



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

CRIMINAL APPEAL NO. 6 'B' OF 2002

(From Original Conviction and Sentence in Criminal Case No. 103 of 2002 of the Senior Principal Magistrate's Court at Machakos: S. M. Kibunja, Esq. on 14.1.2002)

ALEXANDER MUEMA SAMMY ::::::::::: APPELLANT

VERSUS

REPUBLIC ::::::::::: RESPONDENT

J U D G E M E N T

The appellant herein was charged in the lower court with the offence of Burglary and Stealing contrary to section 304 (2) and 279 (b) of the Penal Code. The record in the lower court shows that the charge was read to the appellant in a language not indicated as the same is just indicated English/Swahili. He is indicated to have accepted the same and said it was true. The facts were narrated in a language not indicated and the appellants replies were also in a language not indicated. The appellant was convicted and sentenced to serve one year imprisonment and one stroke of the cane on each limb. The sentences were ordered to run consecutively.

The appellant has appealed to this court citing 5 grounds of appeal namely that the magistrate was wrong in convicting him on charges which were not proved beyond doubt, he was misdirected or misadvised by the prosecution to accept the charge so that he may be assisted to be placed on probation, the court rejected his mitigation, since he was a first offender. He asks the appellate court to consider the facts in his mitigation and either order a retrial or set him free. In his oral submission in court the appellant stated that his major complaint is that the sentence is long, his father died and he has a sick mother with brothers and sisters and he would like to go home so that he can fend for them. The state on the other hand submits that plea was properly taken and facts narrated disclosed an offence and a sentence of one year and 1 stroke of the cane is lenient.

In reply the appellant has stated that in prison the sentence indicated against him is 2 years imprisonment and two strokes of the cane. On the courts assessment of the facts herein and upon perusal of the record before the lower court I find that the language used to explain the charge to appellant is not indicated as it is just indicated Swahili/English. It was necessary for the Learned Trial Magistrate to indicate the language used to read the charge to the accused person. It should also have been indicated in which language the appellant gave his replies. Plea was not properly taken but as there is no complaint that the appellant did not understand the charges there is no miscarriage of justice. The conviction was therefore proper. As for the sentence it was made to run consecutively with no reasons given. Since the offence was one with two limbs, it was preferable that the imprisonment sentence do run concurrently unless if there

are special reasons and circumstances directing otherwise.

Herein there are no such reasons or special circumstances indicated. It was therefore not proper to order the sentences to run consecutively save for the strokes. There is therefore a genuine complaint. The appeal against conviction is dismissed. Appeal against sentence allowed. The order that the imprisonment sentence do run consecutively is set aside and it is substituted with one ordering that the sentences do run concurrently. The net result is that the appellant will serve one year imprisonment on each limb to run concurrently and one stroke on each limb which translates to one year and 2 strokes. Order accordingly.

Dated, read and delivered at Machakos this 16th day of July, 2002.

R. NAMBUYE

JUDGE