REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEALS 188 and 190 OF 2014

SAMMY MUNYAO WAMBUA..…….....……..…1ST APPELLANT

PIUS MULE KALELI..……...……...……..…2ND APPELLANT

VERSUS

REPUBLIC……..……
RESPONDENT

(An Appeal arising out of the conviction and sentence of G.M Mutiso Ag PM in Criminal Case No. 1383 of 2014 delivered on 1st October 2014 at the Principal Magistrate's Court at Makindu)

JUDGMENT

The 1st Appellant was charged with two offences in the trial Court. In the first count he was charged with the ofAfence of stock theft contrary to section 278 of the Penal Code whose particular were that on 31st Day of July 2014 at Ngiluni village, Makindu location in Makindu District within Makueni County, the 1st Appellant stole one goat valued at ksh. 3500/= the property of Annah Njoki Chege.

The second count was that of the offence of housebreaking and stealing contrary to section 304(1) and 279(b) of the Penal Code, for which he was charged jointly with the 2nd Appellant. The particulars were that on the 14th Day of August 2014 at Ngiluni village, Makindu location in Makindu District within Makueni County, the Appellants jointly broke and entered in a dwelling house of Annah Njoki Chege and stole one mattress, one blanket valued at ksh. 4,000/= the property of Annah Njoki Chege.

In the alternative the 2nd Appellant was charged with the offence of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars were that on the 14th Day of August 2014 at Ngiluni village, Makindu location in Makindu District within Makueni County, he dishonestly retained a mattress and a blanket knowing or having reason to believe to be stolen goods or unlawfully obtained.

The 1st and 2nd Appellants were first arraigned in the trial court on 18th August 2014, when they both pleaded guilty to the charges. They further pleaded guilty to the charges on 10th September 2014, when a new trial magistrate took over the hearing of their case. The trial court proceeded to convict the Appellants, and the 1st Appellant was sentenced to four (4) years imprisonment for the offence of stock theft, and four (4) years in prison for the offence of housebreaking and stealing, which sentences were to be served consecutively. The 2nd Appellant was sentenced to four (4) years imprisonment for the offence of housebreaking and stealing.

The Appellants are aggrieved by the judgment of the trial magistrate and have preferred this appeal against the conviction and sentence. The main grounds of appeal are that they had pleaded guilty to the charges and were remorseful; the case was a family matter that could be settled amicably at home; and that the sentence was harsh and excessive.

The Appellants' Advocate, Mrs Elizabeth K. Isika filed submissions dated 15th October 2015. The Appellants stated therein that their appeal against conviction was only in relation to the offence of housebreaking and stealing, and that their pleas of guilty with relation to the said count was not unequivocal as provided by the law. Secondly, that their pleas were not recorded in the Kiswahili which was the language used by the Appellants.

It was also submitted with respect to their appeal against sentence that the trial Court had a wide discretion as regards the sentence for the offence of stock theft, which attracts a sentence not exceeding 14 years imprisonment. In addition, that the trial court relied heavily on the probation report in sentencing the 1st Appellant, which had sole information from the complainant who was the 1st Appellant's mother, and who was most likely driven by emotion.

It was contended by the Appellants that the maximum sentence for the offence of housebreaking is seven years imprisonment, and for stealing from a dwelling house fourteen years imprisonment. Further, that section 279(b) of the Penal Code is qualified to the extent that for the term of imprisonment for stealing from a dwelling house to apply, the thing that is stolen must have a value exceeding Kshs 100,000/=.

However, that in the present case the value of the stolen items was Kshs 4,000/=, and therefore the sentence applicable was one of general theft under section 275 of the Penal Code, which is three years imprisonment. It was also contended that since the facts disclosed a lesser offence, the trial Court was duty bound to take this into consideration while sentencing the Appellants. It was thus submitted that the sentences imposed were too harsh.

The learned counsel for the State, Mr. Shijenje, opposed the appeal and made oral submissions in court on 21/10/2015. He submitted that the Appellants both pleaded guilty as regards count II and were sentenced to four years in prison. On Count I the 1st Appellant was to serve another four years in prison. He conceded that the sentences ought to have run concurrently other than consecutively. Further,, that a probation report presented to the trial Court before the sentencing of the Appellants recommended a custodial sentence in order for the said Appellants to learn a trade in prison.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The two issues in this appeal are whether the pleas of guilty by the Appellants to the offence of housebreaking and stealing contrary to section 304(1) and 279(b) of the Penal Code were unequivocal, and secondly if so, whether the sentences meted by the trial magistrate on the Appellants was harsh and excessive.

The procedure to be applied in taking a plea of guilty were well enunciated in the case *of* **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

"(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's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(iii) The prosecution should then 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 of 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 sentence together with the accused's reply should be recorded."

The procedure as laid out in ***Adan vs Republic*** (**supra**) is also provided for under *section 207* of the Criminal Procedure Code.

In the present appeal, the record of the proceedings in the trial court indicates that the procedure of taking of the pleas of the Appellants on 10th September 2014 was as follows:

"1st accused:

I want to plead guilty.

2nd accused:

I want to plead guilty.

Charge read over and explained to the accused in Kiswahili who replies:

Count 1

Accused 1: it is true

Court:

Plea of guilty entered

Count 2

Accused 1: it is true

Court:

Plea of guilty entered

Accused 2:

It is true

Court:

Plea of guilty entered

Facts recorded by the court on 10.8.14 read over to the accused

Accused 1:

The facts are true account of what transpired

Accused 2:

The facts are all true accounts of what transpired

Court:

Plea of guilty entered.

Each accused is convicted on his own plea of guilty."

It is evident from the said record that the learned trial magistrate recorded the replies to both charges by the Appellants in their words, and the facts were then read out in detail and the Appellants confirmed that the facts were indeed correct. The Appellants have not alleged that they did not understand Kiswahili, which the trial court record shows was the language used. Their argument is that the record of the Court was not in Kiswahili to record their exact words.

In this regard, the manner of recording evidence in the subordinate courts is provided in Section 197 of the Criminal Procedure Code as follows:

"(1) In trials by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner—

(a) the evidence of each witness shall be taken down in writing or on a typewriter in the language of the court by the magistrate, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the magistrate, and shall form part of the record;

(b) such evidence shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative:

Provided that the magistrate may take down or cause to be taken down any particular question and answer."

In addition section 198(4) of the Criminal Procedure Code provides that the language of a subordinate court shall be English or Swahili.

The procedure used up to this point by the trial Court therefore cannot be faulted. However, I do agree with the Appellants that the facts as read out do not disclose the offence of housebreaking. The said facts as recorded by the trial court on 10th August 2014 which were read to the Appellants at the time of recording of the plea of guilty are as follows:

"On 31.7.2014 the 1st accused who is the complainant's son stole one goat at the grazing filed and disappeared. The matter was reported at Maklingu Police Station. On 14.8.2014, the two accused went to the complainant's home and stole one mattress, valued at Kshs.4,000. The matter was reported at Makindu Police Station. Police recovered the mattress and one blanket with the 1st accused. Both are in court as exhibits."

The offence of housebreaking is provided in section 304(1) of the Penal Code as follows:

"(1) Any person who—

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit 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 committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years."

In addition section 303 of the Penal Code defines breaking and entering as follows:

"(1) A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever any door, window, shutter, cellar flap or other thing intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.

(2) A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.

(3) A person who obtains entrance into a building by means of any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any aperture of the building left open for any purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the building"

None of the said elements of breaking and entering were present in the facts read out to the Appellants indicated in the foregoing. In addition, I also agree that the punishment of seven years imprisonment provided in section 279(b) of the Penal Code as regards stealing from a dwelling house was not applicable in the circumstances of this appeal. The said section provides that the punishment of imprisonment of seven years applies if the value of thing that is stolen in a dwelling-house, 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.

