



No. 2820

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL APPEAL NO. 54 OF 2011

GEORGE OLOO OTIENO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an Appeal from the original conviction of sentence of the Senior Resident Magistrate's Court

at Oyugis Hon. C. Yalwala in Criminal Case No. 874 of 2007 delivered on 24th April, 2008)

“**The appellant**” together with one, **Noel Biane** were jointly charged before the Senior Resident Magistrate’s court at Oyugis with one count of house breaking contrary to Section 304(i) and stealing contrary to Section 279(b) of the **Penal Code**. The particulars were that the two on 15th October, 2007 at Oyugis Township in Rachuonyo District within Nyanza Province, jointly with others not before Court broke and entered the dwelling house of **Benta Atieno** with intent to steal therein and did steal one Television make LG and one DVD deck make Sentomi all valued at Kshs.17,200/-.

In the alternative count, both accused persons were charged with the offence of handling stolen goods contrary to Section 322(2) of the **Penal Code**. The particulars of the offence were that the two on 16th October, 2007 at Oyugis Township within Nyanza Province otherwise in the course of stealing dishonestly retained one Television set make LG and one DVD deck knowing or having reason to believe them to be stolen goods. The 2nd count was in respect of the appellant only in which he was charged with being in possession of cannabis sativa contrary to Section 3(i) as read with Section (a) of the **Narcotic drugs and psychotropic substance Control Act**, to which he pleaded guilty, was convicted and sentenced accordingly. The appellant entered a plea of not guilty on those other counts and was accordingly tried.

The prosecution called a total of four (4) witnesses. **PW1, Benta Atieno Otieno** testified that on 15th October, 2007 she came back home from a journey and found the window to her house broken and her TV set and DVD deck missing. She reported to the police who advised her to undertake her own inquiries and report to them of any suspect she had in mind. She duly inquired from a friend, one **Florence Achieng** and they decided to send an informer who posed as a potential buyer for the stolen items to the appellant's co-accused aforesaid whom they suspected. That the informer reported back to them that the co-accused had agreed to having the items for sale. She together with her friend and informer proceeded to where the co-accused was and though he initially denied having the items, he eventually admitted and offered to lead them to where he had hidden them. He had done so in his brother's homestead, "**the appellant**". Accompanied by police officers, they went to the homestead of appellant who in turn took them to where the items had been hidden in a pit that was covered. The TV set and DVD deck were recovered in a sack and net and PW1 positively identified them as her property.

PW2, **Fred Oketch Olwalo**, the husband of the complainant recalled having left the house of the complainant securely locked on 15th October, 2007 and went to Kisumu. Later in the evening he received a report that the house had been broken into and TV and DVD deck stolen. He confirmed that he was the one who bought the stolen items for his wife and produced a receipt for the purchase of the DVD player and a certificate of warranty for the TV set. PW3, **Florence Achieng** the friend of the complainant received a phone call from the complainant on the morning of 16th October, 2007 who informed her of the break in and theft from her house. She went to the scene and saw the broken window. As they consulted, they noted that the space of the window through which entry was made was very small and concluded that the person who entered must have been a minor or a very small person. They suspected the co-accused who apparently lived in the neighbourhood. It is then that they decided to use an informer as per the evidence of PW1.

PW4, **PC Dan Ombogo** received a report of the incident on 16th October, 2007. He visited the scene and found that indeed the window had been broken. In the evening of the same date, the complainant went back to the station accompanied by the co-accused and informed him that he had some information on the incident. He interrogated and arrested him. The co-accused owned up and stated that the stolen items were with his brother, the appellant and he led them to the house of the appellant. From the house, both the appellant and co-accused led the police officers to the place where the items were hidden and were recovered in a hole. They were then all arrested and charged.

In his own unsworn defence, the appellant stated that police officers accompanied by the co-accused went to his house at night and arrested him. He stated that the police left with co-accused who led them to a place where the stolen items were recovered. The police conducted a search in his house and found cannabis sativa. He admitted the offence of being in possession of cannabis sativa but denied the other offences preferred against him.

The learned Magistrate having carefully evaluated the evidence on record found the appellant guilty of alternative count of handling stolen goods contrary to Section 322(2) of the **Penal Code**, convicted him and sentenced him to seven (7) years imprisonment. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on the grounds that the prosecution case was not proved beyond reasonable doubt, the trial Magistrate erred in ignoring his defence and that the custodial sentence imposed was overly harsh and excessive.

When the appeal came up for hearing before me on 9th May, 2011, the appellant opted to abandon the appeal on conviction but pursue the appeal on sentence instead. This was a wise decision as on the overwhelming evidence on record, there was no way that his appeal on conviction would have succeeded.

In support of his appeal on sentence, the appellant submitted that the sentence imposed was harsh and

excessive. He had already served four (4) years of the sentence imposed and felt that he had been sufficiently punished.

Mr. Gitonga, learned state counsel submitted that the state had recognized that the appellant was convicted on his own demeanour. The state also recognized that the appellant had served four (4) years. He therefore urged the court to uphold the sentence to the extent served.

It has been constantly reiterated that the appropriate sentence to be imposed is a matter for the discretion of the trial court. This being the case, the trial court must act judicially and not to impose sentences capriciously. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. The appellate court will only interfere with the sentence imposed if it is shown to be unlawful and illegal or if it is manifestly harsh and excessive as to amount to a miscarriage of justice. **See Ogola s/o Owuora V Republic 19 EACA 270, Nilson V Republic (1970) E.A 599 and Wanjema V Republic (1971) E.A 493.**

Considering the circumstances of this case and the minimal role played by the appellant in the crime and also the fact that the co-accused owned up to have broken into the house of the complainant, stolen the items and hid them in the appellant's *shamba* without his knowledge and only informed him when he had already done so, the sentence imposed on the appellant was no doubt manifestly harsh and excessive. It amounted to a miscarriage of justice. **Mr. Gitonga** was thus right in conceding to the appeal on sentence. Bearing all the foregoing in mind, I think that the appellant has been sufficiently punished. For the ends of justice to be met, I would commute the appellant's sentence to the term so far served with the consequence that he shall be set at liberty forthwith unless otherwise lawfully held. To that extent, the appeal on sentence succeeds.

Judgment dated, signed and delivered at Kisii on this 30th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE