



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO. 105 OF 2016
BERNARD OGILA AJWANG..... APPELLANT
VERSUS
REPUBLIC RESPONDENT

CONSOLIDATED WITH
CRIMINAL APPEAL NO. 167 OF 2015
DAVID KINYUA MURIUKI APPELLANT
VERSUS
REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 191 of 2014 by Hon. W. J. GICHIMU Principal Magistrate on 9th October 2015)

JUDGMENT

1. **BERNARD OGILA AJWANG** herein after referred to as **Bernard** and **DAVID KINYUA MURIUKI** herein referred to as **David** faced the **charge of shop breaking and stealing contrary to section 306(a) of the Penal Code**. These charges were before the Chief Magistrate's Court at Nanyuki. The trial commenced before that court when both Bernard and David pleaded not guilty. After that trial they were convicted as charged. The trial court after considering the mitigation of both Bernard and David and also after considering that they had been held in remand during the trial and taking note of the fact that Bernard was a not a first time offender proceeded to sentence both of them to serve 5 years imprisonment. It is that sentence that aggrieved both Bernard and David and hence this appeal before this court.

2. Bernard informed the court that he had various cases against him before the Chief Magistrate's Court at Nanyuki whereby he was convicted and was sentenced to a cumulative imprisonment sentence of 11 years. It is with that in mind that he requested this court to consider all the matter together and to reduce that accumulative sentence. What I need to state clearly to Bernard is that the various offences he faced before the chief magistrate which cumulatively gave him a large prison sentence were not of the same transaction and this court therefore cannot consider those sentences that have accumulated against him. It follows that each matter including this appeal must be looked at independent of the others.

3. In his further submissions in support of his appeal against sentence he submitted that the five years' imprisonment was harsh and excessive. He also submitted that he is married with two children and has elderly parents who depend upon him.
4. David on his part submitted that he was a first time offender and that he is now reformed. He showed to this court a test result to the court showing that he had qualified in carpentry in grade 3.
5. The appeal was opposed by Mr. Tanui the Principal Prosecution Counsel. The learned counsel submitted that the court should consider that both Bernard and David were convicted of shop breaking and stealing. He further submitted that although the sentence of five years imprisonment was stiff penalty it was however sufficient bearing in mind the offence and the fact that Bernard had a previous record.
6. This court has guidelines when considering an appeal against sentence. Justice F. Tuiyot considered the principle which ought to guide a court when considering an appeal on sentence in the case **Susan Asiyo v Republic (2016) eKLR** and stated:-

“This is an appeal against sentence only. The principles upon which an appellate court can interfere with the sentence of an appeal court are settled. They are:-

I. If sentence is manifestly excessive in the circumstances of the case, or

II. If the trial court overlooked some material factor, or

III. Took into account, some wrong material, or

IV. Acted on a wrong principle (see Bernard Kimani Gacheru vs Republic (2002) eKLR.”

7. Bernard and David were convicted of breaking into a shop near Nakumatt in Nanyuki town on 26th February 2014. The owner of the shop on the following day found the doors to his shop broken and the glass display also broken. In that theft he lost 36 mobile phones, Kshs. 38,000, mobile phones scratch cards worth 6,000 and 2 sim cards. 22 phones amongst the ones that were stolen were found in the house of David. 2 phones from that theft were found at Bernard house. It is without a doubt that the crime committed by Bernard and David was serious one. It is one that robbed a hardworking business man of his merchandise. In my view not only was the learned trial magistrate correct in convicting Bernard and David but was correct in the term of sentence he imposed upon Bernard. The trial magistrate did not err in sentencing Bernard to 5 years imprisonment. The trial court should however in sentencing have considered David was first time offender. The maximum sentence under **section 306** of the penal code is 7 years.

8. In view of the above the court rejects the appeal by Bernard on sentence and the said appeal is hereby dismissed. The court will however allow David's appeal on sentence. The trial court's sentence is hereby confirmed in respect to Bernard Ogila Ajwang. The sentence of David Kinyua Muriuki is set aside. David Kinyua Muriuki is sentenced serve 3 years imprisonment from the date of his conviction.

DATED and DELIVERED at NANYUKI this 31ST day of OCTOBER 2017

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: Bernard Ogila Ajwang

David Kinyua Muriuki

For the State:

Language:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE