



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 114 of 2007

BENJACK OMONDI OBAMBO APPELLANT

VERSUS

REPUBLIC RESPONDENT

[From original conviction and sentence in Criminal Case number 804 of 2007 of the Senior Resident Magistrate's Court at Nyando]

JUDGMENT

Benjack Omondi Obambo, the appellant herein, was the third accused when he and four others appeared before the Senior Resident Magistrate at Nyando, charged with six counts of classroom breaking and committing a felony contrary to Section 306 (a) of the Penal Code, in that on the 21st day of July 2007, at Thurdibuor Secondary School in Nyando District Nyanza Province, jointly with others not before court, broke and entered a building namely a classroom and committed therein a felony namely theft of textbooks valued at Kshs. 2,800/= the property of Thurdibuor Secondary School (count one), Kshs. 3,000/= property of Hilda Odero Akinyi (count two), Kshs. 700/= property of Lilian Akinyi Ouko (count three), Kshs. 1,000/= property of Christopher Owuor (count four), Kshs. 2,000/= property of Robert Ouko Okumu (count five) and Kshs. 1,500/= of Edna Otieno (count six)

In the alternative, the appellant was charged with handling stolen goods contrary to Section 322 (a) of the Penal Code, in that on the 21st day of July 2007, at Thurdibuor Secondary School in Nyando District Nyanza Province, otherwise than in the course of stealing, dishonestly received or retained two mathematics text books, three oxford dictionaries, one Kishwahili fasihi text book, one certificate business studies text book, one secondary biology text book, one history and government text book and one gateway secondary text book knowing or having reasons to believe them to be stolen goods.

To this alternative count, the appellant pleaded guilty and was sentenced to serve two years imprisonment.

It would appear that the alternative count was treated as an alternative to all the six counts of breaking and committing a felony.

This was an error, as an alternative count should be treated as an alternative to a specific main count.

Be that as it may, the appellant being dissatisfied with the sentence imposed by the lower court has now appealed to this court against the extent and legality of the sentence and proceedings.

The grounds in support of the appeal are contained in the petition of appeal filed herein on 2nd August 2007, by K'opot & Company Advocates. These are:-

- (i) That the learned Senior Resident Magistrate erred in law and fact in absolutely failing to give any weight or consideration to the mitigation by the appellant and by so doing arrived at a wrong decision.
- (ii) That the learned Senior Resident Magistrate erred in law and fact in failing to find that the appellant was a first offender and could thus serve a non-custodial sentence if at all.
- (iii) That the judgment arrived at by the learned Senior Resident Magistrate is extremely harsh and manifestly excessive considering the age of the appellant, circumstances and nature of the case.
- (iv) That the learned Senior Resident Magistrate erred in law and fact in accepting a plea of guilty on an otherwise defective charge and a non-existent provision of the Penal Code and in so doing arrived at a wrong decision
- (v) That the learned senior Resident Magistrate erred in law and fact in failing to state concisely the language in which the charge was read over and explained to the appellant

At the hearing of the appeal, the appellant was represented by Mr. K'opot, advocate, while the State was represented by the Senior State Counsel, Mr. Mutai.

Mr. K'opot argued that the penal code does not contain a Section 322(a) under which the appellant was charged, he said that the appellant was therefore convicted under a non-existent provision of the law hence a violation of his Constitutional rights under Section 77 of the Constitution.

Mr. K'opot further argued that the foregoing error is incurable under Section 382 of the Criminal Procedure Code. He said that if the appellant's conviction was proper then the sentence imposed was harsh and excessive considering the mitigating factors put forward by the appellant and also that Section 322 (2) of the Penal Code did not preclude the trial court from exercising mercy on sentencing.

In finality, Mr. K'opot suggested that a sentence of a fine or probation would have been appropriate. He urged this court to vary the sentence accordingly if it upholds the conviction of the appellant.

On his part, the learned Senior State Counsel urged the court to uphold the conviction and contended that the appellant pleaded guilty after the particulars and the statement of the charge were put to him. He said that the statement and the particulars were adequate enough to put the appellant on notice as to the charge facing him and therefore, the omission of a sub-section of the necessary provisions of the Penal Code did not prejudice him. He said that the omission is curable under Section 382 of the Criminal Procedure Code. He also said that the sentence imposed was not manifestly excessive or harsh and that all the mitigating factors were taken into consideration. He urged this court to dismiss the appeal.

Having heard the arguments for and against the appeal, it may herein be restated that the principles upon which an appellate court can interfere with the discretion of a trial court regarding sentence are well settled. The appellate court can only interfere where the trial court in assessing the sentence has acted on wrong principles or has imposed a sentence which is manifestly inadequate or manifestly excessive (See Diego vs Republic KLR 621).

The available lower court record shows that the plea was properly taken in accordance with the guidelines provided in the case of Adan vs Republic [1973]EA 445. However, the appellant pleaded

guilty to an alternative count based on Section 322 (a) of the Penal Code, which is non-existent.

The correct provision of the law should have been Section 322 (1) of the Penal Code. Nonetheless, despite the error, the appellant was not prejudiced as the statement of the charge and the particulars were brought to his attention thereby leaving no doubt that he was facing a charge under Section 322 (1) of the penal code.

Since no miscarriage of justice was occasioned by the error, it becomes curable under Section 382 of the Criminal Procedure Code and invoking the provisions of the Constitution of Kenya would not alter the fact.

Section 322 (2) of the Penal Code provides for a maximum sentence of fourteen (14) years imprisonment with hard labour for a person found guilty under Section 322 (1) of the Penal Code. Therefore, this court does not consider the sentence of two years imposed on the appellant to be harsh or excessive. It was deserved in the circumstances.

However, and of great importance, is the fact that the charge as framed was defective “ab initio” on account of duplicity in as much as two elements of handling stolen property were included in the alternative count to which the appellant pleaded guilty. These are the elements of receiving and retaining.

In the case of Selimia Mbeu Owuor & Another vs Republic NBI CR/APP NO. 68 OF 1999, the Court of Appeal stated as follows:-

“Under Section 322 (1) of the Penal Code, a person handles stolen goods if he, otherwise than in the course of stealing, dishonestly

- (a) receives
- (b) retains
- (c) undertakes or assists in their retention, removal etc

The prosecution must accordingly choose under which of these sub-heads they wish to proceed and it is not open to them to combine dishonest receipt with dishonest retention in one charge, if they do that the charge would be bad for duplicity. The point is that an accused person is entitled to know whether it is being alleged that he dishonestly received the goods or that he dishonestly retained them and so on”.

This case is indistinguishable from the present one with regard to the defectiveness of the charge.

Consequently, the conviction of the appellant on the charge of handling stolen property was, in all the circumstances, unsafe and ought not be allowed to stand.

Accordingly, the appeal is allowed, the conviction is quashed and the sentence set aside.

However, this is a suitable case for a re-trial at least in the interest of justice. The appellant is not likely to suffer any injustice. He has been on bond pending the hearing and determination of this appeal.

To that extent, there shall be a re-trial of the case before a different magistrate of competent jurisdiction.

The appellant shall remain on bond pending the mention of the case at the Nyando Court for necessary action.

It is directed that the matter be mentioned at the Nyando Court at least within two weeks from this date hereof.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 30th day of July 2008.

J. R. KARANJA

JUDGE

JRK/ao