



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 72 OF 2015

MTAWALI KARISA BOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 462 of 2013 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)

JUDGEMENT

1. On 26th June, 2014 the Appellant, Mtawali Karisa Boki, pleaded guilty to counts 1, 3, 4, 5, 6 and 7 being charges of burglary and stealing from various complainants contrary to sections 304(2) and 279(b) of the Penal Code, Cap. 63.
2. In count 1 he was charged with burglary contrary to Section 304(2) of the Penal Code. The allegation being that on 17th May, 2013 at Misufini Village, Marekebuni Sub-Location, Magarini District in Kilifi County the Appellant broke and entered the dwelling house of Samwel Patacho Menza with intent to steal therein. For this count he was sentenced to serve one year imprisonment.
3. In count 2 the Appellant was charged with stealing in a dwelling house contrary to Section 279(b) of the Penal Code. The particulars being that he stole two pillows and one mattress valued at Kshs. 2,600 from the dwelling house of the complainant in count 1. The record does not show the fate of this count. The Appellant did not plead guilty to it and neither was he sentenced for the same.
4. There was an alternative to count 2 namely handling of stolen goods contrary to Section 322(1) of the Penal Code. The alternative charge was not read to the Appellant. Assuming he had not pleaded guilty to count 2, the alternative charge should have been read to him and his plea recorded.
5. In count 3 the Appellant was charged with burglary contrary to Section 304(2) of the Penal Code namely that on the night of 15th and 21st June, 2013 at Misufini Village, Marekebuni Sub-Location, Magarini District within Kilifi County the Appellant broke and entered the dwelling house of Lawrence Kahindi Voti with intent to steal therein. He was sentenced to two years imprisonment.
6. The Appellant was in count 4 charged with stealing from a dwelling house contrary to Section 279(b) of the Penal Code. The particulars being that he stole assorted household items valued at Kshs. 5,700 from the house of the complainant named in count 3. He was sentenced to one year imprisonment.
7. There was an alternative charge to count 4, which was correctly not read out to the Appellant as he had pleaded guilty to the main charge (count 4).
8. In count 5 the Appellant was charged with burglary contrary to Section 304(2) of the Penal Code. The particulars of the charge being that on the night of 24th June, 2013 at Misufini Village, Marekebuni Sub-Location, Magarini District within Kilifi County the Appellant broke and entered the dwelling house of Chengo Voti Hinzano with intent to steal therein. For this count he was sentenced to serve two years imprisonment.
9. As for count 6, the Appellant was charged with stealing from the dwelling house of the said Chengo Voti Hinzano contrary to Section 279(b) of the Penal Code. It was alleged he stole therein assorted items including cash all valued at Kshs.4,160. For this offence he was sentenced the one year imprisonment.
10. The alternative to count 6 was again correctly not read to the Appellant as he had already pleaded guilty to the main charge.

11. Finally in count 7 the Appellant was charged with stealing from a dwelling house contrary to Section 279 of the Penal Code. It was alleged that on 15th July, 2013 at Misufini Village, Marekebuni Sub-Location, Magarini District within Kilifi County the Appellant stole assorted household items valued at Kshs. 11,880 belonging to Jackson Katana Kenga from his dwelling house. He was sentenced to one year imprisonment for this offence.

12. Again, the trial court correctly did not read the alternative charge to count 7 to the Appellant.

13. The Appellant's submissions in support of his appeal are mitigatory in nature. He states that he was misled into committing the crimes.

14. The Appellant proceeds to submit that the sentence should be appropriate to the circumstances of the case. He cites the decision of this court (Muga Apondi, J) in **Thomas Gilbert Cholmondley v Republic, Nairobi H.C. Criminal Case No. 55 of 2006** in support of his assertion that a sentence should be rehabilitatory in nature. He urges this court to reduce the sentences imposed on him.

15. The Respondent urges the court to dismiss the appeal stating that the Appellant was convicted and sentenced on his plea of guilty. Further, that the sentences imposed were proper and as per Section 348 of the Criminal Procedure Code, no appeal shall be allowed where an accused has pleaded guilty except to the extent or legality of sentence.

16. It is noted that the Appellant's appeal is confined to the extent or legality of the sentence imposed on him.

17. I do not understand why the prosecution opted to break up the charge of burglary and stealing so as to create two counts. It resulted in a tedious and messy charge sheet which ended up with 7 counts instead of four. In the process plea was not taken on count 2 and there is no explanation how the Appellant stole from the house of Jackson Katana Kenga as charged in count 7 without first breaking into it. He ought to have been charged with housebreaking or burglary.

18. The Criminal Procedure Code in the Second Schedule has sample forms for stating offences. At page 147 a sample form for charging the offence of burglary is provided. I reproduce it as follows:

“Burglary, contrary to section 304, and stealing, contrary to section 279 of the Penal Code.

PARTICULARS OF OFFENCE

A.B., in the night of the day of.....19....., inDistrict within theProvince, did break and enter the dwelling house of C.D., with intent to steal therein, and did steal therein one watch, the property of S.T., the said watch being of the value of sh.200.”

19. The form should be used with the necessary modification. One charge carry two offences namely housebreaking/burglary and stealing and if convicted an accused person is sentenced for each limb of the charge. Be that as it may, I do not see anything wrong with the prosecutor breaking up the charge into one of stealing and another one of burglary but the better option is to have the two charges in a single count as shown above.

20. In **Peter Mbugua Kabui v Republic [2016] eKLR; Criminal Appeal No. 66 of 2015 (Nairobi)** the Court of Appeal held that:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”

21. The general rule is that sentences committed in the same transaction should be served concurrently. The trial magistrate directed that the sentences be served consecutively but it is noted that some of the offences were committed in the same transaction. Why would the sentence for twin offences of breaking into the dwelling house of one complainant and stealing from therein be served consecutively? In such a situation it is very clear that the two offences have been committed in the same transaction. At least the sentences for counts 3 and 4 and that of counts 5 and 6 ought to have run concurrently.

22. In the circumstances, I agree with the Appellant that the trial magistrate applied the wrong principles in sentencing him. Since the breaking into and stealing from the house of each complainant was distinct and separate, the sentences for count 1; counts 3 and 4; counts 5 and 6; and count 7 could have been ordered to run consecutively. That would mean that the Appellant would have served six years and not eight years.

23. The Appellant was sentenced on 30th June, 2014 meaning that he has already served four years and four months. Prior to his sentencing he had been in remand for close to one year. As per Section 333(2) of the Criminal Procedure Code this period ought to have been taken into account. Assuming that the Appellant was deserving of remission as provided by Section 46 of the Prisons Act, he should be out of prison by now.

24. For the above stated reasons I allow the appeal on sentence. The sentences imposed are set aside and substituted with imprisonment for the period already served. The consequence is that the Appellant is set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 23rd day of November, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT