



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCRA NO. 10 OF 2019

MATHEW KIBICHII CHIRCHIR.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Criminal Case no. 1580 of 2018 delivered on the 7th day of October, 2018 by Hon. J. Tamar, PM]

JUDGMENT

[1] The appellant was on 17th October 2018 convicted on his own plea of guilty for the offence of Burglary and stealing contrary to section 304 (1) (b) as read with section 304 (2) of the Penal Code, the charge and particulars being set out as follows:

“CHARGE SHEET

CHARGE: BURGLARY AND STEALING CONTRARY TO SECTION 304 (1) (b) AS READ WITH SECTION 304 (2) OF THE PENAL CODE.

PARTICULARS OF OFFENCE: MATHEW KIBICHII KIPCHIRCHIR: On the 19th day of SEPTEMBER 2018 at 0230 HRS at KAPDENING Village, in KOIBATEK Sub County within BARINGO County broke and entered into a dwelling house of TRACY JERUTO with intent to commit a felony therein namely stealing and did steal from therein, One Mobile Phone Make TECHNO 18 Imei No. 359342084839854 valued Ksh.9,400/= the property of the said TRACY JERUTO.”

The sentence appealed from

[2] Upon conviction of the appellant on his own plea of guilty, the trial Court sentenced him as follows:

“Sentence

*Accused's mitigation noted. The offence is serious. **Accused is sentenced to served 3 years imprisonment.** Right of appeal explained.”*

Grounds of Appeal and Submissions

[3] In accordance with section 348 of the Criminal Procedure Code, the appellant who pleaded guilty to the charge could only appeal from the sentence, and he accordingly filed a Petition of Appeal in mitigation and written submissions praying a reduction of the sentence as follows:

“PETITION OF APPEAL

- 1. That I am a breadwinner to my young family.*
- 2. That I am a first offender in this case.*
- 3. That I have a single parent and we live in a rental house.*

4. That I mostly pray that the sentence be reduced.
5. That I also pray that I may be given non-custodial sentence.
6. That I have stayed in Prison for a long time and I have reformed.
7. That I pleaded guilty.

WRITTEN SUBMISSION

My lordship I kindly make the following submissions in report of the petition of appeal of leniency under the following mitigation circumstances.

Your lordship having perused through the five (5) pages of my trial proceedings I am remorseful of what transpire on that fateful day and am also remorseful for a phone worth Ksh 9400/= that has made me suffer in prison for 3 years, being a first offender I promise never to repeat such a shameful act which was introduced to me by peer pressure and bad company which I promise to shun.

Your honor in prison I have acquired a number of skills in carpentry and joinery your lordship I promise to utilize the skills when acquitted to safeguard my family needs and never touch anyone's property. Your lords I have transformed from a thief to a committed Christian while in prison and I have been baptized, and even have a baptismal card. I promise when given a chance I will go and spread the gospel and transform other law breakers to change and become good citizens and to obey the laws of the land.

Your lordship my family is suffering as my two siblings are struggling for their basic needs, a single parent who is also jobless will not be able to provide them with all their basic needs they were all depending on me as a sole breadwinner. I pray that may the sentence be reduced or set me free so as I can go and safeguard the worsening situation.

Your lordship turning on my proceedings on page (4) line 16 your lordship I pleaded guilty of the charges and on page 5 line 15 in my mitigation, I quote "I am sorry I ask for leniency" I am praying again for leniency that may this honorable Court have a merciful heart and hear my mitigation and reduce the sentence to a sum to acquittal.

Your lordship in conclusion I am remorseful of what transpired on that fateful day and now I have changed I am obedient and respectful and a law abiding citizen. I pray for a second chance I promise never again to repeat such a shameful and devious act."

[4] The DPP did not oppose the appeal and in oral submissions before the Court urged as follows:

"The appeal is not opposed. Appellant pleaded guilty for the offence of burglary c/s 304 (1) (a) as read with 304 (2) of the Penal Code. He was sentenced to serve 3 years on 17/10/2018. I have noted that the phone was recovered. The sentence of 3 years in my view was excessive. He has served one year one month in prison. He may serve the remainder of the sentence on Probation subject to a positive Pre-sentence Probation Officer's report. "

[5] The Court called for a Probation Officer's pre-sentence report and set further sentencing hearing for 21st November 2019 when the Probation Officer's report was filed. The DPP did not object to the recommendation for CSO placement and the appellant accepted to undertake Community Service at the School which he confirmed was near his home.

Determination

Duty of first appellate Court

[6] As a first appeal, this Court has re-evaluated the evidence to come up with its own conclusion as to the conviction and sentence. While the plea was properly taken in accordance with the provisions of section 207 of the Criminal Procedure Code and the case authority of **Adan v. R** (1973) EA 445, I have considered that the sentence was irregular because the Court passed an omnibus sentence of imprisonment for three (3) years without considering the two limbs of the offence of burglary and stealing under section 304 (2) of the Penal Code.

[7] While considering the issue of the two limbs of the offence in section 304 of the Penal Code the Court in **Njoka v. R** (2001) KLR 175 the Court of Appeal (Chunga, CJ., Omolo & O'Kubasu, JJA.) held as follows:

*"There is however, a third issue that arose in our opinion in this appeal. This was a sentence which, as we indicated earlier, the trial magistrate ordered to run consecutively. Section 304 (2) of the penal Code, cap. 63, was the main section under which the appellant was charged. **The section does however create two offences rather than one offence. The first offence it creates is burglary and the second offence it creates is stealing from the house. Both offences, however, are usually committed in the course of one transaction and they carry ne mens rea. They are, also, usually laid as one offence in one count. The charge is then said to carry two limbs namely one for burglary and one for stealing from the house.***

The question which arises, in the circumstances, is whether, on conviction, the sentences both limbs of the offence should be concurrent or consecutive.

*In law it lies in the discretion of the Court to order whether sentences should run concurrently or consecutively. **Nevertheless, it is an established principle of law that where the offences are committed in one transaction, the sentences ought to run concurrently even when laid in separate counts.***

In the present case, the magistrate entered conviction on both limbs of the charge for breaking as well as for stealing. From the evidence on record these two offences were committed in one transaction. That being so, we are satisfied that the magistrate ought not to have ordered the sentences on the two limbs of the charge to run consecutively.”

[8] The Court of Appeal for East Africa (Sir Charles Newbold, P., Duffus, and Law, JJA.) in **Turon v. R** (1967) EA 789 held it is correct to convict and pass separate sentences on all counts of a charge. See also **Kiarie v. R**. (Trevelyan and Waiyaki, JJ.) where in a similar case of burglary and stealing, where the trial Court had convicted the appellant of a single offence of burglary and theft, having broken into one house and stolen property belonging to three people, on what the magistrate called **“one single co-joint offence of burglary and stealing in a dwelling house”**, the Court held as follows:

*“In the particular circumstances of the case where the trial magistrate fell into error but did not acquit the appellant on any of the charges brought, we think we may properly put the matter right by amending the record entering convictions for burglary and theft on count 1 as charged, and for theft only on the other two counts. And, bearing in mind that the magistrate awarded “twelve months imprisonment in each limb of the offence to run concurrently together with three strokes on each limb”, **we record awards of twelve months’ imprisonment on each limb of count 1 and on each of the other two counts, all four sentences being served concurrently,...**”*

[9] The earlier three-bench High Court of Tanganyika (Weston and Reide, JJ. and Platt, Ag. J.) decision in **Burton Mwakapesile v. R** (1965) EA 407, 413 had overruled the related practice of passing an **omnibus** sentence for several offences, (in the words of Weston, J. with whom Reide, J. and Platt, Ag.J. concurred), as follows:

*“In Criminal Case No. 355 of 1964, it will be remembered, the Court passed one “omnibus” sentence of two years’ imprisonment which carried with it twenty four strokes of corporal punishment in respect of the eleven counts which it had convicted the appellant and ordered him to compensate each of the eleven rate payers concerned in an amount equal to that which the Court had found the appellant had received from him. An “omnibus” sentence is unlawful and the compensation order is misconceived. As to the former, there is must be a separate sentence for each count on which a conviction is had – see **Mohamed Warsame S. T. Musa Aboker Majelo v. R** (1956) 23 E.A.C.A. 576. As to the latter, ‘the owner of the property’ obtained by the appellant within the meaning of s. 6(1) of the Minimum Sentences act was the Rungwe District Council and not any rate payer. **Accordingly, I would allow the appellant’s appeal against the sentence in this case, set aside the sentence imposed, and would substitute for it a sentence of two years’ imprisonment in respect of each of the eleven counts on which the appellant was convicted, the terms to run concurrently,...**”*

[10] In addition, the sentence of three years herein imposed on the appellant who pleaded guilty to the charge appears excessive, the Court not having given credit to the appellant for pleading guilty, as observed in the leading decision for interference with the trial Court’s discretion in sentencing, **Wanjema v. R** (1971) KLR 493, 494 as follows:

*“A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this Court’s interference with it on each of these grounds. **No account was taken, as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51, Cr. App. R. 165 and Geoffrey (1967) 51 Cr. App. R. 449.** (This admits no doubt because the magistrate awarded the maximum sentence to this offender: which of itself is unusual).”*

[11] In the case before the Court, the trial magistrate is not shown to have given credit to the fact that the appellant pleaded guilty, although he expressly notes his consideration of the appellant’s mitigation. The Court also erred in passing an unlawful “omnibus” sentence for the two limbs of the offence of burglary and stealing under section 304 (2) of the Penal Code.

[12] Giving credit of plea of guilty and noting the remorse of the appellant before the trial Court where he said **“I am sorry [and] I ask for leniency”**, as well as the modest value of the stolen item Techno Mobile phone valued at Ksh.9400/- which was in any event recovered, I consider the sentence of imprisonment for three (3) to be excessive in the circumstances. I would reduce it to a sentence of imprisonment for two (2) years on each limb of the offence of burglary and stealing.

Probation officer’s presentence report

[13] The Probation Officer’s Presentence report dated 19th November 2019 found as follows:

“Conclusion

Your Honour the offender before the honourable Court is a 23 year old man who admits committing the offence charged against him. He claims to have a young dependent family, a fact that was not corroborated by his relatives. He lived in a rented house in Ravine Township and survived through hawking eggs. It is worth noting that he is not a first offender, he has a record in Criminal Case No. 654/2013 sentenced on probation for two years on 8/1/2016 by E/Ravine SRM Court.

Recommendation.

*In view of the aforementioned and having regard to the fact that he is remorseful, I deduce that he has been found suitable for a non custodial sentence. Granted he is willing to serve on Community Service sentence, if granted he can be placed at **Lombongishu Primary School for a period of three months.**”*

[14] Of course, the Court must, as counseled by the Court of Appeal (Omolo, Waki & Onyango Otieno, JJA.) in ***Kyalo v. R*** (2009) KLR 325, be careful not to accept wholesale Probation Officer’s report which have not been subjected of cross-examination and consequently, the Court is not able to act on the report of previous conviction which was not put to the appellant in the trial Court and he, therefore, had no opportunity to comment on, confirm or deny the same and no copy of the Court record in the alleged previous conviction was availed.

[15] The appellant having accepted to undertake Community Service at the School, the Court will, as urged by the Probation Officer with no objection by the DPP, place the appellant on Community Service Order.

Orders

[16] Accordingly, for the reasons set out above, the Court pursuant to section 354 (3) (b) of the Criminal procedure Code alters the nature of the omnibus sentence of imprisonment for a period of 3 years for the offence of burglary and stealing c/s 304 (1) (b) as read with 304 (2) of the Penal Code and substitutes therefor a sentence of imprisonment for two (2) years for each of the limb of the offences in the charge of burglary and stealing, both sentences running concurrently from the **17th October 2018**, the date of conviction and sentence in the trial Court..

[17] As the actual prison time, with remission, for a concurrent sentence of imprisonment for two (2) years is **one (1) year four (4) months**, and the appellant has been in custody since **17th October 2018**, a period of **one (1) year one (1) month** and has, therefore, only **three months** to complete that sentence, the Court accepts the recommendation by the Probation Officer with no objection by the DPP for the appellant to be committed to Community service for the remainder of the sentence.

[18] The appellant will, therefore, be placed on **Community Service Order to be performed at Lombongishu Primary School for a period of three (3) months under supervision of the school principal and the area County Probation Officer.**

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF NOVEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.