REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 49 OF 2017

JAMES KILEMA MBOGHOLI….. APPELLANT

VERSUS

REPUBLIC…….… RESPONDENT

(From original conviction and sentence in Criminal Case Number 184 of 2015 in the Senior Principal Magistrate's Court at Wundanyi by Hon G. M. Gitonga (RM) on 19th May 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, James Kilema Mbogholi, was charged on two (2) Counts. Count I was in respect of the offence of house breaking contrary to Sections 304 (1)(a) of the Penal Code Cap 63 (Laws of Kenya). The particulars of this charge were that on 16th May 2015 at Mrabenyi Village in Ronge Location within Taita Taveta County, he broke and entered the building used as a dwelling place by Priscilla Mkambura Omar (hereinafter referred to as "the complainant") with intent to commit a felony therein namely theft.

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 one (1) Solar lamp worth Kshs 5,500/=, Radio make Sonitec worth Kshs 3,500/=, long trousers worth Kshs 1,800/=, all valued at Kshs 11,250/= property belonging to the Complainant, from her dwelling place.

3. He was also charged with an alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code. The particulars of this offence were that on 17th May 2015 at around 8.00pm at the aforesaid place, otherwise than in the course of stealing, dishonestly received or retained three (3) long trousers, one (1) solar lamp, one thermos flask and one Radio make Sonitec knowing or having reason to believe them to be stolen goods or unlawfully obtained.

4. When he was arraigned in court on 19th May 2015, he pleaded guilty to Count I and Count II and a plea of guilty was entered in respect of both Counts. The Alternative Charge was therefore rendered moot. The Learned Trial Magistrate Hon G.M. Gitonga(RM) sentenced him to serve five (5) years imprisonment on Count I and eight (8) years imprisonment on Count II.

5. The basis of the stiff sentences was because the Appellant was a repeat offender having been convicted in **Criminal Case Number 426 of 2011** for the offence of theft by servant and sentenced to four (4) years imprisonment. The Learned Trial Magistrate had observed that he had committed another offence barely a year after he had completed his four (4) year sentence.

6. Being dissatisfied with the said judgment, on 29th June 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 four (4) Grounds of Appeal.

7. Subsequently on 21st September 2017, he filed Amended Grounds of Appeal and Written Submissions. This time he relied on three (3) Grounds of Appeal. His Written Submissions were also filed on the same date. The State's Written Submissions were dated and filed on 8th November 2017. He informed this court that he did not wish to respond to the said State's Written Submissions.

8. When the matter came up on 9th November 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

9. 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".**

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

> **a. Whether or not the Appellant's rights to fair trial were infringed upon;**
>
> **b. Whether or not the Prosecution proved its case beyond reasonable doubt:**
>
> **c Whether or not the sentence that was meted upon the Appellant by the Learned Trial Magistrate was excessive warranting interference by this court.**

11. Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya) stipulates as follows:-

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."**

12. Where an accused person has pleaded guilty to a charge, the jurisdiction of an appellate superior court is limited to analysing the evidence that has been adduced in a trial court afresh with a view to establishing whether or not such trial court erred on fact or law or both and/or considering the legality and extent of a sentence where an accused person has pleaded guilty to an offence.

13. In this case, this court noted that the Appellant pleaded guilty to Count I and Count II. The admission of the two (2) Counts that had been preferred against him was *prima facie* reflective of his guilt. No value then would be added in analysing the evidence that was adduced during trial as this court is limited to looking at the extent and legality of the sentence that he was given only.

14. Having said so, this court took cognisance of the fact that this was a *pro se* trial. The Appellant represented himself during the trial in the Trial Court and as he rightly contended, he was a lay man on issues pertaining to the law. Notably, a court has inherent powers to make such orders are as necessary for the ends of justice and to prevent the abuse of the process of court. It was on that basis that although he pleaded guilty to Count I and Count II, this court nonetheless deemed it fit to interrogate whether or not

his constitutional right to fair trial was infringed upon as this preliminary point of law was hinged on the grounds that he was not assigned legal representation and that he was not of sound mind at the time he took the plea.

I. APPELLANT'S RIGHT TO FAIR TRIAL

A. LEGAL REPRESENTATION

15. Amended Ground of Appeal No 1 was dealt with under this head.

16. The Appellant submitted that he was not assigned legal representation as was enshrined in Article 50(20(g) and (h) of the Constitution of Kenya which really prejudiced him because the Trial Court did not establish the veracity of the Prosecution's case.

17. On its part, 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 **Dominic 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.

18. 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.

19. 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."***

20. 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.

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:

"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."

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

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."

21. 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.

22. 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 contended and consequently his Amended Ground of Appeal No (1) was not merited and the same is hereby dismissed.

B. SOUNDNESS OF THE APPELLANT'S MIND

23. Amended Grounds of Appeal Nos (2) and (3) were dealt with together as they were related.

24. The Appellant contended that the Learned Trial Magistrate ought to have given him ample time to consider his options after he was charged and not require to take plea a day after he was arrested. He argued that some time in remand would have been sufficient for him to make up his mind on how to plead to the charges.

25. He pointed out that he served four (4) years imprisonment for a similar offence after having pleaded guilty to the charge therein. His contention was that no person of sound mind could have pleaded guilty to the charges that he faced more so after serving time in jail. He pointed out that it was not logically possible for a thief to wear a woman's trousers that he had just stolen instead of selling them, for him not to have known his age or not to possess an Identity Card.

26. He submitted that he was a person of unsound mind necessitating this court to interrogate the circumstances of the case herein. He added that the aim of the criminal justice system was meant to rehabilitate and not destroy offenders.

27. On its part, the State argued that a re-trial in this case could not be ordered as the unsoundness of the Appellant's mind was not determined at the plea taking stage and that in any event, the Learned Trial Magistrate had an opportunity to assess his demeanour. It placed reliance on the case of **Samuel Wahini Ngugi vs Republic [2012]eKLR** where it was held that referring a case for re-trial depends on the particular circumstances of a case and should only be ordered where the interests of justice require and not where it was likely to cause an injustice to the accused person.

28. A perusal of the proceedings of 19th May 2015 show that when the substance of the charges and every element thereof were read to the Appellant, he responded in Kiswahili and said "Ni kweli." Translated in English language, this meant that he had admitted to the charges. A plea of guilty was then entered on Count I and Count II. After the facts were read out to him, he replied that they were correct. In his mitigation, he stated that his parents had neglected him and that although he had an Identity Card, he did not know how old he was. He pleaded for mercy of the court.

29. It was not clear how old the Appellant was. However, this was not material to the case. What was apparent was that he understood the proceedings in court and responded in the manner he was required to respond. There was no indication that he was of unsound mind. Notably, after he pleaded guilty, the Trial Court explained to him the punishment available and he still maintained his plea of guilty. Facts were then read to him and he still pleaded guilty.

30. He could not now purport that he did not understand the implications of his actions or argued that he ought to have been given a few days to consider whether he would admit or deny the charge as he had several opportunities on 19th May 2015 to change his plea in the event he wanted or wished to.

31. In the circumstances foregoing, this court was not satisfied to find and hold that this was a suitable case to order a Re-trial because doing so would be giving the Appellant a second bite of the cherry to prove his innocence. He had been to prison previously and having served four (4) years imprisonment, he ought to have been wiser than to plead guilty when in fact, he wished the case to proceed to full trial or he was not guilty of the offence he had been charged with.

32. In that regard, this court found that Amended Grounds of Appeal No (2) and (3) were not merited and the same are hereby dismissed.

II. SENTENCE

33. In his initial Grounds of Appeal, the Appellant had raised the question of the harshness of the sentence that was meted upon him by the Learned Trial Magistrate. He did not raise the issue in his Amended Grounds of Appeal. However, as the State touched on this issue, this court found it necessary to give its determination of the same.

34. The State was categorical that the sentence that was meted upon the Appellant was fair and within the discretion of the Learned Trial Magistrate. It placed reliance on the case of **Peter Ole Kesina vs Republic [2016] eKLR** where the appellate court therein affirmed a sentence of five (5) years on the appellant for the offence of housebreaking and that of **Haleli Yusuf vs Republic vs Republic [2013] eKLR** where the appellate court therein affirmed a sentence of six (6) years for house breaking and a sentence of eight (8) years for the offence of stealing from a dwelling house.

35. It pointed out that sentencing was essentially an exercise of the trial court that could not be interfered with by an appellate court lightly. In this regard, it relied on the case of **Criminal Case No 253 of 2003 Shadrack Kipchoge Kogo vs Republic** (KLR citation not given).

36. In ***Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No.253 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."***

37. Having said so, this court was of the view that sentencing the Appellant to serve eight (8) years imprisonment for stealing goods worth Kshs 11,250/= was manifestly excessive in the circumstances. It was the view of this court that sentencing the Appellant for five (5) years for the offence of housebreaking bearing in mind the items stolen was excessive in the circumstances.

38. The fact that the Appellant was charged barely a year after coming from prison in another similar case was not sufficient reason to double the sentence he was to serve despite the same having still been within the discretion of the Learned Trial Magistrate.

39. Notably, the facts that were read to the Appellant did not point to the fact that he broke into the Complainant's house. The facts merely stated that members of the public informed her that he was seen looking for causal jobs whereafter he was found wearing one of her trousers belonging and he led them to here he had kept the items.

40. As he admitted having been found with the items and the facts were not clear as to how he obtained the same, this court found that the proper conviction ought to have been on the alternative charge of handling stolen property contrary to Section 322(2) of the Penal Code.

41. However, he admitted that he brought into the Complainant's house and stole her items when the Charges were read to him. It was therefore the view of this court that a sentence of six (6) months either on Count I or Count II was sufficient punishment in the circumstances of the case as the Appellant had pleaded guilty to the charges in the first instance thus saving the court precious judicial time.

42. 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."**.

43. It was however, 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.

44. 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."**

45. 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."**

46. This court was of the view that the Prosecutor ought to 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.

DISPOSITION

47. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 29th June 2017 was partly successful. However, as he had pleaded guilty to the Count I and Count II, his conviction is hereby upheld. 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 six (6) months imprisonment on Count II only which encompassed breaking into a house and stealing, two (2) offences the Appellant had pleaded guilty to.

48. As the Appellant has already served his imprisonment sentence for almost two and a half (2 ½) years, this court hereby orders that he be set free forthwith unless he be held or detained for any other lawful reason.

49. It is so ordered.

DATED and **DELIVERED** at **VOI** this **23rd** day of **January** 2018

J. KAMAU

JUDGE

In the presence of:-

James Kilema Mbogholi- Appellant

Miss Anyumba - for State

Susan Sarikoki– Court Clerk