



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.8 OF 2016**

**G M M..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. L Mutai Chief Magistrate dated 31<sup>st</sup> December 2015 in Nanyuki Chief Magistrate Court Criminal Case No. 27 of 2015)*

**JUDGMENT**

1. **G M M** (the appellant) was convicted, after trial, before the Nanyuki Chief Magistrates court on **two counts**. On the **first count** he was charged with the **offence of breaking into a building with intent to commit a felony Contrary to Section 307 of the Penal Code**. On being **convicted** on this first count the trial court sentenced the appellant to serve four years imprisonment. In the **second count** the appellant was **charged with the offence of having suspected stolen property, Contrary to Section 323 of the Penal Code**. On being convicted on that second count the trial court sentenced the appellant to serve one year imprisonment. Those two sentences were ordered to run consecutively.
2. The appellant has filed this appeal against his sentence.
3. The facts of the case that emerged from the evidence adduced at the trial are that the appellant was a regular customer of a hotel called Joskaki in Nanyuki town. The owner of that hotel George Kahugi in evidence stated that, his hotel had been experiencing frequent thefts of customer's belongings from their rooms. The owner stated that he began to suspect one of his customers was perpetrating the theft.
4. On 7<sup>th</sup> January 2015 the appellant, a frequent customer of that hotel, arrived and was allocated room number 304.
5. Humphrey Onchomba Makori, a security guard at the hotel stated in evidence that when the appellant went to his allocated room he kept a vigil near the appellant's room. This was because it had come to the notice of the management that theft in other customer's rooms always occurred when the appellant stayed at that hotel.
6. Shortly afterward the security guard saw the appellant leave his room, without shoes, and go to room 3012. The security guard with the assistance of his colleague detained the appellant at room 3012 until the arrival of the owner of the hotel at the scene. On searching the appellant they found on him a bunch of keys. When the police were summoned and arrived at the hotel they search the appellant's allocated room and found yet more keys and screw driver. The police went to the appellant's home, in Nyeri, where they recovered an ipad and a laptop.

7. The owner of the hotel in evidence stated that his customer had previously suffered a theft of his laptop and ipad while staying at the hotel. Consequently the hotel had to pay him compensation for the two items lost, before he returned to UK.

8. On the appellant being convicted by the trial court, on the two counts, he presented his mitigation as follows:

***“I would pray for leniency. I have a wife and children who are HIV positive. They all depend on me and also the court to consider the time I have spent in remand.”***

9. In sentencing the appellant the trial had this to say:

***Court: I have considered the mitigation and in particular that he has an ailing family who depend on him.***

***The court also considers the fact that the accused is a first offender.***

***On the other hand the court notes the gravity of offence as well the circumstance under which the offences occurred. In particular it is noted that that the accused had mastered techniques of unlocking customers rooms and stealing valuables from therein. The effect of this is in two fold. One it leaves the victim dispossessed of valuables and in anguish. The second is that this habit leads to loss of reputation and business to the hotel. The court thus finds that a deterrent sentence is necessary.***

***As such for count 1 the accused shall serve four (4) years imprisonment***

***For count 2 he shall serve one year imprisonment.***

***The court is also required to deduct the period served in remand from the sentences.***

***However, in the present case it is noted that the accused continues to be out on a cash bail of 50,000/=. His remand stay is due to the other case that he has in Nairobi. Thus there is nothing to deduct in this instant case but the accused may raise this issue in the Nairobi case should it end on in a conviction.***

***The two sentences shall also run concurrently since this was committed almost the same time.***

10. The appellant, before this court repeated the same mitigation he had raised before trial court, save that he stated that his son had failed to continue education because of lack of school fees; that his daughter had become pregnant; and that his wife had suffered a stroke on her right side and was therefore unable to work. The appellant sought for a non-custodial sentence.

11. The Supreme Court in the case **FRANCIS KARIOKOMURUATETEU & ANOTHER –V- REPUBLIC & OTHERS PETITION NO. 15 OF 2015 (CONSOLIDATED WITH PETITION NO. 16 OF 2015)** had this to say as purpose of imposing sentencing:

***“We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners.”***

12. The Learned author **Jonathan Herring** in the book ‘Criminal Law’ fifth edition in discussing the theory of retribution stated:

***“This is that, quite simply, punishment is justified because the offender deserves it. It is good in and of itself to punish, regardless of any consequence of the punishment. Through punishment, the law treats people as human beings who are able to make choices and take the consequences***

*of those choices..... retributivist concept of the offender paying his or her dues to society. Having suffered the penalty, the offender can return to society as a fully acceptable member.”*

13. There is no doubt in my mind that the appellant’s custodial sentence, by the trial court, was justified and he deserved it. The appellant needs to be reminded that his custodial sentence is a consequence of the choice he made to steal from the customers of the hotel.

14. The trial court, in my view, very well-articulated the reason behind the sentence it imposed upon the appellant.

15. The maximum sentence under **Section 307 of the Penal Code is five years**. The appellant being a first time offender should not in this court’s view have been sentenced to four years, which is just one year less than the maximum sentence. I do appreciate what the trial court stated, that the offence committed by the appellant was grave because it affected the customers of the hotel and also the reputation of that hotel. That, however as it may be I am of the view four years sentence on count one was excessive.

16. In view of the above this is the judgment of this court:

**(a) The trial court’s sentence on count one is hereby set aside. The appellant on count one is hereby sentenced to serve 3 years imprisonment, which sentence will begin to run from the date of his conviction by the trial court.**

**(b) That sentence of 3 years on count one shall run concurrently with the sentence of the trial court on count two.**

It is so ordered.

**Dated and Delivered at Nanyuki this 14<sup>th</sup> February 2018**

**MARY KASANGO**

**JUDGE**

**Coram**

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: Geoffrey MuigaiMuchugu

For state: .....

Language.....

**COURT**

Judgment delivered in open court

**MARY KASANGO**

**JUDGE**