REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEALs 56 and 57 OF 2014

PATRICK MUTUKU NZOMO.....1ST APPELLANT

JOHN OKUMU ONDEKO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the sentence of Hon. P.M. Mugure RM

in Criminal Case No. 332 of 2013 delivered on 4th April 2014

in the Chief Magistrate's Court at Machakos)

JUDGMENT

The 1st and 2nd Appellants were charged in the trial Court together with a third accused person, with three counts of the offence of shop breaking and stealing contrary to section 306(a) as read with section 279(b) of the Penal Code.

The particulars of the offence in Count I was that on the night of 4th April 2013 at Machakos Township in Machakos County within Eastern Province, they jointly broke and entered into Mosa shopping mall of Silvester Mwaka Musyoka with intent to steal therein and stole 3 pairs of safari boots, 7 pairs of unisex shoes, 3 pairs of timberland shoes, 2 pairs of male shoes, 11 pairs of sandak, one briefcase, 2 pairs of female open shoes, one bag, 4 pairs of plastic shoes, one dozen underpants, one pair of sports shoes the property of Silvester Mwaka Musyoka all valued at kshs. 42,550/=

In count II the particulars were that on the night of 4th April 2013 at Machakos Township in Machakos County within Eastern province, the Appellants broke and entered into Mosa shopping mall of Anastacia Wavinya Mutuku with intent to steal therein and stole 2 jeans trousers, one pair of khaki trouser and three blouses the property of the said Anastacia Wavinya Mutuku all valued at Kshs. 6,300/=.

The particulars of count III were that on the night of 4th April 2013 at Machakos Township in Machakos County within Eastern province the Appellants broke and entered into Mosa shopping mall of Debora Mwikali Musau with intent to steal therein and stole 4 pairs of lesos the property of the said Debora Mwikali Musau all valued at Kshs. 2,400/=.

The 2nd Appellant was also charged with an alternative charge of handling stolen goods contrary to section 322(1) and(2) of the Penal Code. The particulars thereof where that on the 4th day of April 2013 at Machakos Township in Machakos County within Eastern province, other than in the course of stealing, he dishonestly received or retained two pairs of timberland shoes and two pairs of female open shoes knowing or having reason to believe then to be stolen goods or unlawfully obtained.

The 1st and 2nd Appellants were arraigned in the trial court on 5th April 2013 when they pleaded not guilty to the charges. They were tried, convicted of the offence and each Appellant was sentenced to serve prison terms of 2 years for shop breaking and 1½ years for stealing for each of the three counts, which sentences were to run consecutively.

The Appellants are aggrieved by the judgment of the trial magistrate and preferred the appeals herein. The 1st Appellant first filed a Petition of Appeal on 11th April 2014 appealing against his conviction and sentence, and also filed grounds of mitigation. The 2nd Appellant in his Petition of Appeal filed on 11th April 2014 also appealed against both the conviction and sentence. The 1st and 2nd Appellants later availed to this Court Amended Grounds of Appeal and submissions both dated 10th February 2016, wherein they are appealing against the sentences only, which position they reiterated during the hearing of the appeal on 15th March 2016 and 12th April 2016.

The 1st Appellant submitted that the trial erred in law in awarding consecutive instead of concurrent sentences as the instant offences were related in nature and substances, committed by the same persons at the same time and in the same locus in quo. The 1st Appellant relied on the cases in **Elias Abdi Osman vs Republic, (2006)** and **Musa s/o Bakari vs Republic (1968) HCR Tanzania** as regarded concurrent sentences.

The 2nd Appellant in his submissions reiterated that he did not contest the fining of the trial Court but prayed for leniency as he was a first offender, and was the sole breadwinner of his family. He asked to serve his sentences concurrently, and that having served a custodial sentence for some time, the Court grants him a non-custodial sentence.

Mogoi Lilian, the learned prosecution counsel filed submissions dated 8th April 2016 in opposition to the appeal. It was argued therein that from the facts of the case the Appellants had committed the offences in different shops belonging to different complainants, and at different times, and they stole different items making the each offence distinct. Sections 14(1) of the Criminal Procedure Code and 37 of the Penal Code was referred to in that regard. Additionally, there was reference to the decision in **Jamleck Mugo Karani vs Republic, (2016) eKLR**.

It was further submitted that the sentence was lawful, fair and lenient in view of Section 306(a) that gives a maximum sentence of 7 years imprisonment. Further, it was submitted that the court should be guided by the case of **Peter Mbugua Kabui vs Republic, (2016) eKLR** on the principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court. Finally, it was submitted that there were no sufficient grounds adduced by the Appellants to persuade court to interfere with the sentence of the trial court.

I have considered the Appellant's mitigation and the arguments by the Prosecution, and find that the issues 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:-***
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> > ***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)"***

In the instant appeal, the 1st and 2nd Appellants were charged with, and convicted of the offences of shop breaking and stealing contrary to section 306(a) as read with section 279(b) of the Penal Code. Section 306 of the Penal Code provides as follows:

> **"Any person who—**
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> **(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**
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> **(b) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years."**

Section 279 on the other hand provides as follows:

> **"If the theft is committed under any of the circumstances following, that is to say —**
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> **(a) if the thing is stolen from the person of another;**
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> **(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;**
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> **(c) if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;**
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> **(d) if the thing stolen is attached to or forms part of a railway;**
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> **(e) if the thing is stolen from a vessel which is in distress or wrecked or stranded;**
>
> **(f) if the thing is stolen from a public office in which it is deposited or kept;**
>
> **(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,**
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> **the offender is liable to imprisonment for fourteen years."**

I have perused the Court record and note that although the Appellants have primarily argued the issue of sentence, they had also initially appealed against their conviction. I find that I am unable to overlook certain material irregularities as regards their conviction, and particularly in light of the provisions of Article 159 of the Constitution which now requires this Court to dispense substantive justice, and also taking into account that the Appellants were unrepresented both in the trial Court and in this appeal. These irregularities are also material factors that were overlooked in the sentencing of the Appellants.

The first irregularity I have noted is that the 1st Appellant was convicted on the basis of hearsay evidence. The only evidence against him was that of Jacob Maithya Sula (PW2), who testified that he was told that the 1st Appellant was arrested with the extension cable and amplifier that were before the trial Court, and which were marked for identification as MFI 3 and MFI 4. The investigating Officer, Corporal Wycliff Ashihundu (PW5) then produced this items as exhibits, and testified that the 1st Appellant was arrested at the scene by other police officers. Likewise, Cpl. Richard K. (PW4) stated that the 1st Appellant was arrested by other police officers at the scene.

No police officer or any other witness however gave evidence placing the 1st Appellant at the scene of the crime, or as to his arrest. No evidence was also brought that the 1st Appellant was arrested or found with any of the items alleged to have been stolen. There was therefore no evidential and legal basis to convict the 1st Appellant for any of the counts of shop breaking and stealing, and the trial magistrate erred in doing so. To uphold this conviction would be a travesty of justice.

The second irregularity is as regards the conviction of the 2nd Appellant. Cpl. Richard K. (PW4) testified that he went to the scene of the crimes, where he had been told by the OCS that thieves had been locked in a building. He began to search the building and arrested the 2nd Appellant on the roof of the building, with a bag which contained 2 pairs of safari boots and 2 pairs of ladies shoes.

The only witnesses however who testified as to their property being stolen were Anastacia Wavinya Mutuku (PW1), and Jacob Maithya Sula (PW2). PW1 testified that she was employed at one of the exhibition stalls at the shopping mall where the crimes occurred, and that on 4th April 2013, her employer, upon receiving information about the alleged break-in and theft, told her to go and check on the stall. She further testified that she found 3 trousers, 2 blouses and a suitcase all worth Kshs. 6,300/= missing from the shop. She identified the stolen items as a trouser (blue jeans) and brown suitcase in court which were marked as MFI 1 and 2, and later produced as exhibits by PW5.

PW2 on his part testified that on 03rd April 2013 at 12.00 p.m., he was called by one Anne Nduku and told that there were thieves at their business at Corner Exhibits. He further testified that he never saw the said thieves, but he was later told at the police station that the 1st Appellant was arrested with an amplifier and an extension cable which had been stolen from his shop

No evidence was adduced by the prosecution as to the ownership and theft of the 2 pairs of safari boots, 2 pairs of ladies shoes and bag found with the 2nd Appellant. No evidence was also adduced as to which shop the 2nd Appellant broke into. In the circumstances and bearing in mind that the standard of proof in criminal offences is beyond reasonable doubt, it would be unsafe to convict the 2nd Appellant for the offences of shop breaking and stealing, as the elements of these two offences were not proved beyond reasonable doubt as against the 2nd Appellant.

I accordingly allow the appeals by the 1st and 2nd Appellants, and quash the conviction and sentence of the 1st and 2nd Appellants by the trial Court for the three counts of shop breaking and stealing contrary to section 306(a) as read with section 279(b) of the Penal Code. I consequently order that the 1st and 2nd Appellants be and are hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DATED AT MACHAKOS THIS 27TH DAY OF JUNE 2016.

P. NYAMWEYA

JUDGE