



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 267 OF 2007

-BETWEEN-

JOHN CHEGE MWANGI.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from sentence imposed by District Magistrate Mr. Kassam on 28th August, 2006 in Criminal Case No. 4620 of 2006 at Makadara Law Courts)

JUDGEMENT

The appellant was charged with burglary and stealing contrary to s.304(2) and s.279(b) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant jointly with others not before the Court, on 19th August, 2006 at Kayole Estate within Nairobi, broke and entered the dwelling house of **Florence Wangui Chege**, with intent to steal therein, and did steal therein a video deck machine (LG by make), a Royal Tech VCD machine, a Meko Gas Cooker, a wall clock, a blanket and two bed-sheets, being the property of the said **Florence Wangui Chege** – the said property being of the value of Kshs.19,500/= in cash.

The appellant faced the alternative charge of handling stolen property contrary to s.322(2) of the Penal Code; and the particulars were that he, on 20th August, 2006 at Kayole Estate aforesaid, otherwise than in the course of stealing, dishonestly retained a Video Deck LG by make, and a Royal Tech VCD machine knowing or having reason to believe them to be stolen property.

Before Principal Magistrate **Mrs. Nzioka**, the record of 24th August, 2006 shows,

“The substance of the charge and every element thereof has been stated by the court to the accused person who, being asked whether he denies the truth of every element of the charge replies: It’s true. I broke into [the dwelling house] and stole.”

The learned Magistrate entered a plea of guilty, and ordered that the pertinent facts be read out in a different Court. The matter was on the same day mentioned before District Magistrate **Mr. Kassam**, before whom the facts were read out on 28th August, 2006.

The facts were that, on the night of 19th August, 2006 at Kayole Estate in Nairobi, the complainant had locked up her house, before travelling to Nyeri. While she was away, the accused and others went to her house, broke in, and stole a video deck, a VCD machine, a cooker, a wall clock, a blanket and two bed-sheets – all valued at Kshs.19,500/=. The complainant later returned, only to find her house broken into. In the course of investigations, the accused was traced, and some of the stolen property found in his possession. Charges were then laid against the accused.

The response of the accused to this statement of facts was: “All the facts are true and correct”; and thereupon, the learned Magistrate convicted him on his own plea of guilty. The Court proceeded to convict the accused, under s.304(2) of the Penal Code, and to sentence him to a three-year term of imprisonment. The Court also sentenced the accused to a two-year term of imprisonment under s.279(b) of the Penal Code.

In the grounds of appeal it is acknowledged that the appellant pleaded guilty to the charge of burglary and that of stealing. He contends that he had not understood “the full context of the charge”; and that he is “now aware of the seriousness of the offence and entreat the Honourable Court for leniency.” He says he is remorseful and “deeply regrets the loss suffered by the complainant”. The appellant pleads that he has a family that wholly depends on him for subsistence, and who stand to suffer “as a result of [his] long incarceration.” He contends that the sentence imposed against him was harsh and excessive. The appellant asks the Court to review the sentence in favour of a non-custodial penalty.

Learned respondent’s counsel, **Mr. Makura** contested this appeal against sentence. But he urged that the learned Magistrate ha failed to indicate whether the two separate sentences imposed (one being three years, and the other being two years) were to run concurrently, or consecutively. He urged that sentences when cumulative, are presumed to run consecutively; s.37 of the Penal Code thus provides:

“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the Court directs that it shall be executed concurrently with the former sentence or any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence...”

Mr. Makura submitted that the sentences in this case were cumulative, and so should be presumed to run consecutively, the offence of burglary under s.304 carrying a maximum penalty of 10 years’ imprisonment, whereas breaking into a building and stealing, under s.279, carried a maximum penalty of 14 years’ imprisonment. Counsel urged that the three and two years’ of imprisonment awarded by the leaned Magistrate, taken consecutively, was not by any means harsh or oppressive. Counsel submitted that the appeal had not merit and should be dismissed.

Mr. Makura’s submission on the interpretation of s.37 of the Penal Code is, with respect, quite correct, and there is no basis for consolidating the penalty imposed as a concurrent prison term.

Consequently, I hereby dismiss the appellant’s appeal, uphold conviction, and affirm the two prison terms which shall run consecutively.

It is so ordered.

DATED and DELIVERED at Nairobi this 8th day of October, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mr. Makura

Appellant in person