



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL CASE APPEAL NO.71 OF 2017

HASSAN ESIMIT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence

by Hon. L Mutai Chief Magistrate dated 30th May

2017 in Nanyuki Chief Magistrate Court

(Criminal Case No. 576 of 2017)

JUDGMENT

1. **HASSAN ESIMIT** the appellant was convicted before the Nanyuki Chief Magistrate Court on his own plea of guilty, to **two counts** of the **offence of breaking into a building and committing a felony, Contrary to Section 306 (a) of the Penal Code**. The trial court after receiving the facts of the case, from the prosecution, and after receiving the appellant's mitigation, sentenced him to serve 3 years imprisonment on each of the two counts and those sentences were ordered to run consecutively.

2. The appellant has filed this appeal against that sentence.

3. The facts of the case relayed by the prosecution were as follows:

“PROSECUTOR - Facts of the case are that on 15/4/2017 at about 8.00p.m. at Timau trading centre. The complainant Regina Kathambi and Alice Mithika who conduct businesses at the trading centre of wines and spirit and hotel business respectively closed their premises and went home. The next morning of 14/4/2017 they learnt that their premises had been forced open and items stolen from there.

The doors were wide open. Each of the complainants rushed to their premises. They are adjacent.

The 1st complainant Regina found her door wide open, and from inside.

- ***Five boxes of Dallas were missing,***

- *Ten cartons of Kenya King,*
- *Bottles of Napoleon*
- *bottles of Legends*
- *three bottles of Smirnoff*
- *Safaricom credit cards,*
- *17 gas cylinder gas cookers and*
- *Cash 3000/=.*
- *all valued Ksh. 143, 900/= were also missing.*

The 2nd complainant Alice also found the door wide open and from inside – a T V LG was missing, gas cylinder

24 packet maize flour, 12 packet wheat flour, 35 bottles of soda all worth 20,000/= were also missing.

They both reported the matter at Timau police station. Investigations were carried by officer from Timau. While in Town P C Musembi arrested the accused person Esimit after he who was found selling alcoholic drinks in town. He was interrogated and he led police to his house from where 5 gas cylinders of 6 kgs, 2 cartons Kenya Kane, were recovered. He could not explain how he had acquired them or how they were in his possession.

Also recovered was a T V remote from his home.

The accused led police to another house occupied by other persons but who ran away on seeing police and from the home a gas cylinder of 13 Kgs, 1 T V set LG Make and 2 carton of Kenya Kane and on asking the accused to account for them he failed to. The accused was escorted to the Timau police station together with the recoveries which were later identified by the complainants as some of those stolen on the material date.

- *The five gas cylinder of 6 kgs,*
- *2 cartons Kenya Kane*
- *1 gas cylinder at 13 kgs*
- *L G TV and the adaptor and remote control are all before court.”*

4. Once the appellant confirmed the above facts were correct, the trial court convicted him on the two counts, on his plea of guilt. The prosecution informed the trial court that the appellant was a first time offender. In mitigation the appellant sought leniency and said that he was a family man, and that he was the sole bread-winner of that family.

5. The trial court in sentencing the appellant stated:

“SENTENCE: *The accused mitigation duly considered. Although a first offender, and although some of the items stolen from the complainant premises have since been recovered the seriousness of the offence Calls for a stern punish as this court cannot sit and let people to enjoy the sweat of those who have toiled very hard*

Accused is hereby sentenced to serve three (3) years imprisonment on each count and conviction and sentence shall run consecutively.”

6. The appellant in his grounds of appeal before this court, which he entitled ‘Mitigation’ stated that he was first time offender; that he was left with responsibility to care for his younger siblings when their mother died; that as result he went into the business of hawking, that it was in those circumstances the police found him selling liquor which was part of the stolen goods. He ended his mitigation by requesting the court to review his sentence for the sake of his young family and his siblings who rely on him.

7. Under **Section 306(a) of the Penal Code**, under which the appellant was charged, in respect to the two counts, the maximum sentence provided is 7 years. The trial court in sentencing the appellant noted that he was first time offender but there is no evidence that, that court noted that the appellant had pleaded guilty. Nor did the trial court consider that the two counts the appellant faced were committed at the same time.

8. Had the trial court considered the appellant had pleaded guilty, and thereby had saved the court the time that would have been spent in trial, if he had pleaded not guilty, the trial court would have given the appellant a reduced sentence.

9. Similarly if the trial court had considered that the two counts were committed at the same time, the trial court would have ordered the sentences on both counts to run concurrently. This is what stated in the case: **Peter Mbugua Kabui V- Republic [2016] eKLR** thus:

“In the case of Sawedi Mukasa s/o Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”

10. The trial court did not state that in the appellant’s case there were exceptional circumstances that justified this sentence to run consecutively and therefore should have borne in mind that the offences were of the same transaction.

11. When the appellant court is considering appeal on sentence it may interfere with the trial court’s sentence if it is manifestly excessive or wrong in principle, or not justified by law, or where the matters are improperly taken into account or improperly ignored: **see the book Smith and Hogan’s ‘Criminal Law’ 14 edition.**

12. It is with the above in mind that I make the following orders:

(a) The trial court’s sentence of HASSAN ESIMIT is hereby set aside.

(b) The said HASSAN ESIMIT is hereby sentenced to 2 years imprisonment on each count which sentence shall run concurrently and shall start to run from the date of conviction and sentence by the trial court.

Dated and Delivered at Nanyuki this 14th February 2018

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: Hassan Esimit

For state:

Language

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE