



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO. 163 OF 2015

ANDREW MUTWIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. E. Bett

Senior Resident Magistrate dated 8th May 2015 at Nanyuki

Chief Magistrate Court Criminal Case No. 664 of 2014

JUDGMENT

1. **ANDREW MUTWIRI (the appellant)** has appealed against his sentence following his conviction before the Chief Magistrate's Court at Nanyuki of the **offence of house breaking Contrary to Section 304 (1) and Stealing Contrary to Section 279 of the Penal Code**. His conviction was after trial. On being convicted the trial court sentenced him to **4 years imprisonment on the first limb** of the **charge and 5 years on the second limb**. Both sentences were to run concurrently.

2. The appellant has relied on his submissions in support of this appeal which is that he has reformed, that he promises not to re-offend, that he has gained a skill in carpentry since his incarceration; and that he was a first time offender when he was convicted.

3. The Learned Principal Prosecution Counsel opposed the appeal submitting that the sentence of the trial court was lenient.

4. The facts of the case were that on 10th July 2014 Roy Mutuma, the complainer, left his home and did not return until 11th July 2014. On his return he found house broken into and his household items stolen. Those items consisted of one bed, 2 blanket, 3 bedcovers, curtains, one jean trouser a pair of slipper, body creams, soap, body spray, one basin, one window curtain, two shirts, one mattress, 20 litre jerrican one nylon sack, washing powder and freshener. An informer informed the complainer of a house which previously had no bed but now had a bed. When the complainer went to that house with police all his house hold items were found there. The house where those items were found belonged to the appellant. The complainer was able to identify the items of property by the peculiar markings he had put on them.

5. Conviction under **Section 304 (1)** will attract a maximum sentence of 7 years imprisonment while conviction under **Section 279 (b)** will attract Maximum sentence of 14 years. The trial court sentenced the appellant to 4 years and 5 years imprisonment respectfully.

In the case **ARTHUR MUYA MURIUKI - V- REPUBLIC [2015] eKLR** the court discussed the guiding Principle for an appellant court when considering appeal on sentence as follows:

“Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factor. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously (Simon Ndungu Murage vs Republic, Criminal Appeal No. 275 of 2007, Nyeri) Shadrack Kipchoge Kogo vs Republic, Criminal Appeal No. 253 of 2003 (Eldoret), Omolo, O’Kubasu & Onyango JJA the court of Appeal stated: -

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be show that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh

an excessive that an error in principle must be inferred”.

6. I have considered the appellant’s submission and the trial court’s sentence. I find that the trial court exercised its discretion, in sentencing the appellant, rightfully and lawfully. The trial court took into account relevant factors in sentencing the appellant. The relevant factor the trial court considered was, according to the Learned trial Magistrate’s own words:

“On the other hand the court considers the gravity of the offence as well [as] the fact that the complainant entire households were taken away”.

7. Bearing the above in mind there is no basis of interfering with the trial court’s sentence other than to state that the trial court should have considered the period the appellant spent in custody while his trial proceeded. The trial court was required to consider that period of remand under Section 333 (2) under the provision which states:

“Provided that where the person sentenced under Subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”.

8. In this case the appellant spent 9 months in custody pending his trial.

9. The upshot is that the appellant’s appeal against sentence is dismissed save that the period of 9 months spent in remand will be credited to the appellant’s sentence.

Dated and Delivered at Nanyuki this 29th November, 2017

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: Andrew Mutwiri

For state:

Language.....

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE