



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HIGH COURT CRIMINAL APPEAL NO. 36 OF 2015

(CORAM: J. A. MAKAU – J.)

SAMMY OCHIENG OLOO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 101 of 2014 in Siaya Law Court before Hon. M. S. Kimani – R.M.)

JUDGEMENT

1. The Appellant **SAMMY OCHIENG OLOO** with another faced four counts, that is 1st, 2nd 3rd, & 4th of an offence of house breaking and stealing from a dwelling house contrary to Section 304 (1) (a) and Section 279 (b) of the Penal Code. The appellant and another also faced an offence of breaking into a building and committing a felony therein contrary to Section 306 (a) of the Penal Code in respect of the Penal Code. The appellant and another also faced an alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal Code.
2. The facts of the prosecution case were that there was series of break-in of dwelling houses and houses licensed to sell intoxicating liquor belonging to 1st, 2nd 3rd, 4th and 5th complainants. That various properties were stolen from each of the dwelling house and bar. The 1st complainant stated that she had on 12.1.2014 returned to his house at Pandi Estate and found it bungled and the items listed in the charge sheet stolen. He reported to Siaya Police Station and on 30.1.2014 he was informed of recovery of the stolen phone them 31.1.2014 he identified the phone and another item at Police Station who had been recovered them from the appellant. He also confirmed his DSTV Smart card A/C number 41335851287 was recovered from the appellant. The appellant took police to 2nd accused house in which other items were recovered.
3. The second complainant PW2 testified how she found her house burglarized while she was away at work on 21.1.2014 and a number of items stolen. She reported to Siaya Police Station. That after 5 days she went to police and identified some of her stolen items which had been recovered from the house of the 2nd accused.
4. The 3rd complainant PW3 testified his house was burglarized on 4.1.2014 and several items stolen. He reported to Siaya Police Station. That on 31.1.2014 he was called to go to identify his properties amongst the recovered stolen items. He went and identified some.
5. PW4, the fourth complainant testified that her house was broken into on 24.12.2013 and several items stolen. That on 3.2.2014 she went to Siaya Police Station and identified some of her stolen properties.

6. PW5, the fifth complainant testified that his bar was burglarized on the night of 12/13 January 2014 and assorted types of beers stolen. He reported to Siaya Police Station on 14.1.2014. He testified that he identified two empty bottles at Police Station.

7. PW6, Morris Mongoli, a Police Corporal based at Siaya Police Station testified that he received reports from PW1 and commenced investigations and with aid of Police informers they arrested the appellant who was found in possession of motorola CII8 exhibit P1. That on 31.1.2014 the appellant lead them to the house of 2nd accused and on search they found 1st complainant's DSTV Smart Card exhibit 2. They also recovered items of 2nd, 3rd, 4th and 5th complainants.

8. The Appellant on being put on his defence opted to give unsworn statement. The appellant stated that he needed a cheap phone and came to Siaya Town where he met a certain person who was stranger to him who was selling a motorola CII3 at Kshs.200 and that he paid for it then at 4.00 p.m. he started getting numerous phone calls hence he started disconnecting the calls. That at and 9.00 p.m. as he was walking home two people followed him. They asked him about the phone and he said he had bought it. He was arrested, taken to Siaya Police Station and the following day they went to his home for search and found nothing. He denied knowing the 2nd accused and denied taking police to the 2nd accused home. That Police took him to his home searched and did not know where police found the items mentioned in the charges. He stated he is a complete stranger to the offences.

9. That upon evaluation of the prosecution's evidence and the appellant's defence the trial Magistrate convicted the appellant with counts 1, II, II and V and sentenced the appellant to serve imprisonment for a period of 2 ½ years in respect of thus each count 1, II, III and V and prison terms to run consecutively.

10. The appellant being aggrieved by conviction and sentence lodged an appeal on 27th March, 2010 setting out 4 grounds of appeal but when the appeal came up for hearing the appellant abandoned his appeal against conviction and argued he appeal against sentence.

11. The appellant in his written submissions urged the Court to reduce the sentence as he is the breadwinner of his family, and that the Court should order his sentence to run concurrently.

That since his incarceration he has transformed and is trained as part of prison reform, in theological studies, and that he is suffering from acute ulcers.

12. M/s. Odumba, learned State Counsel appearing for State stated the sentence of 2 ½ years on four counts running consecutively was excessive.

13. The appellant and another were jointly charged with 5 counts in the lower Court for offences committed between December, 2013 and 31st January, 2014. The offence arose out of similar circumstances however on conviction the appellant was sentenced to serve 2 ½ years on each of the four counts and sentence ordered to run consecutively, thus to serve 10 years for an offence whose maximum sentence is 7 years. **In the case of Robert Njogu Mburu V. Republic Criminal Appeal NO. 553 of 2010 (C.A. At Nyeri)** held:

“A mistake was plainly obvious on the record as far as sentencing was concerned. The two charges had arisen out of the same offence and same facts and the proper way to have sentenced the appellant would have been to make the sentence concurrent.”

14. The offences in this case were committed by the appellant at the same duration of period and in the same transaction. It is trite law that where a person committed more than one offence at the same time and in the same transaction the practice is, save in very exceptional circumstances have sentences to run concurrently. The trial Magistrate convicted the appellate over transaction involving in same period involving the appellant and gave him 2 ½ years imprisonment as a result and each of the four counts by the Court to run consecutively. He did not indicate any exceptionable circumstances as to why the sentence could not run concurrently. In view of the above the appellant's sentence of 2 ½ years should have been ordered to run concurrently. I find the sentence of 2 ½ years to be reasonable for each count

and I decline to interfere with the sentence.

15. The upshot is that the appeal is allowed to the extent that conviction is upheld, sentence of 2 ½ years for the on four counts to run concurrently from 19th March, 2015.

DATED AT SIAYA THIS 17TH DAY OF DECEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 17TH DAY OF DECEMBER, 2015.

In the presence of:

M/s. M. Odumba for Respondent.

Appellant – Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE