REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 217 of 2006

MBULU MUSYIMI SUMBI…...…….....……..……. APPELLANT

-AND-

REPUBLIC…….……...RESPONDENT

(An appeal from conviction and sentence by Resident Magistrate D. Orimba on 27th January, 2005 in Criminal Case No. 113 of 2005 at Garissa Law Courts)

JUDGEMENT

The charge brought against the appellant was: house-breaking contrary to s.304(1) of the Penal Code (Cap.63). The particulars were that the appellant, on 23rd January, 2005 at about 10.55 a.m. in Garissa District within North Eastern Province, broke and entered the dwelling house of ***Dr. Joachim Mulwa*** with intent to commit a felony, namely theft.

On 27th January, 2005 the trial Court read and explained the charge to the appellant in Kiswahili. Certain inaccuracies are apparent on the face of the record: the Court hearing the matter is recorded as Githunguri; and the appellant's plea is typed as ***"it is not true"***; though in the hand-written version it is correctly shown as ***"It us true,"***

Upon the plea being taken, the prosecution set out the facts of the case, which are as follows. On 23rd January, 2005 at around 11.00 hours, the complainant left his house securely locked. He later received information from neighbours that his house had been broken into. The members of the public arrested the accused. The Police were called and visited the scene. Entry had been gained through the door. The accused was taken to the Police station, where a charge was preferred against him. The appellant agreed that those facts were correct, whereupon the prosecutor asked that he be treated as a first offender. In mitigation, the appellant prayed for leniency. He was then convicted on his own plea of guilty. The learned Magistrate then proceeded as follows:

"***The accused pleaded guilty to the offence. I have considered his mitigation. I have also taken note that he is a first offender. However the offence [he is] facing is a serious one which attracts a minimum of 10 years' imprisonment. I will use my discretion and sentence him to 10 years' imprisonment as provided …by law."***

In his grounds of appeal, the appellant contends that the trial Court failed to consider that he is a first offender; that he had pleaded guilty because the Police officers had induced him to do so; the sentence should be set aside and he be set free.

The appellant also had written submissions which he handed over to the Court. He contended that he had *not* pleaded guilty to the charge – but, as already noted, the not-guilty record was clearly a typographical error.

The appellant contended that he had been kept in custody for 25 days before being charged in Court – and that the alleged crime was committed while he was in custody, and so he could not be the thief. The appellant contended that even if he had committed the offence charged, then the sentence of 10 years' imprisonment was excessive.

Learned counsel ***Mrs. Kagir***i too noted that from the record, the appellant had pleaded guilty to the charge of house-breaking and burglary; and therefore, though he could appeal against sentence, he could not appeal against conviction. That is the correct position, with respect, as already stated herein. By virtue of s.348 of the Criminal Procedure Code (Cap.75) an appeal against conviction by one who has pleaded guilty is an incompetent appeal.

The State, however, conceded to the appeal on sentence. Learned counsel submitted that s.304 of the Penal Code (Cap.63) which penalises house-breaking and burglary, specified a penalty of *10 years;*

"***(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years."***

By recognised principle of construction, a term of imprisonment thus specified is a *maximum* term; but the learned Magistrate, as learned counsel rightly submitted, had erroneously thought the said 10 years was a *minimum* sentence. This, ***Mrs. Kagiri*** submitted, was a misdirection; and consequently, it was urged, "the appellant is right when he says [the sentence imposed against him] was harsh and excessive – especially for a first offender." Learned counsel asked the Court to exercise its powers to regularise the sentence.

Mrs. Kagiri noted that the appellant, by pleading guilty had saved the Court's time as well as other resources. Already, the appellant had been in custody for two years and a half – and counsel urged that this be taken into account.

Learned counsel contested the appellant's claim regarding the period during which he had been held in custody; before trial; the records show that the offence was committed on 23rd January, 2005, and the appellant was charged in Court on 27th January, 2005; and this showed, it was urged, that there was no undue delay in bringing the appellant to Court.

As the period during which the appellant was held by the Police does not, in all the circumstances, appear to have been *unduly long*, and it is not an issue that has ever been raised, I would hold that the said period has not occasioned a failure of justice towards the appellant.

The law is clear, that an appellant who has pleaded guilty before the trial Court and has been convicted, may not appeal against the conviction itself.

I therefore dismiss the appellant's appeal against *conviction;* but I uphold his appeal against *sentence*, set aside the 10-year term of imprisonment, and substitute it with a term of three-and-a-half years imprisonment counting from the date when he was first sentenced by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 18th day of September, 2007.

J. B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Tabitha Wanjiku

For the Respondent: Ms. Kagiri

Appellant in person