



No. 2778

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 187 OF 2007

FREDRICK OCHIENG KAGANDA APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGMENT

(Being an Appeal from the original conviction of sentence of the Senior Resident Magistrate's Court at Homa-bay Hon. S.M. Mwendwa in Criminal Case No. 1001 of 2007 delivered on 14th November, 2007)

When this appeal came up for hearing on 8th March, 2011, the appellant elected to abandon the appeal on conviction. Instead he chose to pursue the appeal on sentence only. **Mr. Mutuku**, learned Senior Principal state counsel, did not object to the path taken by the appellant. Accordingly, the appellant's plea was granted.

In support of his appeal on sentence, the appellant submitted that the sentence imposed was harsh and excessive. He therefore prayed for this court's intervention with a view to scaling it downwards. On his part **Mr. Mutuku** elected to leave the matter to the court's discretions.

The appellant faced the charge of burglary contrary to Section 305(2) and stealing contrary to Section 279(b) of the **Penal Code** in the Senior Resident Magistrate's court at HomaBay. The particulars of the offence were that on the night of 8th and 9th August, 2007 in Kaksingiri Location of Suba District within Nyanza Province, he broke and entered the dwelling house of **Mary Anyongo Ochieng** with intend to steal therein and did steal one Mattress 4X6, two plastic suitcases, one Aniko Coloured TV 12", one charcoal iron box, assorted clothes and cash Ksh. 10,000/=, all valued at Ksh. 34,000/= the property of the said **Mary Anyongo Ochieng**.

In the alternative, the appellant faced the charge of handling stolen goods contrary to Section 322(2) of the **Penal Code**.

The particulars were that on 8th and 9th August, 2007, at Kaksingiri location in Suba District, the appellant otherwise in the course of stealing, dishonestly retained one mattress, one white plastic suitcase, one black savco jeans trouser, two blue savco jeans trousers, one jeans jacket, one yellowish kitambaa,

one radio cassette make sonitech, model ST 4545, one wall clock make quartz, one blue passcon jeans trouser and one battery make Jacobs knowing or having reason to believe them to be stolen goods. He pleaded not guilty to both counts and his case went to trial.

PW1 **Mary Anyango Ochieng** was the complainant. Her evidence was that on the 8th August, 2007, she locked and left her house at Sindo at around 5.00 a.m. and proceeded to Ringiti Island where her husband worked. While at Ringiti, she received a call from a neighbour one, **Pamela** who informed her that her house had been broken into and goods and other valuables stolen there from. She came back to Sindo and found that the door to her house was broken and several items stolen there from.

She reported the case to Sindo Police Station and a search ensued. PW3 a radio technician at Sindo market, on 9th August, 2007 was at his place of work when the appellant brought him a radio cassette to repair for him. As he was repairing, the appellant intimated to him that he wished to have a battery. PW3 told him that he had a battery but the appellant had no money to buy the same. Instead he promised to bring him a suit case. The appellant duly brought the suitcase at around 7.30p.m and when asked by PW3 why he was bringing it at night, he admitted that he had stolen it. PW3 directed him to leave the suitcase there and come the following day for the battery. He then proceeded to Sindo AP Camp where he reported the case to the police and handed the suitcase over to them.

On 10th August, 2007, PW2 **Shadrack Omondi Agudha** had been informed that **Peter Ooko's** house had been broken into and several items stolen there from. He saw the appellant at Sindo town wearing one of the t-shirts belonging to the said **Peter Ooko**. He confronted him and demanded to know how he got the T-shirt. They ended up at Sindo Ap Camp where the appellant was apprehended. PW2 and PW4 **APC Hillary Awuor** of Sindo AP Camp proceeded to the appellant's house where they carried out a search and recovered several items which were positively identified by PW1 as some of the items stolen from her house. The appellant was then handed over to PW5 who questioned him and led him to where he had hidden the other stolen goods at a shop at Wadiaga market. The appellant was then charged with the offence. The appellant in his defence stated that the recovered items were planted on him.

The learned magistrate have carefully considered the evidence on record as well as the exhibits recovered came to the conclusion that the appellant was guilty as charged. Accordingly he convicted him on the main count but discharged him on the alternative count and properly so, in my view. Upon conviction, he was sentenced to seven (7) years imprisonment. It is this sentence that the appellant seeks to be interfered with.

Ordinarily, an appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is demonstratively evident that the court overlooked material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. See **Wanjema V Republic (1971) E.A.493**. However it must also be borne in mind that a sentence must in the end, depend upon the facts of a particular case.

The offence for which the appellant was convicted attracts double sentence. The first sentence would have been on Burglary and the 2nd sentence would have been on stealing. In other words though the offence charged was single, it was actually two in one. It was composite charge. The appellant was charged with Burglary which is a distinct offence and stealing upon burglary which is yet another distinct offence. Accordingly, the learned magistrate ought to have imposed a sentence on each of those offences and decided whether such sentences should run concurrently or consecutively. In failing to do so he erred.

The offence of burglary attracts a maximum sentence of seven (7) years imprisonment whereas theft following burglary attracts a maximum of fourteen (14) years imprisonment.

The appellant was however sentenced to seven (7) years imprisonment. The record does not show the basis upon which the trial court reached that sentence. There is nothing on record to suggest that the appellant had previous record(s) as the prosecutor was not called upon to address the court on the issue. Similarly, the record does not show that the appellant was ever called upon to mitigate. For purposes of sentencing, the accused previous record(s) is absolutely necessary so is the mitigation. In the

absence of those, I am unable to tell whether a custodial sentence was merited. Again I am unable to say whether the learned magistrate exercised his discretion as to sentencing on sound legal principles or was whimsical and or capricious. It may well be that the trial magistrate over looked some material factor, look into account some immaterial factor or even acted on wrong principles. As a result of the aforesaid omissions on the part of the learned magistrate, I cannot say whether the sentence imposed was merited.

As a result, I allow the appeal on sentence. The sentence imposed is set aside and substituted with the sentence so far served. The appellant should therefore be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, signed and delivered at Kisii this 4th day of May, 2011.

ASIKE-MAKHANDIA
JUDGE