REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 36 OF 2017

BETWEEN

BOB SEPHANIA MAGERO .....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal originating from the conviction and sentence dated 24th May 2016 at Ogembo law court before SRM C.R.T. Ateya)

JUDGMENT

1. The appellant was charged with burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code. The particulars of the charge for the 1st count were that on 28th November 2014in Nyaisero sub-location in Gucha district within Kisii County the appellant and his co-accused broke and entered the dwelling house of Justa Nyandwaro Matara and stole one door and two chicken all valued at Kshs 4,600/-. The particulars for the 2nd count were that on 28th November 2014 at 10:00 p.m. in Nyaisero sub-location in Gucha District the accused and his co-accused broke and entered the dwelling house of Natman Obwogi Nyachongi and stole eighteen cushions, twelve plates and twelve cups all valued at Kshs.7,500/-. The appellant was sentenced to seven (7) years imprisonment on each count with both sentence to run concurrently. He now appeals against the sentence only.

2. When called upon to offer his mitigation, the appellant stated as follows; "*when I was arrested my wife was three (3) months pregnant. I ask for non-custodial sentence*." The trial court noted the mitigation and ordered for a pre-sentencing report. On the day of sentence the pertinent comments by the trial court were as follows:

> **"I have considered the pre-sentencing report and noted the recommendations therein. I also take into account the circumstances of the offence and the mitigation of the accused. I find that the accused persons are not suitable to serve non-custodial sentence."**

3. At the hearing of the appeal the accused stated that he had been sentenced to serve seven (7) years and was seeking that the same be reduced to three (3) years. Mr. Otieno for the State submitted after perusal of the court records he contends that the accused ought to have been charged with stealing and not burglary. He submitted that the chicken were in a chicken coop and not a dwelling house. That for the offence of burglary it is essential that the element of a dwelling house be established. On the second count he submitted that the complainant had stated that when he came back to the house at 10:00 p.m. he found that the cushions, plates and cups had been stolen. It is not clear as to what time the property were stolen and time is essential in the offence of burglary.

4. Under the Penal Code a dwelling-house has been defined to includes ; *"any building or structure or part of a building or structure which is for the time being kept by the owner or occupier for the residence therein of himself, his family or his servants or any of them, and it is immaterial that it is from time to time uninhabited; a building or structure adjacent to or occupied with a dwelling-house is deemed to be part of the dwelling-house if there is a communication between such building or structure and the dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other, but not otherwise."*

5. Justa Nyandwaro Pw1 gave evidence that on waking up on the 29.11.2014 he found his chicken missing and the wire he used to lock the enclosure was on the ground. He further stated a door was also stolen and that they went to the house where the door was removed. From the evidence by Pw1 it is clear that the door stolen was one of a dwelling house, and even if the stealing of the chicken from the chicken coop did not amount to burglary the removal and stealing the door from the house considered to be a dwelling house amounted to burglary.

6. On the second count I agree with the prosecution that the time of the theft was not established. Nathan Obwogi, Pw2 gave evidence that at 9:00 p.m. he found cushions from his house stolen. He had locked the house with a padlock and was in the kitchen. The cushions were in the house Pw2 sleeps in. It is therefore unclear whether the cushions were stolen during the day or in the night. I find that the appropriate offence that the accused ought to have been charged with on the second count is one of housebreaking under section 304 (1) of the penal code for which the sentence is imprisonment for seven years.

7. However, the court must bring its mind to the fact that the current appeal is on the sentence only. The Appellant is asking the Court to reduce his sentence as he has reformed. The Appellant's appeal is on sentence and the appellant did not raise any issue on his conviction, to this end this court shall not say more about it.

8. The Court of Appeal in ***Bernard Kimani Gacheru v Republic [2002] eKLR***stated the general principles upon which the first appellate court can interfere with a sentence imposed by the trial court:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

9. In the case of***Dalmas Omboko Ongaro v Republic [2016] eKLR*** the court stated that:

> **"The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism."**

10. The trial court considered whether the appellant was a first offender by virtue of the pre-sentencing report which indicated that the accused was not a first offender and had been jailed before. It is also worth noting that the maximum sentence for burglary is ten (10) years whereas that of stealing from a dwelling-house is fourteen (14) years as prescribed by the penal code. The Appellant in his mitigation before the trial court, stated that his wife was three (3) months pregnant at the time of arrest and urged the trial court to consider non-custodial sentence. He now states that he is an orphan and which information was reflected on the pre-sentence report and considered by the trial court. The appellant now states that he has taken the necessary positive steps towards his rehabilitation and is seeking that the court to consider that he has young children and the breadwinner of his young family. This court having considered the reasons by the appellant and the circumstances of this case, I allow this appeal on sentence .I also note that the appellant was sentenced on the 29/9/16 and has been in custody since 2014. He has served 2 years jail term which in my view is adequate punishment. The appellant shall be set free unless lawfully held.

Dated and delivered at Kisii this **23rd** day of **November 2018.**

R.E. OUGO

JUDGE

In the presence of;

Appellant in person

Mr. Otieno For the State

Ms.Rael Court/ clerk