2010* at page 9,

“The indictment must be double; that is to say, no one count of indictment should charge the defendant with having committed two or more separate offences...The question of whether a count breaches the general rule against duplicity is a question relating to the form of the count, not the underlying evidence...thus, if the particulars set out in the count allege only one offence, the fact that the evidence at trial may reveal more than one offence does not make the count bad for duplicity.”

13. What then is the legal consequence of a duplex charge? The Court of Appeal in Mahero vs. R [2000] 2 KLR 496 considered the English case of Ministry of Agriculture Fisheries and Food vs. Nunn Comm & Coal (1987) Limited [1990] LR 268 where it was emphasized that the question of duplicity is one of the fact and degree and that the purpose of the rule is to enable the accused to know the case he had to meet. In the case of Omboga vs. Republic [1983] KLR 340, it was held that;

“injustice will be occasioned were evidence is called relating to many separate counts all contained in one count because the accused cannot possibly know what offence exactly he is charged with.”

14. I agree with the decision in **Alistide Brilliant Nkoumondo vs. Republic [2016] eKLR** that:

It is the view of this court that the rationale for the principle of duplicity is that when a charge is duplex, and an accused person goes through a trial, the fairness of the process is fundamentally compromised. The obvious reason to this is that it would not be clear to him/her what the exact charges do confront him or her. In the end, he/she may not be in a position to prepare himself/herself for a proper defence. This may not only be prejudicial but ultimately amounts to a failure of justice.

15. Just like in that case, I have no doubt at all that the charge as laid was bad for duplicity.

16. There is however a problem with the manner in which the charge was drawn, assuming that what was meant was an offence under section 304(1)(a). The offence thereunder expressly provides that the breaking and entry of the building, tent or vessel used as a human dwelling must be with intent to commit a felony therein. Therefore, intent is an important ingredient of the offence. That ingredient was missing from the charge as drawn. As was held in **David Chwea vs. Republic [2015] eKLR**:

“On the issue of the particulars in support of the charges of house breaking and stealing, I do agree that the words “with intent to steal therein” ought to have formed part of the particulars. There is an omission to that extent.”

17. Should this court order a retrial? In **Geoffrey Kamau Kahuthu vs. Republic [2009] eKLR**, the appellant, was upon his own plea of guilty to a charge of housebreaking contrary to Section 304(1) and stealing contrary to Section 279(b) of the ***Penal Code*** convicted and sentenced to 30 months imprisonment on each limb and the sentences were ordered to run concurrently. He appealed against that sentence and submitted that he had reformed and prayed for the reduction of the sentence. He stated he was one of those affected by the post-election clashes and as a result of his imprisonment his family was in dire need of help. After considering his submissions and given the fact that the stolen radio was recovered and the appellant had served about a half of the sentence imposed upon him, **Maraga, J** (as he then was) reduced it to a term that secured his immediate release.

18. Based on the sentences in **Paul Kinuthia Thiga vs. Republic [2005] eKLR** and **Geoffrey Kamau Kahuthu vs. Republic [2009] eKLR**, it is my view that no useful purpose will be served by ordering a retrial. The appellant was convicted on 4th January, 2017. He has been in prison for two years which is more than the period that the appellants were sentenced to serve in the said cases.

19. In the premises, I allow the appeal, set aside the conviction, quash the sentence and direct that the appellant be at liberty unless otherwise lawfully held.

20. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 26th day of June, 2019.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in Person

Ms Mogoi for the Respondent

CA Geoffrey