REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 10 OF 2017

OLIVER MWAKILENGE KALE……..…….....…….... APPELLANT

VERSUS

REPUBLIC……...…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 492 of 2016 in the Senior Principal Magistrate's Court at Wundanyi by Hon N. N. Njagi (SPM) on 30th December 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Oliver Mwakilenge Kale, was charged with the offence of house breaking contrary to Sections 304 (1)(a)and Section 304(2) of the Penal Code Cap 63 (Laws of Kenya). The particulars of this charge were that on 20th August 2016 at around 4.00 am at Kambi La Punda Village in Mwatate Location within Taita Taveta County, he broke and entered the house of Jones Mwamburi (hereinafter referred to as "PW 1") with intent to commit a felony therein.

2. Count I related to the offence of stealing in a dwelling house contrary to Section 279 (b) of the Penal Code. The particulars herein were that on the aforesaid date and place, he stole PW 1's TV Decoder Make Bamba, an amplifier and a speaker all valued at Kshs 6,000/= from PW 1's house.

3. He was also charged with an alternative charge of conveying stolen property contrary to Section 323 of the Penal Code. The particulars of this offence were that on the aforesaid date and aforesaid place at about 4.50 am, having been detained by No 40936 Sgt Stephen Samkul (hereinafter referred to as "PW 4") as a result of the exercise conferred by Section 26 of the CPC, was found conveying a TV Decoder, an amplifier, a speaker and a decoder all reasonable suspected to have been stolen and unlawfully obtained.

4. The Learned Trial Magistrate Hon N.N. Njagi (SPM) sentenced him to serve three (3) years on 1st limb and another three (3) years on 2nd limb of Count I and five (5) years imprisonment on Count II. He directed that the sentences were to run consecutively.

5. Being dissatisfied with the said judgment, on 3rd February 2017, the Appellant filed a Notice of Motion application seeking leave to be allowed to file an Appeal out of time, which application was allowed and the Petition of Appeal deemed to have been duly filed and served. He relied on five (5) Grounds of Appeal.

6. Subsequently on 1st August 2017, he filed Amended Grounds of Appeal and Written Submissions. He also relied on five (5) Amended Grounds of Appeal. His Written Submissions were also filed on the same date. On 11th October 2017, he informed this court that he had withdrawn the said pleadings and that instead, he would rely on his Amended Grounds of Appeal and Written Submissions that he filed on 21st September 2017. This time he relied on four (4) Amended Grounds of Appeal. The State's Written Submissions were dated 11th October 2017 and filed on 11th October 2017. He informed this court that he did not wish to respond to the said State's Written Submissions.

7. When the matter came up on 1stNovember 2017, both parties asked this court to deliver its Judgment based on their respective Written Submissions. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. As this is a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

9. It appeared to this court that the only issue that had been placed before it for determination was:-

> **A. Whether or not the Charge Sheet was defective;**
>
> **B. Whether or not the Appellant's rights to fair trial were infringed upon;**
>
> **C. Whether or not the Prosecution proved its case beyond reasonable doubt:**
>
> **D. Whether or not the sentence that was meted upon the Appellant by the Learned Trial Magistrate was excessive warranting interference by this court.**

10. The said issues were dealt with under the following distinct heads.

I. CHARGE SHEET

11. Amended Ground of Appeal No (1) was dealt with under this head.

12. The Appellant contended that the Charge Sheet had indicated that one (1) decoder, one (1) amplifier and one (1) padlock had been stolen but that this was contradicted by Arnold Mwasi (hereinafter referred to as "PW 3") who told the Trial Court that what had been stolen was one (1) speaker, one (1) decoder, one (1) radio and one (1) amplifier andby PW 4 who testified that one (1) decoder, one (1) speaker, one (1) amplifier and a bunch of keys had been stolen.

13. He added that the time of the incident had not been established because Count I indicated the time of the incident as having been 4.00 pm, Count II showed the time as having been 4.50 am while PW 4 had testified that the incident herein occurred at 4.50 am.

14. The fact that the Charges and evidence by the Prosecution witnesses gave different times of when the incident occurred did not render the said Charge Sheet defective. Indeed, a charge sheet does not become defective merely because the evidence that has been adduced during trial does not prove the facts in such a charge sheet. If the evidence that is presented in court does not prove any offence, the trial court is obligated to acquit an accused person as envisaged in Section 210 and Section 215 of the Criminal

Procedure Code Cap 75 (Laws of Kenya) as the prosecution will either have failed to demonstrate that a *prima facie* has been established or to prove its case beyond reasonable doubt.

15. Section 382 of the Criminal Procedure Code provides as follows:-

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

16. In the absence of any demonstration by the Appellant of what prejudice he suffered this court was not persuaded to find that the Charge Sheet as drafted was defective.

17. In the circumstances foregoing, his Amended Ground of Appeal No (1) was not merited and the same is hereby dismissed.

II. APPELLANT'S RIGHT TO FAIR TRIAL

A. LEGAL REPRESENTATION

18. The Appellant had raised this issue in his Amended Grounds of Appeal that he filed on 1st August 2017. He did not raise the same in his subsequent Amended Grounds of Appeal that were filed on 21st September 2017. However, as the State submitted on the said issue, this court found it necessary to render its views on the same.

19. The State argued that it was not in every case that an accused person was assigned legal representation and that such right was progressive in nature. It placed reliance on the case of **Cr Appeal No 497 of 2007David Njoroge Macharia vs Republic [2014] eKLR** where the court therein explained that legal representation ought to be assigned to an accused person where substantive injustice would occur in complex issues of law or fact, where the accused is unable to conduct his own defence or where public interest requires that representation be provided.

20. The limitation of the right to be assigned legal representation by the State was addressed by the Court of Appeal in the cases of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR**and In the **case of Dominic Macharia vs Republic (Supra)**amongst many other cases.

21. In the case of **Dominic Macharia vs Republic (Supra)**, the Court of Appeal rendered itself as follows:-

> ***"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."***

22. In the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic**(Supra),the Court of Appeal also stated as follows:-

> **"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include *all situations where an accused person is charged with an offence whose penalty is death.* This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.**
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> **Again, this Court differently constituted in the case of Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:**
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> ***"It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation."***
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> **Article 261 of the Constitution provides *inter alia*:-**
>
> ***(i) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.***
>
> ***(ii) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year***
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> **It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution."**

23. Whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it took cognisance of the aforesaid decision by the Court of Appeal and only hoped that the right to assign legal representation to **all**(emphasis court) accused persons will be realised progressively but sooner than later.

24. In light of the aforesaid limitations on assignment of legal counsel, this court was not persuaded to find that the Appellant's rights to fair trial had been infringed upon as he had initially contended.

B. WITNESS STATEMENTS

25. Amended Ground of Appeal No (3) was dealt with under this head.

26. The Appellant argued that his rights to fair trial as enshrined in Article 50(2)(j) of the Constitution of Kenya, 2010 were infringed upon as he was not supplied with witness statements. The State did not appear to have addressed itself to this issue as it appeared to have responded to the Appellant's Written Submissions that were filed on 1st August 2017.

27. A perusal of the proceedings shows that the Appellant was arraigned for the first time in court on 22nd August 2016. He denied the charges and a plea of not guilty to the charge was entered whereupon the Learned Trial Magistratedirected that the matter be mentioned on 5th September 2016 and that the Appellant be furnished with Witness Statements.

28. The matter came up in court on 5th September 2016 and 19th September 2016 but the Appellant never informed the Trial Court that he had not been supplied with Witness Statements. On 22nd September 2016, he indicated that he was not ready to proceed with the hearing as he had not been furnished with the Witness Statements. The Charge Sheet was amended on the same day and the Learned Trial Magistrate ordered yet again, that he be supplied with Witness Statements.

29. The matter also subsequently came up in court on 5th October 2016 and 18th October 2016 when a substituted Charge was read to him and once again the Learned Trial Magistrate ordered that he be given Witness Statements.

30. When the matter came up on 2nd November 2016, the Amended Charge Sheet was read to him, he pleaded not guilty and the matter proceeded for hearing. On this day, he never alerted the Trial Court that he had still not yet been furnished with the Witness Statements. He in fact Cross-examined witnesses.

31. This court was therefore not persuaded to find that his right to fair trial had been infringed upon for the reason that he never complained that he had not yet been furnished with supplied with witness statements before the hearing commenced and during the trial. He could not therefore purport to complain that his rights to fair trial had been infringed upon after the trial had been concluded and he had been convicted.

32. In the circumstances foregoing, this court found no merit in Amended Ground of Appeal No (3) and the same is hereby dismissed.

III. PROOF OF THE PROSECUTION'S CASE

33. Amended Grounds of Appeal No (2) was dealt with under this head.

34. The Appellant reiterated that the time when the incident occurred had not been established as there were contradictions in the Charge Sheet and PW 4's evidence. He added the evidence of who arrested him was inconsistent because Lucas Mghanga (hereinafter referred to as "PW 2") stated that he was the one who arrested him, PW 3 testified that he was arrested by neighbours while PW 4 said that he stopped him as members of public were chasing him.

35. On its part, the State submitted that the minor discrepancies in the evidence by the Prosecution witnesses could be cured under Section 382 of the Criminal Procedure Code. It pointed out that PW 4 arrested the Appellant and it was not coincidental that he was found in possession of the stolen items as he was unable to explain how he came to be in possession of the said items that belonged to PW 1. It added that PW 2 and PW 3 both saw the Appellant coming out of PW 1's house carrying his property.

36. It pointed out that the Appellant did not have an alibi defence and that the Learned Trial Magistrate considered his defence before he found him liable of the offences he had been charged with. It was its

argument that the Appellant placed himself at the scene of the incident as he testified that he had gone to collect his debt.

37. A perusal of the proceedings from the lower court show that on the material date, PW 1 was not in his house having gone for a funeral. PW 3 heard someone open and enter his house. He alerted his brother PW 2, who was PW 1's landlord and they both went to PW 1's house and found the Appellant therein. The Appellant came out and started running away. They raised an alarm whereupon members of public gave chase and he was arrested.

38. Notably, PW 2 stated that he ran after the Appellant and arrested him. PW 3 said that he was arrested by neighbours while PW 4 testified that he stopped him as he was being chased by members of public and he dropped some goods he was carrying.

39. Although there were some inconsistencies in PW 2's, PW 3's and PW 4's evidence, the bottom line was that the Appellant was found by PW 2 and PW 3 in PW 1's house carrying some goods from therein, PW 2 and PW 3 raised an alarm which alerted members of public who gave chase, he dropped the items and was arrested by PW 4.

40. Whenever, an incident occurs in a fast paced manner, every person present will observe different things. The discrepancies in the narration by PW 2, pw 3 and PW 4 were inconsequential. Their evidence was so consistent and pointed to the Appellant's guilt.

41. Notably, in his unsworn evidence, he stated that he was arrested at 4.00 am as he was going to get pay for his debt. It is incredulous that a person would go to get his pay at 4.00am and that he would break into a house and flee with that person's goods. The Appellant's defence of alibi was weak and the doctrine of recent possession was firmly applicable in the circumstances of the case herein.

42. Having considered the evidence that was adduced in the Trial Court, this court was satisfied that the Prosecution proved its case beyond reasonable doubt and the Learned Trial Magistrate did not err when he convicted him. The question of whether or not the Learned Trial Magistrate should have convicted him on both Count I and Count II was a different matter altogether.

43. In the premises, this court found the Amended Ground of Appeal No (2) was not merited and the same is hereby dismissed.

