



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 166 OF 2018

KASSIM OKUSIMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by F. Makoyo, SRM,

in Butere SRMC Criminal Case No. 483 of 2018 dated 2/11/2018)

JUDGMENT

1. The appellant was convicted on his own plea of guilty of the offence of burglary contrary to section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code and sentence to serve 5 years imprisonment. The appellant was aggrieved by the sentence and filed this appeal. The grounds of appeal are that the sentence of 5 years imprisonment imposed on the appellant is harsh. He faulted the trial court for not considering his mitigation.

2. The particulars of the charge against the appellant were that on the night of 7/10/18 at Kumailo Wambulube Sub-location Kisa Central location in Kakamega County he, with another, jointly broke and entered into the dwelling house of Stanford Okeno (herein referred to as the complainant) with intent to steal and did steal therein a pair of sports shoes, a radio, 2 blankets, a padlock, Masaai kikoi assorted clothes, a mobile phone Tecno all to the total value of Ksh. 6,000/= the property of the above said complainant.

3. The facts of the case were that on the evening of the material day the complainant locked his house and went to watch a football match at Khamalo Shopping Centre. He returned to the house and found the padlock broken. He found the above stated goods having been stolen from the house. On the following day he reported to the village elder and to other villagers. Later he received a phone call and was informed that the appellant and a colleague had been found in possession of his clothes. He went to the place where the people were being detained and found his clothes. The appellant and his colleague were then charged with the offence.

4. The appeal is on sentence. The appellant contends that the sentence of 5 years imposed on him by the trial court is harsh. He mitigated that he is the breadwinner of his family that entirely depends on him. That the family will suffer if he remains in jail. That he was a first offender. He pleaded with the court to sentence him to the period already served.

5. The state through the prosecution counsel **Mr. Juma** opposed the appeal. He submitted that the appellant was a repeat offender. That the maximum sentence for the offence was 14 years. That the sentence of 5 years imposed on the appellant was lenient.

6. This trial court called for a pre-sentence report that indicated that the appellant had served a jail term though the report did not state the offence over which the appellant was jailed. The report further indicated that the appellant's community was against a lenient sentence being imposed on the appellant due to his former conduct.

7. The appellant was charged with burglary and stealing contrary to section 304 (2) and 279 (b) of the Penal Code. The charge therefore had two limbs – burglary and stealing. The trial court was required to sentence the appellant to two separate sentences for the two offences committed. The trial court however gave a composite sentence of 5 years. This was an error on the part of the trial court.

8. Sentencing is a discretion of the trial court. In **Bernard Kimani Gacheru –Vs- Republic (2002) eKLR**, the Court of Appeal stated that:-

It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with 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. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

9. The appellant broke into the house of the complainant and stole goods whose total value was Ksh. 6,000/=. I am of the considered view that the sentence of 5 years for the offence committed was manifestly harsh in relation to the value of the property stolen. I therefore set aside the sentence of 5 years and sentence the appellant to:-

Burglary – to serve two years imprisonment.

Stealing – to serve two years imprisonment.

Sentence to run concurrently from the date of sentence by the lower court.

Delivered, dated and signed in open court at Kakamega this 24th day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Ng'etich for state

Appellant - present

Court Assistant - George

14 days right of appeal.