



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL NO. 49 OF 2017

DAVIS NGIGI MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein **Davies Ngugi Maina** was charged with the offence of robbery with violence contrary to section 296(1) of the Penal Code.

It was alleged that on the 5th day of August 2017, at about 10.00hrs in Munore village of Mukurwe-ini sub county within Nyeri County, he robbed ESTHER WAITHIEGENI NGUGI of a T.V make Hot point and a mobile phone make Nokia all valued at Ksh. 23,000/- and immediately before the time of such robbery used actual violence to the said ESTHER WAITHIEGENI NGUGI by strangling her neck thereby occasioning her actual bodily harm.

On the second count he was charged with Handling stolen property contrary to section 322(1) (2) of the Penal Code. It was alleged that on the 5th day of August 2017, at Kiahungu market in Mukurwe-ini Sub-County within Nyeri County, otherwise in the course of stealing, he dishonestly received or retained a TV make Hot point and a mobile phone make Nokia knowing or having reason to believe them to be stolen goods.

On 9th August 2017 plea was taken before Hon. V.O Chianda SRM. The appellant pleaded not guilty to both counts and was granted bond of Ksh. 1,000,000/- with a surety of the same amount.

On 22nd August 2017, when the matter came for mention the appellant requested for the charges to be read afresh to him. The record reads: -

Count 1-True

Count 2-True

The facts as read by the prosecution were:

“On 5.8.2017, around 10:00hrs, the complainant Esther Waithegeni was at her house when the accused who is her grandson went home. She instructed him to wash some utensils he had used to eat and he declined. He suddenly without provocation got violent, strangled her to the point of

unconsciousness. He then took the TV, and went to Mukurweini town. He convinced a purchaser to buy the TV at Kshs.2000/-. The intended purchaser became suspicious and reported to the police. He was then escorted to Mukurweini Police Station after the report went out and he was arrested. The complainant was able to identify her stolen TV. She was treated and discharged at Mukurweini hospital”.

The proceedings further show that some exhibits were produced: -

<i>Nokia phone</i>	<i>PEXH 1</i>
<i>TV set</i>	<i>PEXH 2</i>
<i>P3 Form</i>	<i>PEXH 3</i>

In response to the facts the appellant responded:

“It is true”

Court: plea of guilty entered.

Prosecutor: No previous record.

Mitigation: Am sorry I won't repeat it again.

Court: Accused convicted of on his own plea of guilty and ordered to serve 14 years' imprisonment on count 1 and 3 years in count 2, sentences to run concurrently.

It is noteworthy that the trial magistrate did not realise that the so called 'Count 2' was indeed the alternative charge. He also did not notice that the alternative charge was duplex by using 'or' as in *received or retained*, each a distinct act that would require to be proved. If the police meant received and retained they needed to say so. Secondly, there was nothing to tie the appellant to the mobile phone in the facts yet it was produced as evidence. There were no directions with regard to the exhibits.

Aggrieved by the above sentence the appellant filed his appeal on 29th August 2017. He set out six Grounds of Appeal: -

1. THAT, the sentence imposed against me was harsh and excessive due to my health status.
2. THAT it was my first time to be in a court of law and being a layman, hence not able to defend myself.
3. Am the only son in our family, being the only breadwinner of my elderly parents and my wife and children.
4. THAT I kindly urge this honourable court to deduct the same for me to its convenient one.
5. THAT, if the same is reduced at the courts discretion, it will enable me join my family and society being of no threat to the complainant but keep peace since I am so remorseful.
6. THAT other further grounds to be adduced during the hearing of this appeal.

On 13th February 2018, in compliance to Section 350(2) (v) of the CPC, he filed amended Grounds of Appeal together with his written submissions. These he referred to as “mitigation seeking for leniency of the court and not against the judgment reached”;

1. THAT I am a first offender and the sole family breadwinner.

2. THAT I am fully reformed and remorseful for what happened.
3. THAT sometimes justice has to be tempered with mercy.
4. THAT I promise to be a role model in the society.
5. THAT I pray for a lesser sentence rather than a severe sentence.

He made the following prayers:

- a) Reduction of the sentence, or
- b) Such other order as this Honourable Court may deem just.

Section 295 of the Penal Code defines the offence of robbery;

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

Section 296 provides the penalty thus;

*(1) Any person who commits the felony of robbery is **liable to imprisonment for fourteen years.** (emphasis mine).*

The offence of handling stolen goods is provided for under section 322(1)

A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

The penalty is provided for under s.322(2)

*A person who handles stolen goods is guilty of a felony and **is liable to imprisonment with hard labour for a term not exceeding fourteen years.** (emphasis added).*

The appellants case is governed by the provisions of section 348 of the Criminal Procedure Code which limits the scope of an appeal in a case of guilt plea. It says;

*No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the **extent or legality of the sentence.***

The wording of the law is that appellant can only challenge the extent or legality of the sentence.

In his submissions the appellant relied on the written submissions he filed on the 13th February 2018 where he pointed out that the only reason he was before me was to seek the indulgence of this court to temper the justice that was meted against him with mercy. He admitted that he had done wrong. In his very candid and blunt written submissions he told the court that he had '*played with fire...made a very big mistake and I regret for what happened*'. He said he was a changed man from his experience behind bars, for the good. He admitted the charges because he had committed the offence. That the trial court in sentencing him had given him '*a sense of direction and focus*'. That he is 30 years of age, husband to a young wife, the first born in a family of two, the sole bread winner. He lost his father as a teenager, and his mother was ailing. His prayer was that the sentence was too long for a first offender. In short, he asked the court to look at the length of the sentence.

