REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 112 OF 2010

CRIMINAL APPEAL NO. 111 OF 2010

(From original conviction and in Criminal Case No. 368 of 2010 sentence of the Senior Resident Magistrate's Court at Lamu before Hon. R. Kithinji – SRM)

ALI SHEKUE AHMED……..……..1ST APPELLANT

MOHAMED ALI OMAR ….…….……2ND APPELLANT

VERSUS

REPUBLIC …….…..……RESPONDENT

JUDGMENT

1. The two appellants were jointly charged before the Senior Resident Magistrate's Court in Lamu in Criminal Case No. 36 of 2010, with the offence of Burglary and stealing contrary to Section 304(2) and 2799b) of the Penal Code. The record of the lower court shows that they pleaded guilty and were convicted on their own plea and eventually sentenced to seven years imprisonment on the first limb and three years imprisonment on the second limb.

2. Their appeals to this court were consolidated and heard together. Ali Shekue, the 1st accused in the Lower Court is the appellant in Criminal appeal No. 111/10 and for the purposes of this appeal is 1st appellant while his co-accused in the Lower Court and appellant in Criminal appeal No. 112/2010 is the second appellant.

3. During the hearing of the appeal, each of the appellants relied on their respective grounds and written submissions. The thrust of the appellants' appeals was that the sentence handed down on them is manifestly excessive. The 1st appellant, in addition introduced allegations in his submissions to the effect that he was tricked by the complainant to admit an offence he did not commit, and obliged in order to take a "short-cut", I presume, of the justice system. These allegations were not part of his grounds of appeal.

4. Be that as it may this court is duty-bound even before considering the sentence to examine the record of the lower court in order to satisfy itself that the plea of guilty by the appellants was unequivocal (see **ADAN VS R [1973]E.A 445**).

5. Having done so, I can find no defect in the plea-taking. The Lower Court was evidently alive to its duty, and even though. The accused appear to have used similar words in responding to the charge and facts read to them, that by itself cannot be a basis for vitiating the process. Indeed the 2nd appellant in his submissions reiterates that he committed the offence and only seeks review of the sentence.

6. The first appellant's allegations to have been tricked by the complainant do not advance his appeal in any way, as the record shows that he admitted the charges without reservation, a fact he also confirms in his own written submissions. In my considered view, the 2nd appellant knowingly and freely admitted the charges and his subsequent allegations of duress are an afterthought.

7. The only viable point raised by this appeal is with respect to the sentence. The prosecutor in the Lower Court did not produce any previous criminal records against the appellants. Secondly, while the stolen goods were not recovered, they were of a modest value, and further more the appellants' plea of guilty should have been taken in their favour.

8. The learned State Counsel in opposing the appeal has quipped that the appellants are fortunate not to have been charged with robbery as the prosecution case suggests that the 2nd appellant waved a *panga* at the complainant to restrain him from going chase after the burglars.

9. An appellate court will not interfere with the discretion of the Lower Court in sentencing except where it appears that in assessing the sentence, the trial court acted on some wrong principle or has imposed a sentence that is manifestly inadequate or excessive **(R –vs- JAMAL [1948] 15EACA 126).**

10. This principle was reiterated in the case of **SAYEKO VS REPUBLIC**. In that case, it was stated that it must be "evident that the Lower Court overlooked some material factor, or the sentence is manifestly excessive in the circumstances of the case". Some of the relevant sentencing considerations discussed in Sayeko's case include the fact that the appellant pleaded guilty to the charge and had no previous conviction **(WILSON V R [1971] E.A 599**; the period of detention before the trial **(WANYONI V R [1980]KLR 116),** and the gravity of the offence.

11. Citing the principle stated in **OGALO S/O OWUORA V R (1054) 21EACA 270**, the Court in **Sayeko's case** stated that an appellate court does not alter the sentence on the mere ground that had it tried the appellant it might have passed a different sentence. The court went on to state at page 309 – 310;

"We accept the proposition by Harris J. in Wilson's case that a plea of guilty from a first offender requires recognition as a matter of principle…In our view the reason for recognizing such factors is that they show that the accused has accepted his offence, and that is the first step to rehabilitation, which is the main object of sentencing in the first place."

Applying these principles to the present case and considering the value of the stolen items, I do not think that sufficient credit was given for the mitigatory matters.

12. Besides, the maximum penalty prescribed for offences under Section 304(2) (burglary) and Section 279(b) stealing from a dwelling house are ten and fourteen years imprisonment, respectively. The trial court sentenced the appellants to seven and three years imprisonment on each limb but did not make an order for the sentences to run concurrently. These were composite offences committed in the same incident hence it was improper to have them run consecutively. **(SEE JAMES KITHUKA WAMBUA VS R CR. APPEAL NO. 52 OF 1982; VITALIS OYOO OKWENY VS R CR. APPEAL NO. 293 OF 1982).**

13. Evidently, all these failures resulted in an excessive sentence which ought to be altered. The appeal against sentence succeeds to the extent that the sentence will be reduced to the period already served.

Both appellants should be set at liberty unless otherwise lawfully held.

Delivered and signed this **9th** day of **February 2012** at Malindi.

C. W. Meoli
JUDGE

In the presence of: the appellants, Mr. Naulikha for State.
Court clerk – Randu

C. W. Meoli
JUDGE