



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**HCCRA NO. 50 OF 2017**

**DANIEL EKURU.....1<sup>ST</sup> APPELLANT**

**EKURU NGIBEYO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 249 of 2014 delivered on the 4<sup>th</sup> day of April, 2014 by Hon. E. Bett, RM] and on 27<sup>th</sup> day of June by Hon. S.O. Temu, PM]**

**JUDGMENT**

**Introduction**

1. Ekuru Ngibeyo, the 2<sup>nd</sup> appellant herein and Daniel Ekuru were first charged in Cr. Case 247 of 2014 for burglary contrary to section 304 (2) of the Penal Code, with particulars that:

*“Ekuru Ngibeyo 2. Daniel Ekuru on the 2<sup>nd</sup> day of April 2014 at Marigatina village in Marigat district within Baringo County jointly with others not before the Court broke and entered into posho mill kiosk of Japheth Boiwo with intent to steal therein and did steal two half sacks of maize, a mattress one bedsheets and cash 9,070/- all valued at Ksh 14,070/- the property of the said Japheth Boiwo”.*

They also faced an alternative charge of handling stolen property contrary to section 322 of the Penal Code.

2. The 1<sup>st</sup> accused Ekuru Ngibeyo (2<sup>nd</sup> appellant herein) pleaded guilty to the charge and was sentenced to imprisonment for five years. The trial of the 2<sup>nd</sup> accused Daniel Ekuru (the 1<sup>st</sup> appellant) was subsequently terminated under section 87 (a) of the Criminal Procedure Code for lack of witnesses upon an order for *denovo* trial following change of trial Court, on 5/12/14.

3. In the meantime, the said Ekuru Ngibeyo and Daniel Ekuru had been charged in Cr. Case 249 of 2014 with another Ekwami Sammy, respectively as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused for the offence of burglary contrary to section 304 and stealing contrary to section 279 (b) of the Penal Code with particulars that they:

*“On night of 29<sup>th</sup> day of March 2014 and 30<sup>th</sup> day of March 2014 at Unknown time at Marigatina Centre in Marigat district within Baringo County, jointly with others not before the Court broke and entered the Kiosk of Josphine Ngugi with intent to steal from therein and did steal 30 clothing materials and other ready-made clothing's, all valued at Ksh. 42,000/- the property of the said Josphine Ngugi”.*

4. The first two accused persons and the third accused in Criminal case 249 of 2014, separately faced alternative counts of handling stolen property contrary to section 322 (2) of the Penal Code for respective clothing materials alleged dishonestly received by them.

5. It is the conviction and sentence in the Cr. Case No. 249 of 2014 that the appellants herein – the 2<sup>nd</sup> and 1<sup>st</sup> accused therein appealed from. The judgment and sentence of the trial Court in the matter are set out in material portions as follows:

**“JUDGMENT**

*After the evidence tendered it was clear that the complainant's shop was broken into and items recovered.*

*It was also clear that the items were recovered from the accused persons. That is some from the house where the 2<sup>nd</sup> accused was with the 1<sup>st</sup> accused and the house where the 3<sup>rd</sup> accused had led PW1, PW2 and PW3 to.*

*The issues for determination were whether it was the accused persons who had broken into the complainant shop or they were holding the items legally.*

*The items were recovered for days after the break in and what was quite a short period and one can safely make an inference that the accuse were the thieves.*

*I thus find the 2<sup>nd</sup> and 3<sup>rd</sup> accused guilty and count them for the offence of Burglary and Stealing contrary to section 309 (2) and 279 (b) of the Penal Code.*

#### **SENTENCE**

*I have conducted the nature of the offence and felt that the offence is now common within the area.*

*There is thus need to discourage other like-minded persons from engaging in such like activities.*

***The 1<sup>st</sup> accused was sentenced to serve 7 years imprisonment and I found no reason to grant the two that is 2<sup>nd</sup> and 3<sup>rd</sup> accused any lesser sentence.***

***The two will thus server 7 years imprisonment for each and sentence will run concurrently.***

*14 days Right of Appeal.*

**S.O. TEMU, PM**

**27/6/14”**

The 1<sup>st</sup> accused pleaded guilty at plea stage.

