REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 51 OF 2015

LEONARD OPERE alias BOYI……...APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(*Appeal against conviction and sentence meted on 2nd March 2015 in Busia CM Criminal Case No. 390 of 2015 by Hon. D.O. Ogola, Chief Magistrate*)

JUDGMENT

1. The Appellant, Leonard Opere alias Boyi is currently serving a prison term of three years for the offence of burglary and three years for the offence of stealing contrary to Section 304(2) and 279(b) of the Penal Code. The sentences were ordered to run concurrently.

2. In the main count it was alleged that on the night of 19th and 20th February, 2015 at Adungosi Trading Centre, Okame Location, Chakol Division within Busia County, the Appellant broke and entered the dwelling house of Luciata Emaase and stole from therein five cushions and six pieces of seat covers all valued at Kshs. 4,000/-. The Appellant was faced with an alternative charge of handing stolen property contrary to Section 322(2) of the Penal Code.

3. The Appellant pleaded guilty to the main charge and was subsequently convicted and sentenced to imprisonment as already stated.

4. A perusal of the Petition of Appeal dated 23rd November, 2015 shows that the current appeal is on the sentence only. In a nutshell, the Appellant is asking the Court to reduce his sentence as he has reformed. He contends that the trial Court failed to consider his mitigation in passing sentence.

5. The appeal is opposed by the State. It is the Respondent's position that the sentence meted out was not harsh considering that Section 304(2) which creates the offence of burglary provides for a maximum sentence of ten years and that the Appellant was sentenced to less than a third of the legally provided sentence.

6. Mr. Owiti for the Respondent contended that the trial magistrate did indeed consider the mitigation of the Appellant and the allegation that his mitigation was not considered is farfetched.

7. Mr. Owiti veered off to an issue that was not raised by the Appellant and submitted that the trial magistrate erred in that he imposed distinct sentences for burglary and stealing instead of imposing a single sentence. In this regard he cited the decision of the Court of Appeal in **Reuben Nyakango Mose & another v Republic [2013] eKLR**. He urged the Court to quash the sentence of three years imposed for

the offence of stealing and let the three years for the offence of burglary be the sole sentence.

8. I will start from the question as to whether the sentence imposed was legal. In **Reuben Nyakango Mose & another** (supra) a question had been raised as to whether charging an accused person with burglary and stealing in the same count is bad for duplicity. The Court of Appeal analyzed several decided cases and concluded that:

> "**It will in any event be seen that the framing of the charge of burglary in the Criminal Procedure Code envisages that another offence may be committed in the course of burglary. That is why the relevant form is couched to include burglary and stealing in the same charge. The authorities we have visited and all relevant law envisage that because a thief who breaks into a dwelling house or a vessel will have had ulterior motives when he formed the intention to break into the house or vessel what follows-this will ordinarily but not necessarily be stealing-should be included in the burglary charge. There cannot therefore be duplicity when the offence of burglary and stealing are combined in the same charge."**

9. The charge as framed was therefore proper. It showed that two offences had been committed. The first offence was burglary – breaking into a dwelling-house at night with intent to commit a felony. That felony was identified as stealing which is an offence under Section 279(b) of the Penal Code – stealing from a dwelling-house or vessel. The main count therefore carried two offences and upon conviction the magistrate had to impose a separate sentence for each limb of the charge. Imposing an omnibus sentence would have been irregular – see **Kiarie v R [1980] KLR 52.** I therefore find the submission by Mr. Owiti that the sentence imposed by the magistrate was illegal to be misplaced. The trial magistrate was correct in passing a sentence for each limb of the charge. He was also right in directing that the sentences should run concurrently.

10. Even in the case of **Reuben Nyakango Mose & another** (supra) which was cited by Mr. Owiti for the State, the appellants had been sentenced on each limb for the offence of burglary and stealing. The Court of Appeal did not find anything untoward with the sentence.

11. Now turning to the appeal itself, I note that Section 348 of the Criminal Procedure Code, Cap 75 provides that:

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.**"

This Court's jurisdiction in this matter is thus limited to 'the extent or legality of the sentence'.

12. I will start by observing that the sentence imposed was within the statutory limits. The maximum sentence for burglary is ten years whereas that of stealing from a dwelling-house is fourteen years.

13. What are the principles governing the sentencing power of a trial Court? There is a blue book published in 2004 by the Judiciary called **Bench Book for Magistrates in Criminal Proceedings**. At page 86 paragraph B of that book the principles of sentencing are stated thus:

> **"In determining what is the appropriate sentence to met out, the Court has to consider such factors as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person, the fact that the maximum sentence is intended for the worst offenders of the class for which the punishment is provided, etc. (Makanga v R. Criminal Appeal No. 972 of 1983 (unreported)). The Court may also consider the value of the subject matter of the charge (Mathai v R [1983] KLR 442) and whether there has been restitution of the property by the accused (Hezekiah Mwaura Kibe v R [1976] KLR 118)."**

Apart from considering what is stated above, the Court should also consider whether an accused person is a first offender.

14. In the case before me, the prosecutor indicated that the Appellant could be treated as a first offender meaning he had no evidence of previous conviction of the Appellant. The property was recovered and the same given to the complainant. The Appellant in his mitigation told the Court that he was an orphan and he intended to sell the stolen items so as to pay school fees for his siblings.

15. The Appellant has given more reasons before this Court to warrant a lighter sentence but those reasons were not placed before the trial magistrate and he cannot be accused of failing to consider them.

16. The Appellant was sentenced and convicted on 2nd March, 2015 and has served close to 17 months of his sentence. He has learned his lessons. Having been a first offender and considering that the stolen property was recovered, he should have been considered for a non-custodial sentence. I thus find the sentence harsh in the circumstances of this case and reduce the sentence on each limb of the main charge to the period already served. The Appellant will thus be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Busia this 28th day of July 2016.

W. KORIR,

JUDGE OF THE HIGH COURT