REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 39 OF 2014

KIPNGENO BENARD KOROS……APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

JUDGMENT

1. Kipnge'eno Bernard Koros the Appellant herein was charged with the following offences;

COUNT 1;

Burglary Contrary to Section 304(2) and Stealing Contrary to Section 279(b) of the Penal code

The particulars were that; on the 22nd day of June 2014 at Kericho Soi Estate in Kericho District within Kericho county, broke and entered the dwelling house of Josephat Kipkorir Koros with intent to steal and did steal from therein cash Ksh.3050/=, a TV set 32 inch make Sony, 5 pairs of shoes, a gas cylinger make Afrigas and a sub-woofer for home theatre make Samsung all valued at Ksh.60,000/= the property of Josphat Kipkorir Koros.

COUNT II;

Failing to prevent a felony Contrary to Section 392 of the Penal code.

The particulars were that; On the 22nd day of June 2014 at Kericho Soi Estate in Kericho District within Kericho County, being the security guard of the said Soi Estate knowing that the offence of theft was to be committed, failed to use reasonable cause to prevent the commission of the theft where property worthy Ksh. 60,000/= was stolen.

2. When he appeared before the trial court on 24th June 2014 the first Count was read to him and he pleaded guilty.

The facts were later read and he admitted them. He was given an opportunity to mitigate which he did. He was then sentenced to three(3) years on each limb of the offence with an order that the sentences run concurrently.

3. He filed an appeal raising the following grounds;

1. The trial magistrate erred in law by convicting the appellant of a defective charge sheet
2. The trial magistrate erred in law and in facts by failing to satisfy himself that the plea was totally

unequivocal and that the appellants understood the elements of the offence and their penalty.

3. The trial magistrate errered in law by handing down sentence of 3 years without giving him an option of a fine or non-custodian sentence having in mind the appellant was first offender.
4. The trial magistrate erred in law by convicting appellant on second count he did not plead, which was **contrary to article 50(2**) of the constitution on the "right to be informed of the charge" with sufficient details to answer it.
5. The sentence and conviction against the appellant be reversed, set aside varied and/or be quashed.

4. This is not a matter that proceeded to full trial, as the appellant was convicted on his own plea of guilty.
5. I have perused the record of the lower court and I have found the following;

i. The language of interpretation is shown as Kiswahili while the court clerk is Gladys.
ii. When the charge was read to the accused he responded in Kiswahili saying

> *"It is true. I broke into the complainant's house and stole from the items mentioned in the Charge Sheet."*

6. A narration of the facts was given and the accused person admitted them. He was thereafter convicted on his own admission.

Upon perusal of this record I am satisfied that the plea was unequivocal. Upon being so satisfied I do find that the appellant's appeal on conviction is misplaced.

7. The only other issue I will deal with is the one of the extent or legality of the sentence. The appellant was charged with burglary **contrary to Section 304(2**) and stealing **Contrary** to **Section 279(b)** of the **Penal code.**

i. The maximum sentence for the offence of burglary is ten(10) years, while
ii. The maximum sentence for stealing **contrary** to **Section 279(b)** is fourteen(14) years.

The appellant had been employed as a watchman by the complainant. He broke into the house he was supposed to be guarding and stole from therein goods worth shs.60,000/=. The learned Trial Magistrate took all these into account and handed him a sentence of 3 years on each limb with an order that the sentences run concurrently.

Given the circumstances I have mentioned above I do not find the sentence to be harsh and/or excessive. It is also a legal sentence and I will not interfere with it .

8. What is referred to as Count 2 should actually have been an alternative count since the appellant was convicted of the Principal count he could not have been convicted on what is called the 2nd Count.

I find no merit in the Appeal failed and I dismiss it.

Dated, signed and delivered this 19th day of December, 2014.

H.I. ONG'UDI

JUDGE

In the presence of: