REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 41 OF 2015

PATRICK KING'ORI KILEMI……. APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates Court Criminal Case No. 949 of 2012 (Hon. Nyakundi, RM) on 3rd June, 2013)

JUDGMENT

The appellant, together with one John Maina were charged with the offence of burglary contrary to **section 304 (2)** and stealing contrary to **section 279 (b)** of the **Penal Code, cap 63**.The particulars were that on the night of 22nd day of October 2012 at Kenya Urban Roads Authority offices in Nyeri County within central province, jointly with others not before court, the appellants broke and entered the building namely offices of Kenya Urban Roads Authority and committed therein a felony namely theft and did steal assorted properties worth Kshs. 375,000 the property of Kenya Urban Roads Authority.

In the alternative, they were charged with the offence of neglect to prevent a felony contrary to **section 392** of the **Penal Code**. Here, the particulars were that on the night of 22nd day of October at Kenya Urban Roads Authority offices in Nyeri County within central province, being Lavington security guards contracted to guard the premises failed to prevent commission of a felony, namely theft of the institutions properties which were valued at Kshs 375,000 the property of Kenya Urban Roads Authority.

The trial court found them guilty of the primary count and while sentencing them the court stated thus;

"Accused shall serve five years on each limb. The same to run concurrently."

The appellant appealed against conviction and sentence and in his petition filed in court on 20 July 2015, he raised the following grounds:

1. The trial magistrate erred in law and in fact in convicting the appellant based on the tainted and inconsistent evidence of the prosecution.

2. The learned trial magistrate erred in law and in fact in convicting the appellant yet there was no evidence from the scene of crime personnel who ought to have photographed the scene of crime.

3. The learned magistrate erred in law and in fact in convicting the appellant yet the charge against him was not proved to the required standard.

4. The learned magistrate erred in law and in fact in rejecting the appellants sworn evidence which was not challenged by the prosecution in any event.

Although the appellant appealed against both the conviction and sentence, he only urged the court to consider reviewing the sentence meted out against him when his appeal came up for hearing. He was categorical that he was satisfied with the conviction but that the sentence was excessive in view of the charges against him.

Counsel for the state on the other hand, admitted that there was some error in sentencing but that it was not an error that invalidated the sentence or prejudiced the appellant in any way; the learned counsel submitted that the appellant would still have been sentenced to serve the 5 years the learned magistrate's error notwithstanding.

The manifest error which the learned magistrate made is that he appeared to have convicted the appellant both on the principal and alternative counts; there is no other plausible reason why he ordered that the appellant should serve five years' imprisonment on each limb and the sentences should run concurrently. The only limbs he must have been referring to were the alternative counts with which the appellant was charged. This was clearly an error on the part of the learned magistrate because once the appellant was found guilty of the principal count, he need not have made any finding on the alternative count. To that extent, the appellant's appeal would succeed on sentence.

But my own assessment of the evidence reveals a bigger problem than just the mistake in sentencing. The particulars of the offence showed that the appellant and his co-accused broke into the offices of Kenya Urban Roads Authority and are alleged to have stolen from therein several properties. Indeed, the prosecution evidence was consistent with these particulars and **Benjamin Chepkairol (PW1)** an accountant with the Kenya Urban Roads Authority testified that on 23rd October, 2012, he got information that the authority's offices had been broken into the previous night. He proceeded there and confirmed that indeed there was a break-in and several of his employer's properties had been stolen. The appellant's employers' representatives **Francis Kiprop Sinyei (PW2)** and **Peter Kioko Mutinda (PW3)** confirmed that indeed the appellant and his co-accused were employed to guard the office premises of Kenya Urban Roads Authority. Similarly, the investigations officer **police constable Godfrey Otieno Oloo (PW4)** visited the offices in the course of his investigations and even established how the thieves managed to gain entry into the premises.

With these facts, the appellant shouldn't have been charged with the offence of burglary contrary to **section 304(2)** and stealing as read with **section 279 (b)** of the **Penal Code** because the offence under these provisions relate to breaking, entering and stealing from premises which are used for human dwelling or residential purposes. These provisions state as follows: -

> ***304. Housebreaking and burglary***
>
> ***(1) Any person who—***
>
> ***(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or***
>
> ***(b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.***
>
> ***(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years***.

On its part **section 279(b)** states:

279. Stealing from the person; stealing goods in transit, etc.

If the theft is committed under any of the circumstances following, that is to say —

(a)…

(b)if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house,

(b)…

(c)…

(d)…

(e)…

(f)…

(g)…

the offender is liable to imprisonment for fourteen years.

These provisions are clear that the break-in must have been in a dwelling house and that if the offence is committed at night, the offence of burglary is committed.

The appellant is alleged to have broken in and stolen from an office which as noted was being used by a public authority; the appropriate offence in the circumstances would have been breaking into a building and committing a felony under **section 306** of the **Penal Code** which states:

306. Breaking into building and committing felony

Any person who—

(a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or

(b) breaks out of the same having committed any felony therein is guilty of a felony and is liable to imprisonment for seven years.

It is worth noting here that this section is specific to the kind of premises which if broken into may amount to an offence; these premises do not include a dwelling house for the obvious reason that a break into such house constitutes a separate and distinct offence altogether.

Contrary to the offence of burglary which only comes into play if the break-in is at night, an offence under **section 306** is committed regardless of whether the break-in is at night or during the day.

It follows that the particulars of the offence and the evidence that was made by the prosecution did not support the charge against the appellant. Although the appellant was only concerned about the legality of the sentence at the hearing of his appeal, I found this misdirection on the part of the trial court too glaring to ignore. If the appellant was wrongly convicted, then the issue of the validity of the sentence meted out against him should not arise. I hold that the conviction of the appellant was not safe and it is hereby

quashed and sentence set aside. The appellant is set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 31st day of March, 2017

Ngaah Jairus

JUDGE