In response the learned Prosecutor Ms. Jebet acknowledged the appellant's sentiments. She submitted that there was nothing the court could do as its hands were tied by the minimum sentence of 14 years provided for, for the offences the appellant was charged with. She was of the view that the appellant was actually seeking a review of his sentence.

The issues are:

1. Whether the hands of the court are tied?
2. Whether the penalties provided for the charges facing the appellant are minimum sentences?
3. What is the appropriate sentence?

Although the provisions of section 348 of the CPC appear to be framed in mandatory terms the Court of Appeal has variously held otherwise. This is in recognition of the fact that our criminal justice system is open to abuse by those who wield power despite the rights guaranteed for an accused person. Secondly, it is not a friendly system, has not yet to be fully demystified, and attain the requisite levels of professionalism. Persons of all walks of life are intimidated by it. Some end up pleading guilty out of fear and confusion, and even ignorance of processes.

In Wandete David Munyoki v Republic [2015] eKLR the Court of Appeal (Makhandia, Ouko & M'inoti, JJ. A). stated

*It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in **Ndede v R [1991] KLR 567**, this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there has been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed. (emphasis added)*

The powers of the High Court in an appeal are found in section 354 of the CPC and include;

(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

(a) in an appeal from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.

The appellant herein was sentenced on count 1 robbery contrary to section 296(1), to serve 14 years' imprisonment and on count 2, handling stolen property contrary to section 322 (1) as read with 322(2) to serve 3 years' imprisonment.

On the 1st count the penalty provided for is ‘liable to imprisonment for 14 years’ and the 2nd count is ‘liable to imprisonment with hard labour for a term not exceeding 14 years.’ Section 322(2) clearly states ‘not exceeding 14 years’ imprisonment’. That means that the maximum sentence a person charged with that offence can get is 14 years’ imprisonment.

Hence it was not correct for the state to submit these charges carry minimum sentences.

Secondly when the statute says ‘liable to’ it does not mean that that is a minimum sentence. Section 26 of the **Penal Code** on ‘**Imprisonment**’ explains what it means when it says a person is **liable** to something;

(1)

(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.

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

Provided that—

(i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;

Minimum sentences where they are found are worded so as not to leave any doubt in the mind of the court; usually stating for a ‘term not less than’. In my view The Sexual Offences Act no. 3 of 2006 provides the best example of the provisions for minimum sentences.

This speaks to the extent of the sentences. However, the manner in which the plea was taken does raise concern on the legality of the conviction and sentence meted of the appellant on the alternative charge.

The charge of handling stolen property may be the alternative charge to the charge of any offence that includes some form of stealing

You are not a handler if you are the one who stole the goods. You are a handler if you handle goods otherwise than in the course of stealing. If you are the one stealing, you cannot be the handler at the same time. It says you are a handler if you deal with the goods which are already stolen and you know or believe that they are stolen goods, you proceed to receive or retain or dispose of them for the benefit of another person. This is what it says;

A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

Robbery is stealing. *“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it...”* However, it becomes robbery because of the aggravation involved...” *uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained...”*

It is therefore not legally possible that the appellant could be the ‘stealer’ and the handler of the items he was alleged of ‘stealing’. It is either that he stole or he handled the stolen property.

The procedure generally is that the plea to the alternative charge will be recorded when the accused person has pleaded not guilty to the main charge. The trial court, misdirected itself by asking the appellant to plead to the alternative charge after he pleaded guilty to the main charge. After the appellant the trial

court misdirected itself further in proceeding to convict him on both the main charge and the '2nd Count' which was really the alternative charge to the charge of robbery. In my view the conviction and sentence on the alternative charge unlawful. In **George Ouma Okoth v Republic [2017] eKLR** the Judge was of the view that the trial magistrate was in error in convicting and sentencing the appellant on both the main charge of stealing and the alternative of handling stolen property.

With regard to the extent of the sentence, the appellant was a first offender. There was no negative pre-sentence report. The maximum sentence therefor flew in the face of the Sentencing Guidelines and good practice, the necessity and importance of a pre-sentence report, giving the court the opportunity to take into consideration a host of circumstances including the fact that the offender is a first offender.

This is more so because the offence appears to have been committed within the family setting, involving the offender and his grandmother. The facts present abnormal reactions to a very mundane issue. He had been asked by none other than his grandmother to wash dishes he had used to eat, he refused. Then he attacked her. Then he took the TV and went to sell it. That ought to have set off a light in the mind of the court in determining the sentence to call for a pre-sentence report.

In the circumstances I find that the appeal must succeed in part.

1. The conviction for offence of robbery contrary to section 296(1) remains as the particulars as read out support the ingredients of the offence,
2. The conviction on the alternative charge of handling stolen goods contrary to section 322(1) as read with 322(2) cannot stand. It is quashed and the sentence set aside,
3. The sentence on the main charge is set aside.
4. I order for a pre-sentence report to be filed by the sub county Probation and After Care Services Officer Nyeri County within 14 days hereof.
5. Mention on 7th May 2018 for sentencing.
6. Order be extracted and served on the Nyeri Probation and After Care Services office.

Dated, delivered and signed in open court this 11th Day of April 2018.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: A Atelu

Ms. Jebet for state

Appellant present.