



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 39 OF 2017

SIMON SIMIYU WANYONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 1 of 2016 in the Principal Magistrate's Court at Winam delivered by Hon. J. Mitey (RM) on 10th February, 2017)

JUDGMENT

1. On 10th February 2017; the appellant was convicted for burglary contrary to section 304(2) and stealing contrary to section 279(b) of the Penal Code and was sentenced to serve four years imprisonment in each limb.

The prosecution's case

2. The prosecution called 5 witnesses in support of the charges. PW1 the complainant testified on the morning of 30.12.15, he found his store broken into and his metal bed, wheelbarrow and 3 metal seats were missing. That about 11/2 later, he saw a bicycle carrying some metal and he followed it to a scrap metal shop. That shortly thereafter, appellant arrived and started to weigh the metal and it was then that complainant realized that the metal were pieces of his stolen metal bed, wheelbarrow and 3 metal seats which had been cut into pieces. That appellant managed to escape but was arrested the following day and handed over to the police. PW2 assisted the complainant to apprehend appellant.

3. PW3 recalled that on 30.12.15, he was hired by appellant to deliver some metal to a scrap metal dealer in Kibos which he did. That he later learnt that the metals were stolen.

4. PW4 the scrap metal dealer recalled that on 30.12.15 at about 8.00 am, complainant informed him that his goods had been stolen and he had gone to the yard to see if he could find them. That shortly thereafter, PW3 delivered metal pieces which complainant identified as part of his stolen goods. That immediately thereafter, appellant arrived and conceded that he is the one that had sent the bicycle rider to deliver the metal goods at the yard. That appellant managed to escape but was later arrested and handed over to the police.

The Defence Case

5. When he was put on his defence, the appellant gave sworn testimony in which he denied the offence. He said he did not know why he was arrested and charged.

The appeal

6. Being dissatisfied with the conviction and sentence of 4 years imprisonment in each limb, appellant lodged the instant appeal. In his amended grounds of appeal filed on 5th December, 2017, the appellant raised 3 grounds of appeal which I have summarized into two grounds to wit:

1. That Article 50(2) (j) of the Constitution was not complied with as the prosecution failed to serve him with statements on time for proper preparation

2. Consideration of his mitigation

7. When the appeal came up for hearing on 5th December, 2017, the appellant stated that he as wholly relying on the amended grounds of appeal and written submission filed on 5th December, 2017.

Analysis and Determination

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of OKENO VS. REPUBLIC [1972] E.A. 32, where it held that:-

“It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”

8. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

9. In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

a. Fair hearing under Article 50(2)(j) of the Constitution

10. Article 50 (2) every accused person has the right to a fair trial, which includes the right—

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

11. I have perused the record of the trial court and the appellant did not raise the issue of statements either during trial. I therefore find no merit in this ground of appeal

b. Mitigation

12. The prosecution indicated that the appellant was a 1st offender. In mitigation, accused stated that he suffers from epilepsy and was a first offender. In sentencing the Appellant, the trial magistrate rendered herself as follows:-

“I have considered the fact that accused is a first offender. I have also considered the mitigation tendered and the fact that he has been in custody for the last one year. I note the gravity of the said offence within this jurisdiction and do find it fair to place accused under rehabilitation”.

13. On sentence, Section 304 provides as follows:

(1) Any person who—

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

(b) having entered any building, tent or vessel used as a human dwelling within tent 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 house breaking and is liable to imprisonment for seven years.

14. On the other hand, 279 of the Penal Code provides as follows: If the theft is committed under any of the circumstances following, that is to say

(a) if the thing is stolen from the person of another;

(b) 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;

(c) if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;

(d) if the thing stolen is attached to or forms part of a railway;

(e) if the thing is stolen from a vessel which is in distress or wrecked or stranded;

(f) if the thing is stolen from a public office in which it is deposited or kept;

(g) if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of a key or other instrument, the offender is liable to imprisonment for fourteen years.

15. While the sentence on the first limb was lawful, the sentence on the second limb was unlawful since there was no evidence that the appellant had at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house as provided for under section 279(b) of the Penal Code.

16. On the second limb, the appellant ought to have been charged with a lesser offence of stealing contrary to section 275 which carries a

maximum sentence of 3 years.

17. Generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty. In particular, Section 26 (2) and (3) of the Penal Code provides:-

(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment.

17. I have considered Section 382 of the Criminal Procedure Code which provides as follows:-

”Subject to the provisions herein before 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.”

18. The trial court had the discretion to impose a term of 7 years or less in the first limb and a maximum sentence of 3 years in the second limb. The court imposed a 4 years’ imprisonment term in each limb.

Decision

19. This court has discretion under Section 354 (3) (b) of the Criminal Procedure Code to increase or reduce the sentence or alter the nature of the sentence. This is one such case where the court’s discretion can be exercised in favor of the appellant for the reason that the sentence imposed in the first limb though lawful, calls for consideration since appellant is a first offender. The sentence in the second limb as stated herein above is unlawful and this court has a duty to correct the error thereof.

20. The upshot of this is that the appeal is allowed and court makes the following orders:

i. The sentence imposed on the appellant is set aside and substituted with a sentence of two years imprisonment in the first limb and one year imprisonment in the second limb.

ii. The sentences shall run concurrently from the date of sentence

DATED AND DELIVERED THIS 15th DAY OF March 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Felix & Carolyne

Appellant - Present in Person

For the State - Ms Wafula