



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL CASE NO. 99 OF 2017

FRANCIS MUGAMBI KIBIKI.....PROSECUTOR

versus

REPUBLIC.....ACCUSED

JUDGMENT

1. **Francis Mugambi Kibiki**, the appellant, was convicted before the Nanyuki Chief Magistrate's Court of the **offence of house breaking contrary to section 304(1) and of stealing contrary to section 279(b) of the Penal Code**. On being convicted the trial court sentenced him to **3 years** imprisonment on the first limb and **18 months** for the second limb of the charge. Those two sentences were ordered to run concurrently.
2. He was aggrieved by the sentence and has filed this appeal against the same.
3. The appellant was convicted after his trial. The evidence adduced by the prosecution during his trial revealed that the appellant stole the complainant's two cooking pots (sufurias) and money, that is Kshs.2,400.
4. The complainant earned her living by selling eggs. She was a hawker. On the 22nd June 2015, at 3.00 p.m. to 4.00 p.m, she left her home to go hawk those eggs. She locked up her place of residence. As she walked away she saw the appellant outside the gate. The appellant looked down as she passed him avoiding her gaze.
5. Later on Joseph Lolo, who the complainant owed Kshs.50, for chicken gizzard supplied to her, went to complainant's house to collect that money owed to him. He met the appellant walking out of the complainant's front door carrying a bag; in it was the content which looked like sufuria. The complainant's door had been broken into.
6. The appellant was subsequently seen by the complainant, within Nanyuki town, but on noticing her he always ran away. He was later arrested and charged as stated above.
7. The appellant in his written submission brought what he termed as mitigation. He stated in those submissions that he was a first time offender; he is remorseful; and that he has a family and siblings who depend on him.
8. The appeal was opposed by the state through the principal prosecution counsel Mr. Tanui. In Mr. Tanui's opinion the trial court's sentence was too lenient. He drew the court's attention to what the trial court took into account when it sentenced the appellant and submitted that the trial court sentence does not warrant any interference.
9. In my consideration of this appeal I will be guided by the decision of the case **ARTHUR MUYA MURIUKI v REPUBLIC [2015] eKLR** where it was held:-

“Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all the relevant factors and eschew all extraneous or irrelevant factors.

Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.”

10. The Learned trial magistrate in sentencing the appellant stated thus:-

“I have considered the fact that accused is a first offender as well as mitigation. I also note the value of the stolen items. Two sufuria and cash of Kshs.2,400/- were said to be stolen. This items may appear to be of small value but the court considers the same were stolen from the complainant who had earned them through patience and hard work hawking eggs in the street. When the complainant was giving her testimony in court she testified with a lot of emotion and pain for her lost properties. The court also notes that the complainant items and cash were not recovered.

In view of the foregoing the accused shall serve three (3) years for the first limb of the offence and 18 months for the second limb of the offence. The sentences shall run concurrently.”

11. The case of ARTHUR MU YA (supra) made it clear that sentencing is the discretion of the trial court. Can the trial court’s exercise of that discretion, in this case be faulted?

12. The trial court noted that what was stolen by the appellant was of meagre value. It was Kshs.2,400 and two sufurias. The trial court was careful to state that despite the low of value of what the appellant stole – it meant alot to the complainant, who the court noted was of a humble background.

13. It cannot be said that the sentence passed by the trial court was harsh or excessive. In respect to the first limb of the charge, the charge of house breaking, the maximum sentence provided under **section 304(2)** of the Penal Code is **10 years** imprisonment. In respect to the second limb, the charge of stealing the maximum sentence under **section 279** is **14 years** of imprisonment.

13. In my humble view, the trial court’s sentence of the appellant does not attract any interference from this court. The trial court did not act on any wrong principles in passing sentence.

14. It is for the above reason that the appellant’s appeal fails. It is dismissed. The trial court’s sentence is hereby confirmed.

DATED AND DELIVERED AT NANYUKI THIS 18TH DAY OF APRIL 2018.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Accused: Francis Mugambi Kibiki

For Accused

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE