



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO. 147 OF 2009**

**SAMSON ONYANGO ODUOR.....RESPONDENT**

**VERSUS**

**REPUBLIC.....APPLICANT**

**J U D G M E N T**

This judgment is in respect of criminal appeal No. 147 of 2009 and 148 of 2009 which were consolidated by Karanja judge on 4-10-2006.

In criminal appeal No. 147 of 2009 the appeal arises from proceedings in criminal case No. 273 of 2009 in the Resident Magistrate's court at Ukwala. In it, the appellant had been charged with the offence of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the penal code in that **“on the night of 15<sup>th</sup> and 16<sup>th</sup> day of August 2009 at Ukwala AP lines in Ugenya district within Nyanza province broke and entered the dwelling house of No. 95052496 Cpl Kiptoo Robert with intent to steal from therein and did steal from therein one mobile phone make Nokia make 2700, one small black traveling bag, one brown wallet (leather) containing cash Kshs. 6,500/=, one co-operative bank A.T.M card, one Commercial bank A.T.M card, one National Identity card No. 13806661 all total valued at Kshs. 24,500/= being the property of the said No. 95052490 Cpl Kiptoo Robert.”**.

In count 2, with the offence of burglary contrary to section 304 (2) and stealing contrary to section 292 (b) of the penal code in that **“on the night of 20<sup>th</sup> and 21<sup>st</sup> day of August 2009 at Ukwala township, in Ugenya district within Nyanza province broke and entered the dwelling house of Inspector Joseph Katechi with intent to steal therein and did steal from therein three bed sheets all valued at Kshs. 700/= being the property of the said Joseph Katechi”**.

Count 3, with the offence of stealing contrary to section 275 of the penal code in that **“on the night of 4<sup>th</sup> and 5<sup>th</sup> July 2009, at Ukwala Township, Ukwala location, in Ugunja district Ugenya district within Nyanza province stole one bicycle make phonix frame number not visible valued at Kshs. 9,500/= the property of Matibabu Foundation Project”**.

Count IV, with the offence of burglary contrary to section 304 (2) and 279 (b) of the penal code in that **“on the night of 15<sup>th</sup> and 16<sup>th</sup> day of August 2009 at Ukwala township in Ugenya district within Nyanza province broke and entered the dwelling house of Lilian Mary A. Otieno with intent to steal from therein and did steal from therein one pair of sports shoes and one pair of blue sandals all total valued at Kshs. 1,175/= being the property of the said Lilian Mary A. Otieno”.**

In count V, with the offence of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the penal code in that **“on the nights of 17<sup>th</sup> day of August 2009, and 18<sup>th</sup> day of August 2009 at Ukwala location, in Ugenya district within Nyanza province broke and entered the dwelling house of Lilian Mary A. Otieno with intent to steal from therein and did steal from therein two hens total valued at Kshs. 1,100/= being the property of the said Lilian Mary A. Otieno”.**

In count VI, with the offence of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the penal code in that **“on the nights of 18<sup>th</sup> and 19<sup>th</sup> August 2009 at Ukwala township, Ugenya district within Nyanza province broke and entered the dwelling house of Felix Ochieng Arony with intent to steal therein and did steal from therein one pullover valued at Kshs. 250/= the property of Felix Ochieng Arony”.**

In count VII, with the offence of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the penal code in that **“on the nights of 13<sup>th</sup> and 14<sup>th</sup> day of September, 2009 at Ukwala township, Ukwala location in Ugenya district within Nyanza province broke and entered the dwelling house of Gideon Magak Oduk with intent to steal therein and did steal from therein one mobile phone make Samsung SGH X 200, one safaricom simcard, one wooden carved wine glass, and cash Kshs. 1,100/= being the said Gideon Magak Oduk”.**

