



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 147 OF 2017**

**(From Original Conviction and Sentence in Criminal Case No. 3367 of 2017 by the Chief Magistrate's Court at Kakamega (Hon. B. Ochieng, CM))**

**PETER MUTONYI MAINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant was convicted on two counts of housebreaking and stealing upon his plea of guilty. He was sentenced to three years for housebreaking and to three years for stealing, on each count. The sentences within each count were to run concurrently, while the concurrent sentences in the two counts were to run consecutively.
2. The appeal herein is against sentence. In the petition of appeal, the appellant raises two issues. He says that the court ought to have considered that the offences in the two counts were committed in one transaction and, therefore, the sentences in the two counts ought to have been imposed to run concurrently rather than consecutively. Secondly, he argues that he was remorseful and that should have been taken into account.
3. The appeal was canvassed on 13<sup>th</sup> June 2019. The appellant relied on written submissions that he placed before me. Although his petition of appeal was only on sentence, the written submissions address other matters outside of that and challenge conviction. He submits that he was not informed of his rights contrary to Article 50 of the Constitution, that the trial court did not consider his remorse before handing out a harsh sentence, convicted him of handling stolen property when he had not pleaded guilty to that charge and finally that the committal warrants were defective to the extent that they made him serve an accumulated sentence of twelve years instead of six years. In response, Mr. Ng'etich for the state submitted that sentence imposed was lenient for the offences charged, and urged me to uphold the sentence. Secondly, he stated that the plea was unequivocal and the appellant had not raised the issue of his state of mind at the plea taking event.
4. On the issue of the plea of guilt not being safe, I note that the appeal before me is on sentence only. The appellant did not challenge his conviction in his petition of appeal. Even then, if I were to consider the manner the plea was taken, I would, from the record before me state that there was nothing untoward. The charge was read to the appellant and he pleaded to it procedurally. He has not raised the issue of the language used. On right to legal representation, he did not indicate that he needed a lawyer and the court did not deny him a chance to engage one. In any event, the charge he faced was not so serious, or so complex, as to require representation by a lawyer paid for by the state.
5. Regarding severity of sentence, I do note that the sentences were fairly lenient taking into account the maximums provided for under the law. The appellant did not express remorse before sentencing, he said he had nothing to say, so he cannot be heard to complain that the fact of his remorse was not taken into account. The court may have not recorded that it had considered his plea of guilty in assessing sentence, but the same must have been considered taking into account the sentences imposed.
6. On the issue of the defects in the committal warrant, I understand that the trial court convicted the appellant on two counts, in both of which he was charged with housebreaking and stealing. He was sentenced to three years for housebreaking and three years for stealing. In each of the counts the three years are to run concurrently. That would mean for Count I he would serve three years and not six years, and for Count II he would serve three years and not six years. The sentences in the concurrent three years sentences in the two counts were then to run consecutively, meaning that after serving the three concurrent years in Count I, he would then serve the other three concurrent years imposed with respect to Count II. The effect of it is that he should serve a total of six years in jail.
7. There is an alternative to the two counts, where he is charged that otherwise than in the course of stealing, he was found to be in possession of the items the subject of Counts I and II. He was not convicted of the alternative charge, and therefore the sentences imposed did not apply to the alternative count. Nothing should be reckoned while calculating his overall sentence with respect to the alternative charge.

8. It should be made clear that a person cannot be a thief and a handler or receiver of the items that he is alleged to have stolen. He should either be a thief or, in the alternative, a handler. He cannot be both. That would mean that once a person is convicted of the main count of stealing then he cannot again be convicted of the alternative of handling the same items that he has been convicted of having stolen.

9. I should next consider whether the sentences imposed in the two counts should have been ordered to run concurrently as opposed to consecutively.

10. The law on concurrent and consecutive sentences is stated in section 14 of the Criminal Procedure Code, Cap 75, Laws of Kenya. It would appear that the norm is to require sentences to be served consecutively where there are multiple convictions and sentences for offences committed in the course of the same transaction. The court, however, has the discretion to decide whether the sentences should run consecutively or not. The provision states:

*“14. Sentences in cases of conviction of several offences at one trial (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.”*

11. It was said in *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97, that it was good practice to impose concurrent sentences where a person committed more than one offence at the same time and in the same transaction save in very exceptional circumstances. In *Peter Mbugua Kabui vs. Republic* [2016] eKLR, on the same subject, the Court of Appeal said:

*“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”*

12. The position stated by the Court of Appeal in *Peter Mbugua Kabui vs. Republic*, above, is in consonance with the Sentencing Policy Guidelines, which state:

*“7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively.*

*7.14 The discretion to impose concurrent or consecutive sentences lies with the court.”*

13. In *Vincent Ngetich Kipkemboi vs. Republic* [2017] eKLR, in circumstances similar to the instance case, the offences charged in the two counts for which the applicant had been convicted and sentenced, were committed in the same transaction, though against different complainants but at around the same time. The court took the view that the trial court had erred in imposing consecutive sentences. It set aside the consecutive sentences and substituted the same with an order that the sentences should run concurrently.

14. The offences committed in Counts I and II are distinct to the extent that they were committed against different victims. The facts, as presented by the prosecution at the trial, appear to suggest that they were committed in the course of one transaction. The facts read to the appellant, and to which he pleaded did not suggest that there was more than one transaction that would mean that the court should have imposed a concurrent sentence.

15. In view of what I have stated in paragraph 14, here above, I find that the trial court erred in imposing consecutive sentences. I hereby, accordingly, set aside the consecutive sentences and substitute the same with an order that the sentences shall run concurrently, which shall mean that the appellant shall serve an aggregate or total of three years in prison.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF JULY 2019**

**W MUSYOKA**

**JUDGE**