IV. SENTENCE

44. Amended Ground of Appeal No (4) was dealt with under this head.

45. The Appellant submitted that the Learned Trial Magistrate erred in not considering that he was a first offender and meted upon him a sentence that was severe, harsh and manifestly excessive in the circumstances.

46. However, the State was categorical that the sentence that was meted upon him was fair and within the discretion of the Learned Trial Magistrate but that he erred when he directed that the sentences ought to run consecutively because they were committed at the same time.

47. In the case of ***Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No253 of 2003*** **(quoted in *Arthur Muya Muriuki vs ~Republic* *(2015)* eKLR),** the Court of Appeal stated the following on principles of sentencing:-

> ***"Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred."***

48. Having said so, this court was of the view that sentencing the Appellant to serve three (3) years on 1st limb and another three (3) years on 2nd limb of Count I and five (5) years imprisonment on Count II, giving a total of eleven (11) years and directing that the sentences were to run consecutively was harsh, severe and manifestly excessive more so because the value of the goods that were stolen was Kshs 6,000/= only.

49. Indeed, the Learned Trial Magistrate did not give any justification why he sentenced the Appellant twice on Count I or why he directed that sentences were to run consecutively. Unless there are exceptional circumstances, sentences for offences committed in one (1) transaction must run concurrently.

50. In the case of **Richard Otieno Agunja &Another v Republic [2014] eKLR**, Majanja J had the following to say where the appellants therein faced six (6) cases of housebreaking and burglary of goods worth between Kshs 37,190/= and Kshs 148,000/=:-

> "**For the reasons I have outlined I find that there sufficient ground for the Court to intervene. The factors weighing in favour of the appellant are that they were first offenders at the time they were charged. They pleaded guilty and showed remorse. The stolen items were recovered. The main aggravating factor was that at the time they were charged they had been involved in a series of series of break-ins and thefts. In these circumstances, I think a sentence of two years imprisonment would be appropriate in each case."**.

51. It was also the view of this court that charging the Appellant on both Counts amounted to double jeopardy. It was evident from Section 304 (1) (b) of the Penal Code that committing a felony inside a dwelling house had a penalty and was punishable by imprisonment for seven (7) years. That felony was not identified. It could have been the felony of stealing. Under Section 279 (b) of the Penal Code also provided that the offence of stealing from a dwelling house was punishable by imprisonment for fourteen (14) years.

52. Section 304(1)(b) of the Penal Code provides as follows:-

> **"Any person who having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years."**

53. Section 279 (b) of the Penal Code provides that:-

> **"If the theft is committed under any of the circumstances following, that is to say—**
>
> **if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house; the offender is liable to imprisonment for fourteen years."**

54. This court was of the view that the Prosecution ought to make up its mind and decide whether to charge an accused person either under Section 279 (b) of the Penal Code or Section 304 (1) (b) of the Penal Code as the offence of stealing was envisaged and/or contemplated in Section 304 (1) (b) of the Penal Code. Charging an accused person on both Sections of the Penal Code where a stealing has been committed amounts to double jeopardy on such accused person.

DISPOSITION

55. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 3rd February 2017 was partly successful. As the Prosecution proved its case beyond reasonable doubt, his conviction is hereby upheld.

56. However, this court hereby sets aside the sentence that was meted upon him by the Trial Court as the same was manifestly harsh and excessive in the circumstances of the case and replaces the same with a sentence of four(4) months imprisonment on Count I only as the same encompassed breaking into a house and stealing.

57. As the Appellant has already served his imprisonment sentence for slightly over a year this court hereby orders that he be set free forthwith unless he be held or detained for any other lawful reason.

58. It is so ordered.

DATED and **DELIVERED** at **VOI** this **30th** day of **January** 2018

J. KAMAU

JUDGE

In the presence of:-

Oliver Mwakilenge Kale-Appellant

Miss Anyumba for State

Susan Sarikoki– Court Clerk