REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 14 OF 2017

JOSEPHAT MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Conviction and Sentence in Garissa Chief Magistrate's Criminal Case No. 245 of 2017 - J.J. Masiga - Senior Resident Magistrate)

JUDGMENT

1. The Appellant was charged in the Chief Magistrate's court at Garissa with breaking into a building and committing a felony contrary to Section 306 of the Penal Code.

The particulars of the offence were that, on 5th day of March, 2017 at Soko Ngombe within Garissa township broke and entered a building namely a dwelling house of Mogal Hareth Mire with intent to commit a felony therein.

2. He appeared before the Magistrate's court on 7th March, 2017 and was recorded as having pleaded guilty to the offence. He was thus convicted and sentenced to serve four (4) years imprisonment.

3. The appellant has now come to this court on appeal, which he filed filed on 21st March, 2017. Before the appeal was heard however, he filed amended grounds of appeal. Though his initial grounds of appeal were on sentence alone, the amended ground of appeal challenge also the conviction on the ground that the charge sheet was fatally defective and that he was forced to take plea before the charges were explained to him, and also that the particulars of the charge did not agree with the charge as stipulated in the law.

4. The appellant also filed written submissions which he relied upon, and added orally in court on the day of hearing that he had an eye problem, and wanted the court to assist him.

5. The learned Principal Prosecuting Counsel Mr. Okemwa in response submitted that the language used in the trial court was Kiswahili which the appellant understands well, and that in his mitigation he raised the issue of his eye problem, which confirmed that he understood the proceedings.

6. Counsel submitted further that the requirements for taking a plea of guilty were complied with by the trial court and as such the conviction was proper.

7. With regard to sentence, counsel submitted that Section 306 of The Penal Code provided a maximum sentence of seven (7) years imprisonment, thus the sentence imposed was not excessive.

8. Counsel lastly that though the charge sheet talked of breaking and committing a felony, while the particulars of the offence referred only to breaking with intention to committing a felony, the prosecution had opted not to use Section 305 and instead used Section 306 of the Penal Code because Mire (the complainant) was merely a special owner of the premises. Counsel thus urged this court to uphold both the conviction and sentence.

9. I have perused the entire record, charge sheet and considered the submissions of the appellant both written and oral and the submissions on behalf of the state. The appellant has appealed against both conviction and sentence, though he was convicted on his own plea of guilty.

10. The record of the trial clearly shows that the language used during the proceedings was Kiswahili, which the appellant has used in the appeal. There is no question that he understood the language used, which in my view means he participated fully and understood the proceedings. There is thus no doubt in my mind that the appellant understood the proceedings.

11. The appellant contends on appeal that the charge sheet defective. Indeed, the charge was a charge of breaking into a dwelling house and committing a felony contrary to section 306 (a) of the Penal Code.

The particulars of the offence however only related to the element of breaking into a building or dwelling house, with intent to commit a felony therein. There was certainly a variance between the charge and the particulars of the offence. However, in my view no prejudice was caused to the appellant, as indeed there exists an offence of breaking into a dwelling house with intent to committing a felony, whose sentence is prescribed by law. There is no indication that the appellant was misled or prejudiced by the slight variance between the charge and the particulars of the offence. I thus hold that the slight variance between the charge and the particulars of the offence, which is a defect, is curable under section 382 of The Criminal Procedure Code Cap 75, as no prejudice was caused to the appellant. I thus dismiss the appellant's complaint on the variance between the charge and particulars of the offence.

12. I thus turn to the process of recording a plea of guilty. When the charge was read to the appellant, he was recorded as having stated that the charge was true. A summary of the facts was then given by the prosecutor, and the appellant admitted the facts. It is clear from the facts recorded that the appellant and others were seen breaking into the complainant's house. While the other young men managed to run away, the appellant was restrained at the scene. In my view the facts did disclose the offence of breaking into a dwelling house, with intent to commit an offence. The plea was taken on the proper relevant facts.

13. From the record of the trial court, I am of the view that the procedure for recording a plea of guilty explained in the case of:- **ADAN -VS- REPUBLIC [1973] E.A 445** were complied with by the trial court.

The conviction is thus proper and I will uphold the same.

14. With regard to sentence, the appellant was a first offender and told the magistrate in mitigation that his health was not good. He said that he had a problem with his eyes, and asked for leniency. The learned magistrate found that though the appellant was a first offender, and even after considering his mitigation, the offence was very serious, and sentenced him to serve four (4) years imprisonment.

15. Sentencing is an exercise of discretion by a trial court, and an appellate court should be slow in interfering with such exercise discretion. The sentence imposed was lawful, as the maximum sentence is **7** years imprisonment. However, in my view, it was harsh and excessive because the appellant was a first offender, and no item was stolen or attempted to be stolen from that house. The appellant and the three others were busted when they had not broken in to the home. I will thus interfere with the sentence and reduce it to a term of two (2) years imprisonment from the date the appellant was sentenced by the trial court.

16. I thus uphold the conviction of the trial court. With regard to sentence, I set aside the sentence imposed by the trial court and order that instead the appellant will serve sentence of two (2) imprisonment

from the date on which he was sentenced by the trial court.

Dated, signed and delivered at Garissa this **20th** day of **March,** 2018

George Dulu

JUDGE