REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA
Criminal Appeal 59 of 2004
(Arising from Kimilili RM Case No. 629 of 2004)

REUBEN KAKAI KALOMBO……APPELLANT

VS
REPUBLIC……..……RESPONDENT

J U D G M E N T

Reuben Kakai Kalombo was convicted on his own plea of guilty to the offence of Burglary contrary to Section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code. He was then sentenced to serve 5 years in prison. He now appeals to this court to interfere with the order on sentence. He has listed 4 grounds of appeal in his petition dated 8th September 2004. The appeal is opposed by the state.

The sum total of these grounds of appeal is to the effect that the sentence is harsh and excessive. The learned Principal state counsel opposed this appeal on the ground that the same is not harsh nor excessive in view of the fact that the appellant is a serial thief. He further pointed out that the conviction in this appeal was the third one in a row.

I have considered the submissions made by the appellant in person and those of the principal state counsel. I have also perused the record of appeal. This appeal is only against the sentence. It is a well settled principle of law that an appellate court will not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors or it took into consideration some immaterial factors or it acted on the wrong principle or that the sentence is manifestly excessive in the circumstances of the case.The record shows that the appellant's mitigation was considered by the trial magistrate. The record also shows that the appellant was not a first offender. In fact he told the trial court that he had been convicted on two previous occasions for assault and theft.

The appellant does not complain that his mitigation was not considered. He says that the sentence was harsh and excessive. I have perused and examined the provisions of sections 304(2) and 279(b) of the Penal code, it is clear that the law provides a maximum sentence of 10 years and 14 years imprisonment respectively.The trial magistrate in fact gave a global sentence of 5 years without specifying which limb of the charge he was sentencing the appellant on. However this is a defect which is curable under Section 382 of the Criminal Procedure Code. I have arrived at the conclusion that the sentence of 5 years imprisonment is not harsh nor excessive. The final result is that the appeal has no merit. It is dismissed in its entirety.

I have already stated that the trial magistrate did not pronounce a specific sentence in respect of each limb of the charge. I will correct the anomaly under Section 354 (3) (a) (iii) of the criminal procedure code by setting aside the sentence of 5 years and substituting with it a sentence of 5 years imprisonment each under sections 304 (2) and 279 (b) of the penal code respectively. The sentences are to run concurrently from the date of sentence.

DATED AND DELIVERED THIS 24th DAY OF June 2005

J.K. SERGON

JUDGE