6. The appellants seek a reduction of sentence in written submissions as follows:

#### **“DANIEL EKIRU**

*From the original conviction and sentence of 2 years imprisonment Cr. Case No. 249/2014 BURGLARY and STEALING c/sec 302 (2) and 279 (b) of the CPC Judgment delivered on 4<sup>th</sup> April 2014 by Hon. E. Bett (S.R.M) at KABARNET Law Courts.*

*That my lord’s since I have suffered another sentence and I have stayed in prison for a long term, I do pray that may the Honourable Court reduced the said sentence.*

*That my Lord’s because the said offence arise from bad Company and also influence in alcohol, which I promise to shun and focus on in good relationship with my neighboring citizen. My lord’s I have undergo tough condition while in prison and I have differentiated what is good and wrong. My lord’s I do pray for non-custodial sentence.*

*My lord’s since I am serving different accounts, I do also pray that may the Honourable Court give orders that may this sentence run concurrently, as may this Honourable Court may deem leniency will be.*

*That my lords am still a teenage of which the whole family depend on me both of my parents are too old enough to support themselves due to their old age which makes there hand to provide their basic needs. I do pray that may the Honourable Court re-evaluate and reduce the sentence.*

#### **EKIRU NGIBEYO**

*From the original conviction and sentence 5 years in original Cr. Case No. 249/2014 burglary and stealing c/sec 304 (2) and 279 (b) of the p.c delivered on 4<sup>th</sup> April 2014, 2017, by Hon. E. Bett (RM) at Kabarnet Law Court.*

*My lords I am serving a 12 year’s imprisonment in two counts. Count (I) 7 years imprisonment and count (II) 5 years imprisonment. Count (I) which is 7 years will expired on 04/12/2018.*

*I now beg to write this submission on count II (5 years). My lords I came from a poor family, I was struggling on my casual part time jobs in order for my family to get basic needs, my aged parents who depended on me of their old age, cannot afford to do casual jobs.*

*That this sentence is too harsh and I am the bread winner in my family, my lords I came from an arid area where there are no farm*

produce, mostly we depend on well-wishers and government relief food, and this makes it hard for their survival in my absence.

I have trained in prison and gained skills in tailoring, carpentry and I am now a Christian convert who believes fully in God I am also undergoing a course in studying the bible (Theology), waiting to graduate this month in prison.

I kindly pray for a second chance to build up the nation through my skills and provide for my family now that I have learned my mistake of which they emanated from the use of alcohol and influence of bad company which I promise to shun my lords.

My lords I am a first offender and through my rehabilitation I have gained skills which will benefit my neighbouring citizens, I kindly request for this Court to give me a lesser sentence in criminal case no. 247/014 so as to serve the remaining a count which will expire on 4/12/2018 to enable me to meet my family and I do promise that I will be a law abiding citizen. I pray that may the Honourable Court re-evaluate and reconsider my conviction and reduce the sentence or give me a non-custodial sentence.”

7. The DPP orally responded to the verbal highlighting by the appellants of their submissions as set out in the record of the proceedings of this Court as follows:

**“Daniel Ekuru 1<sup>st</sup> Appellant**

*I have prepared written submission. I pray that the time I have in custody being 5 years since I was 16 years. I have reformed. I pray that I be released to go home. I am orphan. Both my parents are deceased. I was sentenced to 7 years.*

**Ekuru Ngibeyo**

*I have written submissions. I was 17 years. I am now 21 years. I have trained in the prison. I pray for reduction of sentence.*

**DPP**

*Appeal is opposed. I realize that appellants object that they were minors but the issues were not raised in the lower Court. There was no proof of age. We submit that it was an afterthought. The Court may order an age assessment before conclusion of the matter.*

*Appellants were found in possession of the stolen items and they were found in the house where the items were recovered. Pw1 also identified the items are belonging to her.*

*The 2<sup>nd</sup> appellant pleaded guilty and has only appealed for sentence.*

*Considering the circumstances where appellant were arrested with the stolen items. The sentence of 7 years was lenient for deterrence.*

**Daniel Ekuru 1<sup>st</sup> appellant**

*The 5 year sentence is sufficient for reform of the offender.*

*I pray that the 7 years sentence be reduced.*

**Ekuru Ngibeyo**

*I had 2 counts of 5 years which I have finished. My appeal is on the 7 years sentence which I have served 1 year and 1 month.”*

**Determination**

8. The only issue before the Court is the appeal from sentence of 7 years imposed by the trial Court for which the appellants seek review. On the evidence and as a first appellate Court, I am satisfied that the doctrine of recent possession applies to this case to create a reasonable presumption that the appellants were the thieves who broke into the complainant’s store and stole therefrom the items of clothing that were recovered from them 4 days after the theft. See *Njoroge v. R* (1983) KLR 197 and *Thati v. R* (1983) KLR 354.

9. The 1<sup>st</sup> appellant, Daniel Ekuru, has been in custody since 3/4/2014 when he was arrested and charged in Cr. Case 247 of 2014, the charge whereof was withdrawn on 5/12/14 when he was already serving sentence in Cr. Case No. 249 of 2014 passed on 27/6/14.

For the offence appealed from the appellant has served sentence for **5 years** (shy only of 7 days) for the 27/6/14.

10. The 2<sup>nd</sup> appellant, Ekuru Ngibeyo has been in custody from 3/4/14 and has served his 5 years sentence in Cr. Case 247 of 2014 since his conviction on plea of guilty on 4/4/2014 and is on service of the sentence of 7 years imprisonment in Cr. Case No. 249 of 2014, in which he again pleaded guilty on the same day 4/4/14, the sentences which the Court ordered to run consecutively.

11. In ordering consecutives execution of the sentences, the trial Court said that:

*“I have noted that accused person previous conviction and similar offences. As such he shall serve seven years imprisonment in which sentence shall run consecutively to the other conviction”.*

12. Section 37 of the Penal Code allows a trial Court to order consecutive or simultaneous execution of sentences in following terms:

*“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence unless the Court directs that it shall be executed concurrently with the former sentence or any part thereof:*

*Provided that it shall not be lawful for a Court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection 28 of any part thereof.*

13. The burglaries charged in the two cases Cr. Case No. 247 and 249 of 2014 were carried out in different kiosks, on different dates and against different complainants and even though there was proximity in terms of the dates of the offence respectively 29<sup>th</sup> March 2014 and 2<sup>nd</sup> April 2014, there is no basis for ordering a simultaneous execution of sentence as the two were separate and independent criminal acts, and not properly part of the same transaction. See **Ondieki v. R (1981)** KLR 430 and **Nganga v. R (1981)** KLR 530. I therefore do not find a basis for interference with the order for consecutive execution of the sentences imposed on the 2<sup>nd</sup> appellant Ekuru Ngibeiyi. The appellant may have gone on a burglary spree between 29<sup>th</sup> March and 2<sup>nd</sup> April 2014, but the thefts were not part of one criminal transaction but separate criminal acts carried over the same period in time against different victims. See also **Njoka v. R (2001)** KLR 175.

14. However, it is Court’s view that the sentence of 7 years imposed on the appellants in Cr. Case No. 249 of 2014 [Cr. case NO. 247 of 2014 is not before the appellate Court] is excessive for the offence of burglary and stealing in the circumstances of the case.

15. There is also a bit of unfairness that in sentencing the 1<sup>st</sup> appellant and the 3<sup>rd</sup> accused to 7 years imprisonment, the trial Court reasoned that their sentences should accord to the sentence imposed on the 1<sup>st</sup> accused (2<sup>nd</sup> appellant) herein whose severe sentence had been informed by his being a repeat offender having been previously convicted in Cr. Case No. 247 of 2014.

16. I have considered the sentences in similar cases starting with **Mbungo v. R (1983)** KLR 348, where Todd, J. imposed a sentence of 3 years for appellants who pleaded guilty to a charge of burglary and stealing from a dwelling house contrary to section 304 (2) and 279 (b) of the Penal Code, **Thathi v. R (1983)** KLR 354 where Porter, Ag. J considered lenient a sentence of 20 months for the offence of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code, and **Njoka v. R (2001)** KLR 175 where the Court of Appeal while upholding a sentence of 5 years for the offence of burglary and stealing contrary to section 304 (2) and 279 (b) of the Penal Code allowed and appeal on an order for the sentences on the two limbs or burglary and stealing to run consecutively as the offences were committed in one transaction. See also **Omuse v. R (2009)** KLR 214 where a sentence of 7 years was considered severe for the offence of “*burglary and stealing contrary to section 304 (b) and 279 (b) three counts of breaking into a building and committing a felony contrary to section 306 (a) and finally stealing stock contrary to section 278 all under the Penal Code.*”

17. As required of the sentencing Court to consider all circumstances of the case including a blameworthiness of the accused and the value of stolen items [See **Omuse v. R (2009)** KLR 214 and **Ambani v. R (1990)** KLR 161], I have considered that the value of the stolen items in Cr. Case No. 249 of 2014 was 42,000/- [and the 1<sup>st</sup> appellant is alleged to have been found with clothing valued at Ksh. 10,000/- only and the value of the stolen items in Cr. Case No. 247 was 14,070/-]. See **Mathai v. R (1983)** KLR 422 that in sentencing, the value of the goods must be taken into account.

18. I consider also that in sentencing the 1<sup>st</sup> appellant to imprisonment for 7 years to agree with the sentence imposed by a previous Court on the 2<sup>nd</sup> appellant who had previous conviction, the trial Court overlooked the fact that the 1<sup>st</sup> appellant was a first offender.

19. The appellate Court therefore feels justified on the test of interference with discretion in sentencing set out in **Wanjema v. R (1971)** EA 493 and **Omuse v. R (2009)** KLR 214 to review the order of the trial Court on the sentence for being excessive and for overlooking some material fact.

20. In the circumstances of this case, I consider that an imprisonment term of 4 years meets the justice of the case in terms of punishment, deterrence and rehabilitation. As the 1<sup>st</sup> appellant has been in custody for 5 years since sentence on 27/6/2014 for he has fully served the four year sentence even without remission, under section 46 of the Prisons Act which had been withdrawn in the year 2014 but returned by Statute Law (Miscellaneous Amendment) Act 2015.

21. As regards the 2<sup>nd</sup> appellant, he would with remission have fully served his 5 years sentence in Cr. Case 247 of 2014 by the 4/7/2017 (after serving 3 years 4 months from 4/4/2014). Henceforth, he will have been in custody for 2 years to date) shy only of three 3 weeks).

On the sentence of 4 years in Cr. Case No. 249 of 2014, the 2<sup>nd</sup> appellant should serve only 2 years and 8 months, of which he has at the time of this judgment served 2 years. I consider that the end of justice have been served by his imprisonment for a period of 5 years three months that he has on aggregate been in custody for the two sentences.

## **Orders**

22. Accordingly, the appellate Court in exercise of its powers under section 354 (3) (b) of the Criminal Procedure Code reviews the sentence of imprisonment for seven (7) imposed on the appellants in this case to imprisonment for a term of 4 years.

23. As the 1<sup>st</sup> appellant Daniel Ekuru has served in full the said sentence of imprisonment for 4 years, there shall be an order for his release from custody forthwith.

24. As the 2<sup>nd</sup> appellant has served 2 years of the 4 year sentence with remission (2 years and 8 months) and bearing in mind that he has been in custody for over 5 years and 3 months since arrest and conviction in Cr. Case No. 247 of 2014, he has been sufficiently paid for his crimes and there shall be an order for his release from custody forthwith.

25. In the interest of justice, the Court shall order release of the 3<sup>rd</sup> accused person in Cr. Case No. 249 of 2014 if he is still held in custody in execution of the 7 year sentence imposed on all three accused persons by the trial Court.

*Order accordingly.*

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF JUNE 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellants in person.

Ms. Macharia, Ass. DPP for the Respondent.