



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 55 OF 2018**

**ISAAC ANDANCHE OMOLLO.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Criminal Case no. 818 of 2016 delivered on the 9<sup>th</sup> day of October, 2018 by by Hon. J.L. Tamar, PM]**

**JUDGMENT**

1. The appellant was convicted for the offence entering a dwelling house with intent to commit a felony contrary to section 305 (1) of the Penal Code and sentenced to imprisonment for five (5) years, the court considering his four previous convictions two of them of house breaking. The particulars of the offence were that the appellant had “on the 10<sup>th</sup> day of September 2016 at Boito village in Koibatek sub-county within Baringo county entered the dwelling house of Mercy Chepkurui with intent to commit a felony namely stealing and stole one mobile phone make X-tigi 523 MINI valued at Ksh.2000/-”

2. In convicting the accused the trial court found as follows:

*“The prosecution evidence as tendered by the three prosecution witnesses is that the accused had entered into the house of the complainant (dwelling house) with intent to commit a felony and indeed committed a felony by stealing complainant phone.*

*The complainant saw the accused inside her house and accused held her by the neck and threatened to harm her. She screamed and PW2 responded the alarm. By the time PW2 arrived at the scene the accused ran away seeing him partly.*

*The only person who saw and came face to face with the accused was PW1. She was able to recognize the accused [as] the man she met that day inside her house. It was around 11.00am during the day. There was no mistake on identity of the accused and he did not raise it either.*

*I find that the case against the accused has been proved to the required standard.”*

3. In his Petition of Appeal, which he called “Mitigation Based Appeal”, the appellant wrote as follows:

**“Mitigation Based Appeal**

*Being an appeal from the original criminal case no. 818 of 2016.*

*Where the appellant was charged and sentenced to five (5) years imprisonment with offence of house breaking and stealing c/s [304 (1) (b) and] 279 (b) on the 9<sup>th</sup> October 2018 [as originally framed before amendment of 22/8/2018 as above], which is very harsh to the appellant. That when fully served may have a negative impact on the life of the appellant. Thus he humbly submits his mitigation appeal for consideration under the stated grounds.*

*1. My lordship It is my prayer that this honourable court consider the time that my case have taken before it was concluded. May that period be factored because it has been in court since 3<sup>rd</sup> November 2016.*

*2. That my lordship, I was not given the chance to submit my mitigation by the trial court thus denying my right to a fair hearing and determination of my case.*

3. That my lordship, I am the sole bread winner to my young family and I will suffer a lot in the event that I serve the entire sentence thus it is my humble submission that this honourable court consider my state of affairs and reduce my sentence to a reasonable term that will do justice to all parties.

**Reasons wherefore.**

*[I pray] That I be present during the hearing and determination of my appeal. And may this honourable court reduce or substitute my sentence with a non-custodial term.”*

4. The appellant then filed written submissions which he relied on at the hearing, principally seeking a reduction of sentence and pointing to his two months of pre-trial detention before he was released on bail and want of mitigation on his part upon conviction.

5. The DPP did not oppose the appeal and the following submissions were made:

**“Appellant**

*I have written submissions. I wish to add that I am the breadwinner for my family made up of my wife and 2 children aged 7 and 4.*

**DPP**

*I do not oppose the appeal.*

*Appellant was convicted of entering a dwelling house with intent to commit a felony c/s 305 (1) of the Penal Code and sentenced to serve five (5) years from 9/10/2018.*

*Both PW1 and PW2 testified that they were not able to identify the appellant at the incident. When they testified PW2 stated that he did not know the appellant. PW1 did not state at what point she identified the appellant as no identification parade was conducted.*

*She further stated that the appellant was chased by members of the public and arrested. None of the members of the public testified. PW1 did not state that she went to the scene and it is not clear at what point she identified the appellant. It is also not clear how the phone was not recovered if he was arrested immediately. I have gone through the proceedings and I have noted that the appellant was not given a chance to mitigate after conviction.*

*The appellant is alleged to have stolen a phone worth Ksh.2000/- which was not recovered.*

*The sentence of five years is excessive in view of the value of the stolen item and because of lack of mitigation. Appellant has been in custody for eleven (11) months and that is sufficient time. The appellant has learnt his lesson, if at all he stolen the phone which is not supported by the evidence.*

*The sentence may be reduced to the time already served,*

**Appellant in reply:**

*I do not have anything to say.”*

**Issues for determination**

6. The issues for determination are basically whether the offence of entering a dwelling house with intent to steal and whether the appellant was the perpetrator were proved.

**Determination**

7. In accordance with the duty of the first appellate court, I have re-evaluated the evidence before the trial court (see ***Okeno v. R*** (1972) EA 32) as follows.

8. I agree with the DPP that question abide as to the non-recovery of the mobile phone allegedly stolen by the appellant; the non-production of the small knife allegedly recovered by the arresting Administration Police officers as testified by PW3, the regular police officer who rearrested the appellant; and the failure to call any of the arresting members of the public to testify in support of the prosecution’s case.