In count VIII, with the offence of conveying suspected stolen property contrary to section 323 of the penal code in that **“on the 1<sup>st</sup> day of October 2009, at Ugunja township, in Ugenya district within Nyanza province having been detained by No. 62235 police constable Moses Mwitwa and police constable Brian Wambugu as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code, you had in your possession one mattress, and three bed covers, reasonably suspected to have been stolen or unlawfully obtained”.**

In the alternative with the charge of handling stolen property contrary to section 322 (2) of the penal code in that **“on the 1<sup>st</sup> day of October 2009, at Ugunja township, in Ugenya district within Nyanza province otherwise than in the course of stealing, dishonestly retained one bicycle make phonix, one mobile phone make Samsung model SGH X200, one pair of shoes, one local made basket, two pullovers, one pair of blue sandals, one wooden carved wine glass, knowing or having reason to believe them to be stolen property or unlawfully obtained”.**

A perusal of the record reveals that the appellant appeared in court on the 6<sup>th</sup> day of October 2009, and all the charges were read to him in Swahili, all of which were admitted and a plea of guilty was entered. The facts were outlined and were accepted by the appellant and the appellant was thereby convicted on own plea of guilty on all the 8 counts. It is on record that the prosecution made observation that the appellant was a first offender but they asked for a deterrent sentence. In mitigation the appellant asked for leniency and said he was 17 years old, where upon the court called for an age assessment report whose result showed that he was between 18 -19 years of age. On count 1,2,4,5,6 and 7 for the offence of burglary, the appellant was sentenced to serve five years on each count and for stealing on account of the same counts he was also sentenced to serve five years on each count. Separately for counts 3 he was sentenced to serve 2 years imprisonment and on count 8 to serve five (5) years. The sentences were to run concurrently.

The appellant became aggrieved and he presented an appeal to this court citing four grounds of appeal namely:-

**(i) That the appellant's constitutional rights were violated in regard of overstaying in police custody for more than the required time by law as outlined under section 72/3/b of the constitution.**

**(ii) That the trial magistrate erred in law when he failed to warn me of the consequences of my plea of guilty to the charge and as such I pray for conditional discharge and/or any decision that is deemed fit.**

**(iii) That it is my further humble prayer that I pleaded guilty to the charge in order to benefit from the trial court's leniency.**

**(iv) That I further pray that may this appeal be consolidated with other appeals from RM's court Ukwala criminal case numbers 273 and 275 of 2009.**

For these reasons the appellant's prayer is for the appeal to be allowed, conviction quashed and sentence set aside.

Appeal number 148 of 2009 arises from criminal case number 275 of 2009 in the Resident Magistrates' court at Ukwala. The lower court file is enclosed in the appeal record and also a copy of the proceedings is enclosed in this Criminal Appeal file. A perusal of Criminal file number 275 of 2009 reveals that , the appellant Samson Onyango Oduor jointly with another one Onyango Erick Obiero were charged with a main charge of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the penal code in that **"on the night of 26<sup>th</sup> day of august 2009, and 27<sup>th</sup> day of august 2009, at Ukwala location, in Ugenya district within Nyanza province jointly broke and entered the dwelling house of No. 231509 C.I Elijah Macharia with intent to steal therein and did steal from therein one mobile phone make Nokia model 1650, one pair of brown open shoes, one pair of black leather shoes, one mosquito net, one pair of blue sandals, one plastic cup and one curtain all valued at Kshs. 11,710/=, the property of the said No. 231509 C.I Elijah Macharia"**.

In count 2 with the offence of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the penal code in that **"on the nights of 12<sup>th</sup> and 13<sup>th</sup> day of September 2009, at Doho East sub location, Ukwala location in Ugenya district, within Nyanza Province, jointly broke and entered the dwelling house of Norbert Ochieng Onyango with intent to steal therein and did steal from therein one DVD machine make Samsung, one iron box make Ramtons, one remote control, and 48 video disks all total valued at Kshs. 8,600/=, the property of the said Norbert Ochieng Onyango.**

In the alternative, the appellant faced alone the offence of handling stolen property contrary to section 322 (2) of the penal code in that **"on the 1<sup>st</sup> day of October 2009, at Ugunja township in Ugenya district, within Nyanza province otherwise than in the course of stealing, dishonestly retained one mosquito net, one plastic cup, 24 video discs, one iron box and one pair of black shoes and one pair of blue sandals, knowing or having reason to believe them to be stolen property or unlawfully obtained"**.

A perusal of the record reveals that plea was taken on the 6<sup>th</sup> day of October 2009, and the appellant

pleaded guilty to both count 1 and 2 as charged. The facts were outlined and he accepted them and was accordingly convicted on count 1 and 2. The prosecutor made observation that appellant had been convicted in criminal case number 273 of 2009 and 274 of 2009. Mitigation asked for leniency and appellant said he was 17 years old. He was sent for age assessment and the report read that he was aged 18-19 years whereupon the learned trial magistrate sentenced the appellant in count 1 to serve seven (7) years imprisonment for burglary, seven (7) years imprisonment for stealing. These were ordered to run consecutively meaning that the appellant was to serve 14 years on this count 1. As for count 2, the appellant was sentenced to serve seven (7) years imprisonment for stealing. These were ordered to run concurrently, meaning that the appellant would now serve 21 years of imprisonment. The learned trial magistrate went further to order that the sentence in count 1 and 2 would run concurrently.

The appellant became aggrieved and filed this appeal citing similar grounds as those in 147 of 2009 namely:

**(i) That the appellant's constitutional rights were violated in regard of overstaying in police custody for more than the required time by law as outlined under section 72/3/b of the constitution.**

**(ii) That the trial magistrate erred in law when he failed to warn me of the consequences of my plea of guilty to the charge and as such I pray for conditional discharge and/or any decision that is deemed fit.**

**(iii) That it is my further humble prayer that I pleaded guilty to the charge in order to benefit from the trial court's leniency.**

**(iv) That I further pray that may this appeal be consolidated with other appeals from RM's court Ukwala criminal case numbers 273 and 275 of 2009.**

For the aforesaid reasons the appellant prayed for the appeal to be allowed, conviction quashed, and sentence set aside.

On the day of the hearing of the appeal, the appellant reiterated his desire to have the two appeals consolidated and heard together. The state had no objection and the court confirmed the consolidation order ordered earlier on by Karanja judge on 4-10-2010.

In his oral submissions, the appellant stated that he pleaded guilty due to ignorance, he seeks reduction in sentence in both appeals.

In response the state stated that:-

- **Offences giving rise to both appeals are inter related and as such sentences should not have been ordered to run consecutively.**

- **The state has no objection if this court were to exercise its discretion and order the sentences in each appeal to run concurrently and then for both appeals ordered to run concurrently.**

- **The court was invited to be guided by the principle in Section 14 (3) of the Criminal Procedure Code.**

This court has given due consideration to the totality of the the arguments above, as well as the totality of the facts oin the record and it proceeds to make the following findings on the matter:-

