



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 41 OF 2016

(From original conviction and sentence in criminal case No. 35 of 2014 of the Chief Magistrate's court at Garissa – B. J. Ndeda - SPM).

ABDI ADAN MOHAMED.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged in the Magistrate's court at Garissa with four main counts and three alternative counts. Count 1 was for robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on the 5th January 2014 at Rigur Area in Habasweni District within Wajir County jointly with another not before court being armed with an AK47 rifle robbed Ibrahim Mohamud Ismael one Mobile phone make Nokia 1280 code 0592312 valued at Kshs 2,000/= and cash Kshs 2,000/=. In the alternative he was charged with handling stolen goods contrary to section 322 (1)(2) of the Penal Code. The particulars of the offence were that on the same day and place otherwise than in the course of stealing dishonestly undertook the retention of one mobile phone make Nokia 1280 code 0592312 valued at Kshs 2,000/= knowing or having reasons to believe them to be stolen.

Count 2 was also for robbery with violence. The particulars of the offence were that on the same day and place jointly with another not before court being armed with AK47 rifle robbed Omar Mohamed Abdi one mobile phone make Nokia 1200 code 0550587 valued at Kshs 1,800/=. In the alternative, he was charged with handling stolen goods contrary to Section 322 (1)(2) of the Penal Code. The particulars of the offence were that on the same day and place dishonestly undertook retention of one mobile phone make Nokia 1200 code 0550587 valued at Kshs 1,800/= knowing or having reason to believe them to be stolen.

Count 3 was also for robbery with violence. The particulars of the offence were that on the same day and place with another not before court being armed with an AK47 rifle robbed Ali Mohamed Yusuf one mobile phone make Nokia 1280 code 0592304 valued at Kshs 2,000/=. In the alternative, he was charged with handling stolen goods contrary to section 322 (1) (2) of Penal Code. The particulars of the offence were that on the same day and place otherwise than in the course of stealing dishonestly undertook retention of one mobile phone make Nokia 1280 code 0592304 valued at Kshs 2000/= knowing or having reason to believe them to be stolen.

Count 4 was for having or conveying suspected stolen property contrary to section 323 of the Penal Code. The particulars of offence were that on the same day and place having been detained by Sergeant Mohamed Abdullahi and Pc Dalton Chesire as a result of the exercise of powers conferred by section 26 of the Criminal Procedure Code, had in his possession two mobile phones Nokia 1280 code 0592312 and

0592312 reasonably suspected to have been stolen or unlawfully obtained.

When he was brought to court on 7th January 2014, he was recorded as having pleaded guilty to the alternative charges to count 1, and alternative count 2 as well as the alternative to count 3. He denied count 4.

The prosecution then gave a summary of the fact on 9th of January 2014. In response, he said that the facts were correct and that what they were carrying were toy pistol. He was sentenced to 7 years custody in the alternative to count 1, 7 years custody to the alternative to count 2 as well as 7 years to the count 3. The court did not record whether the sentences would be concurrent or consecutive, which means they would be consecutive.

Attempts were made in the trial court, to commence hearing of the case with respect to count 4. However after a number of adjournments, the prosecution was not able to bring witnesses to court. The court thus discharged the appellant on count 4 on 16th September 2014 under Section 210 of the Criminal Procedure Code.

The appellant has now come to this court on appeal. He filed his initial grounds of appeal on 23rd July 2014. Before the appeal was heard however, he filed amended grounds of appeal in which he is pleading for leniency and saying that he has suffered immensely and was apologetic.

During the hearing of the appeal the appellant stated that the police forced him to plead and since it was his first time in court and was confused, he pleaded guilty.

Mr. Okemwa for the State opposed the appeal. Counsel stated that it was clear that the appellant had pleaded guilty to the alternative charges and that the facts disclosed the offences alleged. The fact that he was carrying a toy pistol as stated by him in mitigation, did not change the facts of the case.

This is a first appeal and I am duty bound to reconsider all the evidence on record, even if the appellant is said to have pleaded guilty. In a criminal case the prosecution is duty bound to prove a case against an accused person beyond any reasonable doubt. The charge and the facts read together should establish that indeed the conviction was proper and based on proved allegations, even if the accused pleaded guilty.

Indeed, the appellant herein, pleaded guilty to alternative 3 counts of handling stolen goods. He did not plead guilty to the 4th count on conveying suspected stolen property. The prosecution failed to bring to court evidence to support the 4th count and the accused was thus discharged off the same.

In my view, the 4th count was a duplication of the alternative charges already facing the appellant. In my view it was not proper for the prosecution to have charged the appellant with handling stolen property and also conveying stolen property on the same subject matter. This charge under count 4 was thus defective and improperly before the court. It should have been disallowed by the trial court.

With regard to the other charges, the appellant knew what the charges reflected. They were explained to him and he pleaded guilty to the alternative counts, which was his right. In my view the conviction was proper even though the trial court did not specifically record that the appellant was convicted of the offences. Though the appellant says he was coerced by the police to accept the charges, I do not believe him. Otherwise he would not have said in mitigation that the pistol they carried was a toy

As for the sentence the maximum sentence under Section 322 (2) of the Penal Code is an imprisonment for a term not exceeding 14 years with hard labour. The appellant was sentenced to serve 7 years imprisonment on each of the three alternative counts. He pleaded guilty to the charges and did not waste the courts time. The mobile phones were also recovered. The prosecution treated the appellant as a first offender.

In my view, taking into account the above facts and the fact that the appellant did not waste the courts

time, the sentence of 7 years imprisonment on each count was not justified. In addition the sentences should have run concurrently. I will thus interfere with the sentences, and set aside the sentences and order that the appellant will serve 3 years imprisonment on each of the 3 alternative counts, and the sentences will run concurrently.

Consequently, I dismiss the appeal on conviction and uphold the conviction of the trial court. With regard to the sentence, I set aside the sentence and order that the appellant will instead serve 3 years imprisonment on each of the three alternative offences on which he was sentenced by the trial court. The sentences will run concurrently from the date on which he was sentenced by the trial court. In effect the appellant will serve a accumulative sentence of 3 years imprisonment from the date on which he was sentenced by the trial court.

It is so ordered.

Dated and delivered at Garissa this 31st day of October 2016.

GEORGE DULU

JUDGE