**Identification of the appellant**

9. The question of the identification of the accused was central to the case in view of his alibi defence that on the material date he was “going to work when three people stopped me along the way [and] they started interrogating me and beat me up saying I was a thief”. He did not have to raise the issue of identification specifically for the trial court to consider it, as suggested in the Judgment.

10. Although the 12 year old boy PW2 who allegedly responded to the screams for help from PW1 and who saw the accused run away and

arrested by members of the public gave sworn testimony and, therefore, his evidence did not require corroboration, the court should have warned itself of the dangers of accepting evidence of a child which prone to influence on account of tender age, and noting that the complainant was her aunt with whom he lived. Indeed, the boy's evidence was that it was others who could have identified he accused as he said "I went to find out what had happened. Someone left the house and ran away. I did not see the person. People followed the accused and he was arrested. The accused had stolen a phone XTIGI belonging to Mercy. The suspect was arrested and later charged. I can't identify the accused." He obviously did not see the accused steal the mobile phone.

11. Needless to state, evidence which itself requires corroboration cannot be corroborative of any other evidence. The identification evidence of the complainant ought to have been corroborated by the members of the public who gave chase and arrested the appellant as he fled the scene upon her screams for help. PW3 only rearrested the appellant after he was called from the police station that a suspect had been arrested.

12. In holding that the complainant PW1 had **recognized** the appellant at the 11.00am incident, the trial court, with respect, acted without evidence. The court said:

**"The only person who saw and came face to face with the accused was PW1. She able to recognise the accused [as] the man she met that day inside her house. It was around 11.00am during the day. There was no mistake on identity of the accused and he did not raise it either."**

13. There was no evidence that she knew the appellant previously so as to recognize him. It was necessary that after his arrest upon the alleged chase that he be identified by the complainant at an identification parade. This was the testimony of the complainant in chief as material:

**"I recall on 10<sup>th</sup> September 2016 around 11.00am. I was in the farm had taken the cows for grazing and decided to get some potatoes. While there I heard sheep making noise. I went back to the house and found the kitchen door opened. Shortly someone opened the main room. The accused appeared held me by the neck and threatened me with a knife. I screamed and Daniel Kimutai came the accused then ran away. I later realized that a phone XTIGI 523 missing. It is valued at Ksh.2000.**

**People came responding to my screams and accused was chased and arrested. He had a torch and a knife. I did not know the accused before the case."**

Emphasis mine]

14. It was not safe to convict on the scant evidence presented by the prosecution in this case.

### **Failure of Mitigation**

15. Despite his four previous convictions as aforesaid, on the test of interference with sentences by a trial court set out in **Wanjema v. R** (1971) EA 493, this court would have interfered with the sentence of five (5) years imposed on the appellant, had he been properly convicted, on the ground the sentencing proceedings offended constitutional fair trial procedures in that he was not given an opportunity, which has statutory underpinning of section 216 (for the High Court section 329) of the Criminal Procedure Code, to mitigate before sentence.

16. See also the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic** [2017] eKLR as regards the importance of mitigation in sentencing, at paragraphs 42-46 thereof as follows:

**"[42] Pursuant to Sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:**

**The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.**

Section 329 of the Criminal Procedure Code provides:

**The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.**

**[43] Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.**

**[44] In Sango Mohamed Sango & another v Republic Criminal Appeal No. 1 of 2013 [2015] eKLR, Makhandia, Ouko, M'inoiti JJA observed that although Sections 216 and 329 of the Criminal Procedure Code were couched in permissive terms, the Appellate Court has held over time that it is imperative for the trial court to afford an accused person an opportunity to mitigate and the trial court should record the mitigation factors. This applied even when accused persons had been convicted of offences where the prescribed sentence was death. The Appellate Court noted that the mitigating circumstances would be relevant if the matter went**

on appeal or before a clemency board or with regards to the age of the offender or pregnancy in the case of women convicts. Similar decisions can be seen in **Henry Katap Kipkeu v. Republic**, CR. APP. NO. 295 OF 2008 and **Dorcas Jebet Ketter & Another v. R**, CR. APP. NO. 10 OF 2012.

[45] To our minds, what Section 204 the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decisions. Try as we might, we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.

[46] We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive.”

[Emphasis mine]

17. However, having found the conviction to have been unsafe, the sentence shall be set aside, accordingly.

#### **Orders**

18. For the reasons set out above, the Court quashes the conviction of the appellant by the trial court for the offence of entering a dwelling house c/s section 305 (1) of the Penal Code and sets aside the sentence of five (5) years imposed on him.

19. Consequently, there shall be an order for his release from custody unless he is otherwise lawfully held.

*Order accordingly.*

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2019.**

**EDWARD M. MURIITHI**

**JUDGE**

#### **Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.