REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 233 OF 2013

SALIM MWANGI THEURI…..... APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Appeal on sentence of the Principal Magistrate's Court at Naivasha (Hon. P.M. Mulwa) dated 18th January, 2011 in Criminal Case No. 183 of 2011)

JUDGMENT

1. The appellant, **Salim Mwangi Thairu,** was charged with the offence of store breaking contrary to **Section 304 (1)(b)** and stealing contrary to **Section 279(b)** of the **Penal Code.** The appellant was also charged with a second count of Burglary contrary to **Section 304 (2)** and Stealing contrary to **Section 279 (b)** of the **Penal Code**.
2. The Particulars of the first charge are that on 16th and 17th day of January 2011 at Mugumu Village in Nyandarua County, broke and entered the store of Beth Wangui Waithaka with an intent to steal and did steal therein two bags of potatoes, one bicycle make Neelam frame No. 5K386165 and a bag of D.A.P. Fertilizer and four chicken all valued at Kshs. 20,000/- the property of Beth Wangui Waithaka.
3. The particulars of the second charge are that the appellant on the above mentioned date and place, with others not before court broke and entered into a dwelling house of Elizabeth Wangari Irungu with intent to steal and did steal therein two jackets the property of Elizabeth Wangari Irungu all valued at Kshs. 1,500/-.
4. On 18th January, 2011 the appellant was convicted on his own plea of guilty by P. M. Mulwa, Principal Magistrate. He sentenced the appellant under count 1 to serve 3 years imprisonment for the offence of store breaking and 3 years for the offence of stealing. The sentences were to run concurrently. On count II, the trial magistrate sentenced the appellant to imprisonment for a term of 3 years for Burglary and 3 years for stealing. He also ordered the sentences under this count to run concurrently whilst the sentences in respect to count I and count II to run consecutively.
5. The Appellant being aggrieved by the sentences of the Principal Magistrate preferred this appeal. The grounds of his appeals are that the learned trial magistrate erred in law when passing the sentence, by failing to order that the sentences for both counts do run concurrently; that the trial magistrate failed to take into account that the appellant was a first time offender and that he was remorseful. He thus prayed that this court considers a lesser punishment and in the alternative order the sentence to run concurrently.
6. The appellant prayed the appeal be allowed and that the court to order that the sentences do run concurrently. The hearing was adjourned to 28th March, 2014 at the request of the learned Prosecuting Counsel for the State **Mr. Chebii** to enable him study his file so as to make his

submissions in response. On 28th March 2014 the learned counsel intimated to court that he conceded to the appeal. He submitted that the actions of breaking in and stealing were conducted at the same premises; that the two offences formed part of one transaction and in the circumstances the sentences are deemed to be harsh. He further submitted that the appellant was a first time offender.

ISSUES FOR DETERMINATION

7. After hearing the submissions of both the Appellant and the Prosecuting Counsel for the State and after perusing the court record this court finds the following issues for determination;

i. Whether the trial court took into consideration or overlooked a material factors such as the joinder of the charges and the issue of nexus when imposing the consecutive sentence.
ii. By ordering that the sentences in Count I and Count II do run consecutively, was the sentence imposed made harsh and manifestly excessive in the circumstances?
iii. Whether there is need for this court to interfere with the sentence?

ANALYSIS

8. An appellate court may interfere with sentence if it is apparent that a material factor was overlooked, an immaterial factor was taken into account, or the court acted on a wrong principle or the sentence imposed was harsh and excessive in the circumstances. Reference is made to the case of **Wanjema** V. **Republic [1972] EA 493.** This renowned case sets down the principles as when this court may interfere with the sentence imposed.
9. This court notes that the appellant was charged with two counts and each count had more than one offence. Upon perusal of the Charge Sheet this court further notes that there was a joinder of several charges for different and distinct offences. The charges formed part of a series of offences committed by the Appellant on the same night.
10. The Appellant pleaded guilty and was convicted on all counts and it appears from the court record that the trial magistrate prescribed several punishments for all the offences charged and gave a term of three (3) years on each count.
11. Having perused the ruling on the sentence imposed this court notes that this ruling is short and to the point. The decision on sentence consists of ten (10) lines and it would appear from the reading of the text of the decision that trial magistrate felt that the sentences imposed had to run consecutively because the Appellant had a bad record and he was not a first offender as pointed out by the prosecution.
12. Otherwise the decision of the trial magistrate contains no analysis touching on the connectivity of the series of charges.
13. The law at Section 153 of the Criminal Procedure Code provides for the joinder of charges and section reads as follows;

1. **Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are a part of a series of offences of the same or a similar character'**
2. **Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count'**

14. The issue of joinder of charges is therefore permissible in law.
15. From the reading of the facts read out by the prosecutor and admitted by the Appellant it would appear that the offences of store breaking and burglary were committed in one night and in one criminal transaction and that could have been the reason for the joinder of all the charges on one Charge Sheet.
16. This court opines that the trial ought to have taken into consideration that there being a joinder of the charges for the different offences whether there was any connectivity or any nexus arising from the offences. If the nexus existed then the sentences ought to have run concurrently. This was

not reflected in the decision on sentence

17. The holding in the case of **Nganga V. Republic (1981) KLR 530** was that the general rule and practice is that where offences are committed in one criminal transaction, concurrent sentences should be awarded.
18. This court notes that offence of Breaking into a store contrary to Section 279(b) of the Penal Code carries a full sentence of fourteen (14) years. For Count I the trial magistrate imposed a lower term of three (3) years. As for the offence of Burglary contrary to Section 304(1)(b), the section provides for a term of seven (7) years but a lower sentence of three years was imposed on Count II. The aggregate term imposed was therefore a total of six (6) years.
19. This court finds that the sentences passed were within the legal limits for the particular offences. The trial magistrate thereafter pronounced that the sentences were to run consecutively.
20. This court further opines that taking into consideration the connectivity of the offences as a whole when the two sentences are made to run consecutively the aggregate term of six (6) years leads to a sentence that is manifestly excessive in the circumstances.

FINDINGS

21. For the reasons stated above this court finds that the trial magistrate when passing sentence failed to take into consideration material factors such as the connectivity of the offences and whether the offences were committed in one criminal transaction.
22. This court finds that by ordering that the sentences were to run consecutively the sentence imposed is found to be manifestly excessive in the circumstances and this court finds reason to interfere with the sentence.

CONCLUSION

23. The appeal is hereby allowed.
24. The order that the sentences for Count I and Count II do run consecutively is hereby set aside and substituted with an order that the sentences shall all run concurrently.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 4th day of April, 2014.

A. MSHILA

JUDGE