



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 73 OF 2016
(HOUSEBREAKING AND STEALING)
(CORAM: J. A. MAKAU - J.)
GEORGE OUMA OKOTH.....APPELLANT
VS
REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 14.07.2016 in Criminal Case No. 467 of 2016 in Ukwala Law Court before Hon. G. Adhiambo-SRM)

J U D G M E N T

1. The Appellant **GEORGE OUMA OKOTH** was charged with an offence of housebreaking contrary to **Section 304(1)(b)** and stealing contrary **Section 279(b) of the Penal Code**. The particulars of the charge are that between the 1st day of March, 2016 and 19th day of April 2016 at Magadino village, Karadolo sub-location in Ugenya sub-county within Siaya County broke and entered the building used as a dwelling house of **CHRISTOPHER OMONDI AWUOR** and stole three amplifiers, one cross over, one PV graphic equalizer, two mixers, four loud speakers and assorted cables all valued at Kshs.620,000/= the property of the said **CHRISTOPHER OMONDI AWUOR**. The appellant faced an alternative charge of handling stolen goods contrary to **Section 322(1)(2) of the Penal Code**. That on the 16th day of July at Hafumbure Village, Karadolo West Sub-location in Ugenya Sub-County within Siaya County, otherwise than in course of stealing, dishonestly retained four loud speakers, one amplifier, one microphone and assorted cables knowing or having reason to believe them to be stolen goods.

2. The Appellant pleaded guilty to the charge and upon facts of the case being given the appellant admitted the facts, was convicted on his own plea of guilty and sentenced to serve 3years imprisonment for the offence of housebreaking and 4years for alternative charge and the sentence ordered to run consecutively.

3. Aggrieved by the sentence the appellant filed petition of appeal challenging the sentence on the following grounds: -

a. That, the Appellant was sentenced a consecutive of 7 years, 3 years and 4 years for the two offences.

b. That, the Appellant was sentenced to serve these sentences without an option of a fine herein.

c. That, the Learned Trial Magistrate erred in law and fact to consider the Appellant's mitigation.

d. That, the Appellant prays for leniency and for the sentence to run concurrently.

4. At the hearing of the appeal, the appellant appeared in person whereas M/s Maurine Odumba appeared for the state. The Appellant withdrew grounds no 2 and 3 of the appeal and urged ground no.1 and 4 of the appeal. He urged the Court to consider the sentence meted against him and order the sentence to run concurrently and further urged court to consider his mitigation and that he has school going children who need his support.

5. M/S Maurine Odumba, Learned State Counsel is not opposed to the appeal and she left the issue of sentence to the discretion of the court.

6. The Appellant faced a charge of housebreaking contrary to **Section 304(1)(b) and** stealing contrary to **Section 279(b) of the Penal Code** under which upon conviction, the sentence provided for is 7years. He also faced an alternative charge of handling stolen goods contrary to **Section 322(1)(2) of the Penal Code** which upon conviction the sentence provided for is imprisonment for a period not exceeding 14 years.

7. That upon conviction, the trial court sentenced the appellant to serve 3years imprisonment for the offence of housebreaking and a further 4years imprisonment for the alternative charge and ordered the sentence to run consecutively.

8. The Appellant urged the trial court was in error in ordering the sentence to run consecutively for the two offences. In the instant case, the Appellant faced the main charge with alternative charge, which according to my view, an accused cannot be convicted on both the main charge and the alternative charge but on either the main charge or the alternative charge but not on both. One cannot be given sentence on both of them. It is either one of them or none but not on both of them. The trial court was in error in convicting and sentencing the Appellant on both the main charge and the alternative charge. The facts given and admitted by the Appellant were those of breaking and stealing but not of handling the stolen items. He admitted that he was the thief. He was therefore the thief and not handler of the stolen items. The trial court should have noted so and should have entered a plea of guilty in respect of the main charge and should not have bothered with the alternative charge. That was an error in law and the sentencing on the alternative charge was not called for.

9. In **Robert Njogu Mburu V Republic CRA No. 553 of 2016**, the Court of Appeal (Nyeri) held as follows: -

“The High Court acted wrongly in summarily rejecting the appeal. A mistake was plainly obvious on the record as far as sentencing was concerned. The two charges had arisen out of the same offence and the same facts and the proper way to have sentenced the appellant would have been to make the sentences concurrent. It was trite that where a person committed more than one offence at the same time and in the same transaction, the practice was, save in very exceptional circumstances, to impose concurrent sentences.”

10. In the instant case, the main charge and alternative charge having arisen out of the same offence and the same facts, the proper way to have sentenced the appellant would have been on the main charge. That where the accused is found guilty on two or more charges arising out of the same offence and on the same facts, as was the case herein, the proper way to have sentenced the Appellant, would have been to order the sentences to run concurrently except in exceptional circumstances where court can order otherwise. I therefore find that it was not proper for the trial court to have convicted the appellant on the main charge and the alternative charge at the same time; nor was it proper to order the sentence on the main charge and the alternative charge to run consecutively.

11. The upshot is that the Appellant's appeal against sentence is merited and the appeal is hereby allowed.

12. The upshot is that the conviction on the main count is upheld, conviction on the alternative count quashed, the sentence on the main count is confirmed but sentence on alternative charge is set aside. The Appellant shall serve three (3)years imprisonment meted under the main charge and sentence to run from the date of conviction thus 19th July 2016.

DATED AND SIGNED AT SIAYA THIS 30TH DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Appellant: in person, present

M/S Odumba: for State

Court Assistants:

1. George Ngayo
2. Patience B. Ochieng
3. Sarah Ooro

J.A. MAKAU

JUDGE