



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 111 OF 2013

KALAIP NGILA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from conviction and sentence in original file Nanyuki CM Cr 686/2013 delivered on 29/8/2013 by T.B Nyangena Principal Magistrate)

JUDGMENT

The appellant **Kilaip Ngila** was charged in the Chief Magistrate's court Nanyuki with the offence of burglary contrary to section **304 (2)** and stealing contrary to section **279 (b)** of the penal code.

The particulars of the appeal are that on the night of 12th day of August, 2013 at Loraugai village in Laikipia North District within Laikipia County broke and entered the dwelling house of Sikitak Ngila with intent to steal and did steal from therein cash of Kenya shillings **3000/=** the property of the said Sikitiat Ngila.

The appellant pleaded guilty to the charge and facts were narrated by the prosecution which facts he admitted as being true. He was then convicted on his own plea of guilty. The trial magistrate called for a presentence report which was prepared by Mr. Kihuro Mwangi which report was not favourable to the appellant. Appellant was then after trial Magistrate considering the mitigation sentenced him to serve ten (10) years imprisonment.

Dissatisfied with the sentence the appellant filed this appeal against both conviction and sentence. The appellant in his self drafted grounds of appeal faults the trial magistrate convicting him as a plea of guilty without sending (sic) him a chance which may have made him change his mind; and that the trial magistrate convicted on a plea of guilty without cautioning him or inquiring as to what made him plead guilty to the charges and that filling that the sentence imposed by the trial magistrate was excessive.

The appellant filed his written submissions in support of this appeal. He reiterated the grounds of the appeal and further submitted that the trial magistrate did not consider the fact that he had been in police custody for 48 hours , did not consider that the complainant was his relative nor did he take into consideration the mitigation by the appellant. The appellant finally submitted that the sentence of 10 years was excessive.

The appellant prays that the appeal be allowed and sentence quashed.

Mr. Njue learned counsel for the state opposed the appeal. He submitted that the appellant concedes that he pleaded guilty to the charge. He submitted that from the record of the proceedings by the trial

magistrate, the charges were read to appellant who pleaded guilty, the facts were read over to him which he admitted and was convicted on own plea of guilty. He therefore submits that having so pleaded, there was no requirement for the trial court to inquire why he had pleaded guilty.

From the submissions by the appellant and the state the two issues that renders the issues for determination are (1) did the appellant plead guilty to the charge (2) was the sentence by the trial magistrate excessive?

The procedure and legal principles to be applied while taking plea in criminal cases are as set out in **Adan – VS – Republic 1973 E.A 445** where the court stated

(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused own words in response to the charge should be recorded and if they are an admission a plea of guilty

(iii) The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the accused does not agree with the facts or raises any question as to his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea, a conviction should be recorded and a statement of facts relevant to the sentence together with the accused's reply should be recorded.

This procedure is reiterated and provided for in section 207 of the criminal procedure code. I have perused the proceedings before the trial magistrate. The appellant appeared before the trial magistrate on 21/8/2013. He appeared to understand Kiswahili language to which the charge was read to him and every element explained and he replied **"it is true"**.

The facts were read to him but the magistrate postponed appellant response to a next to await production of the exhibits. The next day the prosecution confirmed that the exhibits money was actually never recovered. The appellants on being asked to respond to the statement of facts stated.

"It is true there was no exhibit. Facts read to me are correct"

He was then convicted on his own plea of guilty. In mitigations he confirmed the offence stating.

"I did not steal but did not think before I took the money.

This statement stated in mitigation did not refute any of the statements made earlier. Indeed in my view it confirmed that the appellant had pleaded guilty and understood the important elements of the offence he was charged with. In my view the process of taking the plea was cleared followed and the principals complied with. I am therefore satisfied with the plea was unequivocal and the conviction of the appellant was proper.

The second issue raised by the appellant was that the sentence of 10 years imposed on him was excessive he being a first offender. The appellant was charged with the offence of burglary contrary to section 304 (2) and stealing contrary to section 279 of the penal code. Section 304 of the penal code provides,

304 "(1) any person who,

- a. ***Breaks and enters a building, tent or vessel used as a human dwelling with intent to conviction 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 convicted a felony in any such building tent or vessel breaks out thereof ;

Is guilty of an offence termed house breaking and is liable to imprisonment for seven years.

(2) If the offence is committed at night it is termed burglary and the offender is liable to Imprisonment for ten years.

Section 279 provides

If the theft is committed under any of the circumstances following this 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, the offender is liable to imprisonment for fourteen years”

It is therefore evident that the first limb of the charge burglary attracts a maximum sentence of 10 years and the second limb of stealing under section 279(b) attracts a maximum sentence of 14 years.

This is an appeal from the Magistrate court in which the appellant submits that the sentence imposed on him is excessive. The principles upon which an appellate court can interfere with the trial courts discretion on sentence were well set out in **Nelson – VS – Republic 1970 EZ 599** following **Ogalo Son of Owuora – VS – Republic (1954) 21 EA 270** as follows.

“The Principle upon which an appellant court will act in exercising the jurisdiction to review sentences are fairly established”. The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by the trial judge unless as was said in James – VS – Republic (1950) 18 E.A 147 in is evident that the judge had acted upon wrong principle or overlooked some material factor. To this we add the third criteria namely that the sentence is manifestly excessive in view of the circumstances of the case” (John Muendu Musai – VS – Republic NBI C.A 365/2011).

In the present appeal I do not find that the learned trial magistrate acted on wrong principles or overlooked material factors in sentencing the appellant to 10 years imprisonment. Indeed he considered previous records. I find that the sentence is legal. In the result I find no merit in this appeal and affirm the sentence of 10 years imprisonment.

Dated at Nyeri this 10th day of October, 2015

S RIECHI

JUDGE

31/3/2016

Before – HON S RIECHI JUDGE

Catherine – Court clerk

Njue for respondent

Court – judgment read over and delivered in open court in present of appellant and Njue for the respondent this 31st day of March, 2016.

S RIECHI

JUDGE