



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**HC. CRIMINAL APPEAL NO. 204 OF 2016.**

**BONIFACE WAWIRE KHISA.....APPELLANT**

**VERSUS.**

**REPUBLIC.....REPOENDENT**

*[An appeal from Conviction and Sentenced in original Webuye SPM CR. 433/2015 delivered on 21.5.2015 by C.N. Oruo – Resident Magistrate].*

**J U D G M E N T.**

The appellant Boniface Wafula Khisa was charged with; **Count I: Store breaking and committing a felony Contrary to Section 306 of the Penal Code.** Particulars of offence being on diverse day of 7<sup>th</sup> and 16<sup>th</sup> day of May, 2015 at Khalala Village Sitikho Location in Bungoma East Sub-County within Bungoma County jointly with others not before court broke and entered into the store of EDWARD MANDOLI and did steal from therein one generator make tiger and two plastic chairs all valued at Kshs.75,000/= the property of EDWARD MANDOLI.

**Count II: Kitchen breaking and committing a felony Contrary to Section 306 of the Penal Code.** Particulars of offence being on diverse day of 7<sup>th</sup> and 16<sup>th</sup> day of May 2015 at Khalala Village Sitikho Location in Bungoma East Sub-County within Bungoma County jointly with others not before court broke and entered into the kitchen of EDWARD MANDOLI and did steal from therein eight hens one jembe, one panga, one axe, one pair of gumboots, two pairs of rubber all valued at Kshs.7,500/= the property of EDWARD MANDOLI.

**Count III: Handling stolen goods Contrary to Section 322[2] of the Penal Code.** Particulars of offence being on the 17<sup>th</sup> day of May 2015 at Nabuyole Village Mihuu Sub-location in Bungoma East Sub-County within Bungoma County otherwise than in the cause of stealing dishonestly was found with one generator make tiger, a pair of gumboots, five cautions and two plastic chairs knowingly or having reason to believe them to be stolen goods or unlawfully obtained.

The charges were read to him and he pleaded guilty to the 3 Counts. The prosecution stated the facts which the appellant admitted to be true. He was then convicted on own plea of guilty and sentenced to;

Count I: Accused sentenced to 4 years imprisonment.

Count II: Accused sentenced to 2 years imprisonment.

Count III: Accused sentenced to 1 year imprisonment.

All sentences to run consecutively.

The appellant filed this appeal but stated he is not challenging the conviction but only the sentence imposed. The appellant rightly in my view conceded that no appeal would arise where he had pleaded guilty and convicted on that plea except as to the extent or legality of sentence.

The appellant submits that the sentence of a total of 7 years imprisonment was excessive and irregular. The appellant was charged in Count I with the offence of Store breaking and committing a felony Contrary to section 306 of the Penal Code. In the particulars of the charge among the items he is alleged to have stolen were one generator, make Tiger and 2 plastic chairs.

In Count 2 he was charged with the offence of Kitchen breaking and committing a felony Contrary to Section 306 of the Penal Code. Among the items stolen were 8 hens, one jembe, one panga, one axe, 1 pair of gumboots, 2 pairs of rubbers.

In Count 3 he is charged with the offence of handling stolen goods Contrary to section 322(2) of the Penal Code. He is alleged in the particulars, to have handled, generator, gumboots, plastic chairs.

It is therefore clear from the above that Count 3 relates to handling of the items stolen in Count 1 and 2. Though the appellant pleaded guilty to Count 3, and was convicted, Count 3 should have been an alternative charge to Count 1 and 2. The framing of the charge of handling as a substantive Count rather than alternative was in my view irregular, and the conviction on the same is unlawful. I therefore set aside the conviction and sentence on the charge of handling stolen property. I set aside the sentence of one[1] year imprisonment imposed on Count 3 which ought to have been an alternative charge.

In respect to Count 1 and 2 the offences were committed on the same period on diverse days between 7<sup>th</sup> – 16<sup>th</sup> day of May 2015. The offences were committed in the same transaction. Section 14(1) of the Criminal Procedure provides as follows:

***(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.***

In **Peter Mbugua Kabui vs Republic [2016] eKLR** the Court of Appeal stated as follows:

***“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.***

The sentencing policy guidelines provides guidance in sentencing and provides. I have also considered the **Sentencing Policy Guidelines** which contain specific provisions on whether a court should impose consecutive or concurrent sentences. The Guidelines provide as follows:

***7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.***

In my view while a court under Section. 14 of the Criminal Procedure Code can order sentence to run consecutively, it is good practice to impose concurrent sentences where a person committing more than one offence at the same time and in the same transaction except where exceptional circumstances demand otherwise. In this appeal no such circumstances can be seen. The order that the sentence to run consecutively was an error.

I hereby set aside the order for sentences to run concurrently and direct that the sentences in Count 1 – 4 years imprisonment and Count 2 – 2 years imprisonment to run concurrently. The appellant will therefore serve a maximum of 4 years imprisonment.

**Dated and Signed at Bungoma this 22<sup>nd</sup> day of November, 2018.**

**S.N. RIECHI**

**JUDGE.**