REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL NO. 143 OF 2015

LABAN KYUNGU MUIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. J. Bii RM in Criminal Case No. 236 of 2015 delivered on 14th April 2015 at the Senior Principal Magistrate's Court at Kangundo)

JUDGMENT

Laban Kyungu Muia, the Appellant herein, was charged in the trial Court with five counts which were made up of two counts of housebreaking contrary to section 304(1)(a) of the Penal Code, two counts of stealing from a dwelling house contrary to section 279(g) of the Penal Code, and a fifth count of breaking into a building and committing a felony contrary to section 306 (a) as read with section 306(b) of the Penal Code.

The first count (Count I) was that of housebreaking contrary to section 304(1)(a) of the Penal Code, the particulars of which were that on 29th March 2015 at around noon at Kitongi village of Kawethei Location in Kangundo District within Machakos County, the Appellant broke into and entered the buildings used as a dwelling house by John Mutisya Mbwego with the intent to commit a felony thereon.

The second count (Count II) was that of stealing from a locked dwelling contrary to section 279(g) of the Penal Code, whose particulars were that on 29th March 2015 at around noon at Kitongi village of Kawethei Location in Kangundo District within Machakos County, the Appellant stole various items valued at Kshs 30,805/= the property of John Mutisya Mbwego, and in order to commit such theft opened a locked dwelling house with a crude weapon by breaking a padlock.

The third count (Count III) was that of housebreaking contrary to section 304(1)(a) of the Penal Code, the particulars of which were that on 9th April 2015 at around noon at Kitongi village of Kawethei Location in Kangundo District within Machakos County, the Appellant broke into and entered the buildings used as a dwelling house by Magdaline Nthangu with the intent to commit a felony thereon

The fourth count (Count IV) was that of stealing from a locked dwelling contrary to section 279(g) of the Penal Code, and the particulars were that on 9th April 2015 at around noon at Kitongi village of Kawethei Location in Kangundo District within Machakos County, the Appellant stole various items valued at Kshs 4,460/= the property of Magdaline Nthangu Musembi and in order to commit such theft opened a window pane and ventilation by breaking with a crude weapon.

The particulars of the fifth count (Count V) of breaking into a building and committing a felony contrary

to section 306 (a) as read with section 306(b) of the Penal Code were that on 13th April 2015 in the morning hours at Kitongi village of Kawethei Location in Kangundo District within Machakos County, the Appellant broke into and entered a poultry building of Patricia Mutie Muendo and committed thereon a felony namely, stole two chicken valued at Kshs 1400, the property of the said complainant.

The Appellant was also charged with alternative offences of handling stolen goods contrary to section 322(1) (2) of the Penal Code to counts II, 1V and V.

The Appellant was arraigned in the trial court on 14th April 2015 and he pleaded guilty to the five main counts. He was convicted of the five counts on his own plea of guilty, and sentenced in count I, to serve 3 (three) years in prison, and in count II, to serve to 7 (seven) years in prison, with the sentences in count I and II to run concurrently. In count III, the Appellant was sentenced to serve 3 (three) years in prison and in count IV, to serve to 7 (seven) years in prison, with the sentences in count III and IV to run concurrently. Lastly, in count V, the Appellant was sentenced to serve 4 (four) year in prison.

The Appellant subsequently filed an appeal against the judgment of the trial Court by way of Amended Supplementary Grounds of Appeal he availed to the Court on 14th February 2017. The main ground of appeal is that the Court considers combining the sentences imposed on all the four counts pursuant to sections 12 and 14 of the Criminal Procedure Code and Article 165 (3) (a) of the Constitution, and grants the Appellant a concurrent sentence.

The Appellant also availed written submissions wherein he reiterated his plea for concurrent sentences, and relied on the decisions in **Republic vs Sawedi Mukasa s/o Abdullah Ali Gwaisa 13 EACA 97** in which the court held that where a person commits more than one offence at the same time and in the same transaction, the practice is, save in every exceptional circumstances, to impose concurrent sentences; and in **Njoka vs Rep. (2001) KLR 175** wherein it was held that the Court has discretion to order whether sentences should run concurrently or consecutively.

The learned Prosecution Counsel, Ms. Rono did not file written submissions and left it to the Court to decide, after orally submitting that the total sentence of 18 years imprisonment was unreasonable.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The prosecution presented the facts of the case as follows. That it was reported to Kawethei Police Post by John Mutisya Mbweko that he had securely locked his house at Kitugi Village with a padlock on 29th March 2015 and proceeded to church. On returning he noticed that his house had been broken into by unknown persons who had gained entry through the door after breaking the same, and the following items were missing.

1. Cooked rice

2. Two chapattis

3. Kenblest bread

4. A Tokyo coat

5. A Nokia phone

6. A Samsung chat phone

7. Four dresses

8. Six shirts

9. A hat

10. A pioneer badge

11. A medal by St. Dominies

12. A bunch of keys

13. 2 kg of hostess flour

14. 2 kg of Mumias sugar

15. Ripe avocados, all valued at 30,805/=.

Investigations then commenced and the administrative organs were alerted. On 13th April 2015 in the morning, the Appellant was spotted by members of the public carrying one big black bag full of items. They suspected the goods to have been stolen. They searched him and several items were recovered, which were produced in Court as exhibits, being one dark grey coat (P Exhibit 1), two chicken (P Exhibit.2), a black bag (P Exhibit.3), and several implements for breaking namely a pliers and iron sheet cutter (P Exhibit .4(a) and 4(b)).

According to Patricia Mwendo, she had locked her poultry house and had gone to fetch water at 8.00 a.m. on the same day. When she came back, she noticed the iron sheet door of the poultry house had been cut and two chicken were missing. Later in the day, she received information that a thief had been arrested with the chicken. She identified the chicken at Isiga Chief's Office and reported the matter to Kangundo Police.

On 29th March 2015, Madgalene Tango had locked her house at noon and went to visit her mother-in-law. She returned at around 5.00 p.m. to find her kitchen broken into and a black bag she kept in the kitchen missing. The window pane and eavesdrops were also broken. She found the following items missing.

1. A bar soap

2. Two litres of cooking oil Elianto

3. Shujaa unga

4. A blue stripped scarf

5. 2 kgs of salt

6. Kshs.l,500/=, all valued at 4,440/=.

The said complainant the went to Isinga Chief's Office upon receiving information that a thief had been arrested and positively identified her bag. The accused was taken to Kangundo Police Station and interrogated. He led police to Tala where he had let out the Samsung phone for 500/=. The phone was recovered- a black Samsung phone which was produced as PExhibit.5. It was identified by the 1st complainant. The complainant in count I positively identified the coat while the complainant in count II - Patricia Mutie Mwendo positively identified the chicken. The 3rd complainant Magdalene Tango Musembi also identified the black bag as hers.

The accused was then charged with several offences.

I have considered the Appellant's mitigation and the arguments by the Prosecution, and find that the issue for determination by the court are whether the sentence meted out to the Appellant is illegal or unlawful,

harsh or excessive as provided for under the Penal Code or in any other statute, and whether the said sentence is amenable to reduction and /or variation.

Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-

> ***"In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence".***

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated as follows:

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-***
>
> ***sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"***

See also the case of ***Shadrack Kipkoech Kogo –v- R, Eldoret Criminal Appeal No.253 of 2003*** *where the Court of Appeal stated thus:-*

> ***"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"***

In the instant appeal, the Appellant was charged with, and convicted of various offences. The first offences were those of housebreaking contrary to section 304(1)(a) of the Penal Code, and of breaking into a building and commiting a felony contrary to section 306 (a) as read with section 306(b) of the Penal Code Section 304 of the Penal Code provides as follows:

> **"(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.**

Section 306 on the other hand provides for the offence of breaking into a building and committing a felony as follows:

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.

The Appellant was also charged with and convicted of the offences of stealing from a locked dwelling contrary to section 279(g) of the Penal Code, which provides as follows:

"**If the theft is committed under any of the circumstances following, that is to say…..**

(g) if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of a key or other instrument, the offender is liable to imprisonment for fourteen years."

It was argued by the Appellant that the imprisonment sentences meted out on him should run concurrently and not consecutively. The principles that apply for sentences to run concurrently or consecutively are stated in s*ection 14* of the *Criminal Procedure Code* as follows:

"(1) Subject to sub-section (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 therefor 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.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences –

(a) of imprisonment which amount in the aggregate to more that fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose."

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 and/or 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.

In ***Ondiek – v- R (1981) KLR 430,*** it was also stated by the Court that the practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances, the sentences imposed ought to run concurrently. Likewise in ***Nganga – v- R, (1981) KLR 530***, the High Court held that concurrent sentences should be awarded for offences committed in one criminal transaction.

The issue in this appeal therefore is what criminal transaction or act led to the offences the Appellant is convicted of. I note from the particulars in the charge sheet that the offences were committed by the Appellant on different dates and of different items, and for the offences committed on the same date and time, the trial magistrate did order that the sentences for those offences were to run concurrently. There was therefore no error made by the trial magistrate in this respect

However, the Court notes that for those offences arising from the same transaction, the sentence imposed although lawful was excessive in the circumstances, and also in light of the value of the items alleged to have been stolen by the Appellant. The Appellant was also found not to have any previous record. However the Appellant is in this regard given a warning that if he commits another spree of offences he shall face the full sentences imposed by law.

The Appellant's appeal therefore succeeds only to the extent that the sentence by the trial magistrate is found to have been excessive and is set aside; and is substituted by an order that the Appellant be sentenced to imprisonment for 6 months for count 1 and imprisonment to 18 months for count II, which two sentences shall run concurrently. The Appellant is also sentenced to 6 months imprisonment for count III and imprisonment for 1 year for count IV, which two sentences shall run concurrently. Lastly the Appellant is sentenced to 6 months imprisonment for Count V.

The sentences for Count III and IV and for Count V shall run consecutively to the sentences for Counts I and II, and the Appellant shall therefore serve a total of 3 years in prison. The substituted sentences shall take effect from 14th April 2015 when the Appellant was convicted by the trial court.

It is so ordered.

DATED AT MACHAKOS THIS 24TH DAY OF APRIL 2017.

P. NYAMWEYA

JUDGE