In the present appeal the value of the blanket and mattress admitted to have been stolen by the Appellants and produced as exhibits were shown in the charge sheet to be valued at Kshs 4,000/=, and the facts as read out by the prosecution did not indicate any use and/or threat of violence by the Appellants.

It is thus evident that the trial court acted on the wrong principles of law and overlooked material factors in the conviction and sentence of the Appellants for the offence of housebreaking and stealing,. The Appellants should have been convicted of **simple theft** contrary to **section 275** of the Penal Code which is a minor cognate offence to the charge of housebreaking and theft contrary to section 304 (2) and section 279 (b) of the Penal Code.

As regards the sentence of four years imprisonment meted on the 1st Appellant for the offence of stock theft contrary to section 278 of the Penal Code, I note that the maximum sentence provided by law for the said offence is fourteen years imprisonment. The situations where an appellate court would interfere with the discretion of a trial court on the issue of sentence have been clearly defined in the case of ***Nelson vs Republic, [1970] E.A. 599,*** following ***Ogalo Son of Owuor vs Republic (1954) 21 EACA 270*** as follows:

*"**The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members 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 a trial Judge unless as was said in James v Rex (1950), 18 EACA 147*, **it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364."**

Having been convicted on his own plea of guilty which conviction is not appealed from, I find that the sentence meted on the 1st Appellant in this regard was therefore within the law.

I have also noted the contents of the community service report and victim impact report filed in the trial Court before sentencing and the frustrations expressed by the complainant who was also the 1st Appellant's mother, as to the Appellants' conduct. In particular it is noted in the said reports that the 1st Appellant was stealing from the complainant and his siblings to fund his alcoholism, which act was being facilitated by the 2nd Appellant. This is therefore not an appropriate case for a non-custodial sentence,

which may on the contrary lead to recidivism by the Appellants. I am also of the view that this is thus one of the cases where imprisonment may be for the Appellants' own good, in terms of their reformation and rehabilitation by appropriate educational or vocational programs.

Lastly, it was conceded by the State that the two sentences meted out on the 1st Appellant should run concurrently and not consecutively. The principles that apply for sentences to run concurrently or consecutively are stated in s*ection 14* of the *Criminal Procedure Code* as follows:

"(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences –

(a) of imprisonment which amount in the aggregate to more that fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose."

As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act and/or transaction, a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. In ***Ondiek – v- R (1981) KLR 430,*** it was also stated by the Court that the practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances, the sentences imposed ought to run concurrently. Likewise in ***Nganga – v- R, (1981) KLR 530***, the High Court held that concurrent sentences should be awarded for offences committed in one criminal transaction.

In the present application I note from the particulars in the charge sheet that the offence of stock theft was committed by the 1st Appellant on 31st July 2014, and that of stealing by the 1st and 2nd Appellants on 14th August 2014. Therefore the two are two distinct criminal acts that do not arise from the same transaction, and the trial court did not err in holding that the sentences of the 1st Appellant were to run consecutively.

I accordingly partially allow the appeal against the conviction and sentence of the 1st and 2nd Appellants for the offence of housebreaking and stealing contrary to section 304(1) and 279(b) of the Penal Code, and substitute therefore a conviction for simple theft under section 275 of the Penal Code. I also set aside the sentence of four years imprisonment imposed on the 1st and 2nd Appellants by the trial court for the said offence, and substitute therefor a sentence of imprisonment for two years the offence of simple theft, which sentence is to run from the date of the 1st and 2nd Appellants' conviction in the trial court. The conviction of the 1st Appellant for the offence of stock theft contrary to section 278 of the Penal Code is however upheld, and his sentences for the two offences shall run consecutively.

It is so ordered.

DATED AT MACHAKOS THIS 16th DAY OF NOVEMBER 2015.

P. NYAMWEYA

JUDGE