- (i) That appeal number 147 of 2009 arises from convictions in the Resident Magistrate’s Court at Ukwala in Criminal Case number 273/2009. Whereas criminal Appeal Number 148 of 2009 arises from convictions in the Resident magistrate’ s Court at Ukwala Criminal Case number 275 of 2009.
- (ii) That in both criminal files, it is not disputed that the appellant pleaded guilty to the charges as read to him. The facts were outlined to him and he accepted the same and was dully convicted.
- (iii) Indeed the learned trial magistrate in both criminal cases did not warn the appellant of the consequences of pleading guilty in both occasions as this is not borne out in the record but it is clear that the appellant is not seeking a retrial. He seems to be content with the plea of guilty.
- (iv) The appellant alleges that he pleaded guilty in order to earn leniency from the court but he was not accorded the same.
- (v) The state is in agreement that since conviction is not being, attached the same is safe and it should be confirmed This court is of the opinion that from the content of the record of both appeasl the appellant is not complaining against conviction and for this reason the court agrees with the State that the conviction is safe and the same is confirmed.
- (vi) As for sentences it is clear that indeed the offences fall into the category of a series of crimes committed consequentially. There were no injuries reported to have occurred during the commission of the offences. There were some recoveries made and these were indeed to operate as mitigating factors in favour of the appellant on other mitigating factor should have been the age of the appellant who was between 18 -19 years at the time of conviction. By ordering sentences to run consecutively, it meant that the appellant was going to spent the juicy part of his life in prison and by the time he to be leased he would have lost touch with making his integration back into society difficult at both ends. From the nature of the offences committed, although they cannot be condoned they are not such that call for indefinite incarceration of the perpetrator in order to protect the society. What the appellant needs to be taught as a youth in responsible behaviour so as to enable the society and himself benefits from one another outside prison as opposed to serving the society behind prison bars.
- (vii) The courts attention has been drawn to the provision of Section 14 (3) of the Criminal procedure Code Cap 175 laws of Kenya. It reads:- “ **Section 14 (1) subject to subsection 3, when a person is convicted at one trial of two or more offences, the court may sentence him for those offences to the several punishments prescribed therefore which the court is competent to impose and those punishment consisting of imprisonment shall commence the one after the the other in the order the court may direct; unless the court directs that the punishment shall run oncurrently**

(2).....

**(3) Except in cases to which Section 7 (1) applies, nothing in this Section shall authorize a subordinate court to pass on any person at one trial consecutive sentences**

**(a) Of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction is competent to impose whichever is the less or**

**(b) Of fines which amount is the aggregate to more than twice the amount which the court is competent to impose**

**(3) For purposes of appeal the aggregate of consecutive sentence imposed under this Section in case of conviction or several offences at one trial shall be deemed to be a single sentence.**

(viii) This court has duly construed the afore set out provisions of Section 14 (3) of the Criminal Procedure Code and applied them to the facts herein and the court makes the following findings on the same:-

(a) There is jurisdiction in the lower court to pass distinct sentence and order them to run either consecutively or concurrently.

(b) There is a discretion donated to the court to order distinct sentence to run concurrently or consecutively.

(c) Like all judicial discretions how so ever exercised, by judicial officers, it is now trite law emanating from the court of appeal and as dutifully followed by the superior court is that the exercise of the judicial discretion in unfettered with the only fetter being that the same be exercised with reason and judiciously

(d) That there is a caveat which is tied to the exercise of the discretion to order consecutive sentences which is to the effect that these should not exceed twice the sentence the particular magistrate is empowered to pass.

(e) That there is jurisdiction to revisit the exercise of that discretion on appeal.

**(x) When applied to the scenario herein, it is clear that the learned trial magistrate who passed the sentences in criminal case number 272 of 2009 is a resident magistrate and the one who passed the sentences in criminal case number 273 of 2009 is also a resident magistrate and for this reason they were subject to limitations set out in Section 7 of the Criminal Procedure Code. This Section reads:- “Section 7 (1) a subordinate court of the first class held by:-**

**(a) A Chief Magistrate, Senior Principal Magistrate, Principal Magistrate or Senior Resident Magistrate may pass any sentence authorized by law for any offence triable by that court.**

**(b) A resident magistrate may pass any sentence authorized by law for an offence under Section 278, 308 (1) of the Penal Code or under the Sexual Offences Act 2006.**

**(2) Subject to subsection a subordinate court of the first class may pass the following sentences in cases where they are authorized by law.**

**(a) Imprisonment for a term not exceeding seven years.**

**(b) A fine not exceeding twenty thousand shilling (Kshs. 20,000/=)**

**(3) A subordinate Court of the second class may pass the following sentences in cases where they are authorized by law.**

**(a) Imprisonment for a term not exceeding two years.**

**(b) A fine not exceeding ten thousand shillings (Kshs. 10,000/=).**

**(4) In determining the extent of a courts jurisdiction under this Section to pass a sentence of imprisonment, the court shall have jurisdiction to pass the full sentence of imprisonment provided in this Section in addition to any term of imprisonment which may be awarded in default of payment of a fine, costs or compensation.**

**“Section 8 the judicial service commission may by notice in the gazette extended the jurisdiction of any particular magistrate under Sections 7 either generally or in relation to a particular offences triable by a court of a class which may be held by trial magistrate and a magistrate whose jurisdiction has been so extended may pass sentences, this authorized in cases where they are authorized by law”.**

(xi) This court has construed the afore set out provisions of Sections 7, and 8 of the Criminal Procedure Code and applied them to the sentences handed out by the trial magistrate in convictions which gave rise to the consolidated appeals and it is of the opinion that prima facie, the resident magistrates appear to have exceeded their jurisdictions in the absence of enhancement. However in the absence of a confirmation of lack of enhancement of the learned magistrate’s sentencing jurisdiction, this court will give them the benefit of doubt and hold that they were properly vested with the sentencing power, save that by reason of the caveat placed by the very law on sentencing, the exercise of their sentencing discretion calls for interference because it exceeds twice the aggregate permitted by law.

(xii) As an appellate court seized of the matter in an appellate capacity, the powers of this court are donated by the provisions of Section 354 of the Criminal Procedure Code and for this reason this court has power in the disposal of this appeal which is an appeal arising from a conviction to:-

**(i) Reverse the finding and sentence and acquit or discharge the accused (appellant) or order him to be tried by a court of competent jurisdiction .**

**(ii) Alter the findings, maintaining the sentence or with or without altering the finding, reduce or increase the sentence: or**

**(iii) With or without a reduction or increase and with or without altering the finding, alter the nature of the sentence**

**(b) In an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.**

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**(c) In an appeal on any other order, alter or reverse the order and in any case may make any amendment or any consequential or incidental order that may appear just and proper”.**

This court has duly construed the donation of its appellate powers in Section 354 Criminal Procedure Code, and the same considered in the light of the entire assessment of the facts on the record and the court proceeds to make the following orders in the disposal of these consolidated appeals:-

**(1) Convictions in the Resident Magistrates Criminal case number 273 of 2009 and 275 of 2009 be and are hereby confirmed as the same were not challenged.**

**(2) In the absence of evidence of existence or non existence of enhanced power of sentencing as donated by Section 7 of the Criminal Procedure Code, as read with Section 8 Criminal Procedure Code the court opts not to interfere with the sentence of upto a maximum of five (5) years in criminal case number 273 of 2009 with regard to appeal number 147 of 2009 more so when the appellant did not raise complaint that there was excess of jurisdiction in sentencing. The sentence of five (5) years is therefore confirmed.**

**(3) The order of concurrent running of the sentences in criminal case number 273 of 2009 is confirmed**

**(4) With regard to sentence of seven (7) years in criminal case number 275 of 2009 with regard to appeal number 148 of 2009 considering that appellant was aged 18 – 19 years, he was a first offender, had pleaded guilty, and asked for leniency, and also considering that there were recoveries and also considering the value of the subject matter, a sentence of seven (7) years is on the high side in the exercise of its appellate power under Section 354 of the Criminal Procedure Code, this court revises the same to one of three (3) years on each limb of count 1 and 2**

**(5) The order ordering the sentence to run consecutively in criminal case number 275 of 2009 is set a side and substituted with an order of the sentence on both limbs in count 1 and 2 to be ordered to run concurrently**

**(6) There is a further order that the sentences in criminal case number 273 of 2009 and 275 of 2009 vide criminal appeals numbers 147 of 2009 and 148 of 2009 as well as the committed borstal order in criminal appeal number 146 of 2009 arising from Ukwala Resident Magistrate Criminal case number 274 of 2009 be and are hereby ordered to run concurrently.**

**Order accordingly.**

**Delivered, dated and Signed at Kisumu this 28<sup>th</sup> day of September, 2011**

**R. N. NAMBUYE  
J U D G E**

RNN/va