



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 112 OF 2018

BETWEEN

KELVIN WALUBENGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the sentence in Criminal Case Number 883 of 2018 in the

Senior Principal Magistrate's Court at Kimilili by Hon. G.A.Ollimo (RM) on 01.10.18)

JUDGMENT

The Trial

1. On the 01st October, 2018, the Appellant herein **KELVIN WALUBENGO**, pleaded guilty to two counts, one of burglary contrary to section 304(2) of the Penal Code Cap 63 Laws of Kenya (hereinafter referred to as *the Act*) and the second of stealing from a dwelling house contrary to section 279 (b) of *the Act* and was sentenced to serve 3 years and 2 years respectively. The trial court ordered that the sentences run concurrently.

The Appeal

2. Aggrieved by this decision, the appellant lodged the instant appeal on 09.10.18. From the 4 grounds of appeal raises one ground that the sentence is harsh.

3. When the appeal came up for hearing on 07.08.19, the Appellant chose to wholly rely on the grounds of appeal and written submission filed on 24th July, 2019.

4. Mr. Akello, Learned Counsel for the state opposed the appeal on the ground that the Appellant was not a first offender and further on the ground that the sentence imposed on him was lawful.

Analysis and determination

5. This is the first appellate court and as such I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

6. The appellant is appealing only on sentence. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No.135 of 2016** (unreported) held at Page 25 of its judgment as follows:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle, ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000 this Court stated thus:

“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 the 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. (See also Wanjema v. Republic [1971] E.A.493.”

7. The offence of **burglary** contrary to section 304(2) of the Penal Code attracts a maximum sentence of 10 years whereas stealing from a dwelling house contrary to section 279 (b) of **the Act** attracts a maximum sentence of 14 years. The Appellant was not a first offender. By handing the Appellant 3 and 2 years for burglary and stealing from a dwelling house respectively, the trial magistrate was in my humble view reasonable and fair. The sentence does therefore not meet the test of being harsh and excessive and there is no justification for this court to interfere with the trial court’s discretion.

8. In the premises, I find no merit in this appeal. The same is dismissed. The conviction and sentence are upheld.

DELIVERED AND SIGNED AT BUNGOMA THIS 09th DAY ON August 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Brendah

Appellant - Present in person

For the State - Mr. Akello