Ireri v Republic (Criminal Appeal E048 of 2024)
[2025] KEHC 4218 (KLR) (2 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4218 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E048 OF 2024

RM MWONGO, J

APRIL 2, 2025

BETWEEN

DUNCAN KIVUTI IRERI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. S.K Ngii (PM) in MCCR No. E652 of 2023 delivered on 19th March 2024)

JUDGMENT

Background

1. In the lower court the appellant faced 3 counts as follows;

    1. House breaking contrary to section 304(1) of the *Penal Code*. Particulars are that on 06th August 2023 at Kariru village in Kiang'ombe location, Mbeere North sub-county within Embu County, the appellant broke and entered the building used as a dwelling house by Agata Wangari Mubato with the intent to commit a felony namely stealing.

    2. Stealing from a dwelling house contrary to section 279(b) of the *Penal Code*. Particulars are that on 06th August 2023 at Kariru village in Kiang'ombe location, Mbeere North sub-county within Embu County, the appellant stole 96Kg of beans valued at Kshs.15,840/= and a mobile phone make H-Mobile valued at Kshs.1,500/=, cumulatively valued at Kshs.17,340/=, the property of Agata Wangari Mubato from her dwelling house. For this charge, there was an alternative charge of handling stolen goods contrary to section 322(1) and (2) of the *Penal Code*. Particulars of the alternative charge are that on 07th August 2023 at Kariru village in Kiang'ombe location, Mbeere North sub-county within Embu County, otherwise than in the course of stealing, the appellant dishonestly retained 30Kg of beans valued at Kshs.4,950/=

and one mobile phone make H-Mobile valued at Kshs.1,500/= knowing them to be stolen goods the property of Agata Wangari Mubato.

3. Stealing stock contrary to section 278 of the *Penal Code*. Particulars are that on 06th August 2023 at Kariru village in Kiang'ombe location, Mbeere North sub-county within Embu County, the appellant stole one cock valued at Kshs.1,000/= the property of Agata Wangari Mubato.

2. After hearing seven (7) prosecution witnesses and the defendant, the Court found the appellant guilty of the first and second counts. He was sentenced to 2 years and 5 years imprisonment, respectively; the sentences to run consecutively. He was acquitted of the 3rd charge.

The Appeal

3. Dissatisfied, the appellant filed this petition of appeal dated 26th March 2024, seeking the setting aside of the conviction and sentence. The appeal is premised on grounds that:

1. The learned trial magistrate erred in law and fact by relying on prosecution evidence which failed to prove the ingredients to the required standard;

2. The learned trial magistrate erred in law and fact by relying on the riddled narrative which was enough to displace the case;

3. The learned trial magistrate erred in law and fact by misleading himself and failing to consider the irregularities and illegalities occasioned;

4. The learned trial magistrate erred in law and fact by rejecting the appellant's defense without giving cogent reasons; and

5. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant to a harsh and excessive sentence.

The Prosecution Case

4. PW1, the complainant, stated that she returned from church to find that her food store had been broken into and 3 types of beans stolen. She had also left a phone charging in the house where the beans were, and the phone was also missing. Later in the evening, she noticed that her red cock was also missing. She reported the matter to the police who encouraged her to help them find the thief. One Nancy Njue informed her that the appellant was the thief and he was at Soko Mjinga where he had been accosted by members of the public.

5. She was informed by Kelvin Kimanthi that he had seen the appellant going towards the complainant's home with a hammer and shortly afterwards, there was a bang. Kelvin told them that he witnessed the appellant carrying beans away from the complainant's home. He led them to where the stolen beans were hidden in a thicket and PW1 managed to identify them according to the storage bags she had used. The lost phone was recovered in the appellant's home.

6. PW2 was Kelvin Kimanthi who was arrested alongside his uncle, the appellant. He stated that on 06/08/2023 he saw his uncle, the appellant, going towards the complainant's house with a hammer, and soon afterwards, he heard a banging sound. He saw the appellant remove first, one, then a second gunny bag, and took them to a nearby thicket. Later, his uncle returned home with some beans which he sent PW2 to sell on his behalf. From the sale, he got Kshs.800/= which he took to the appellant. Later that day, he was arrested by the Chief together with the appellant. That is when he showed them where the beans were hidden in a thicket.

7. In cross-examination, he stated that he did not report the incident at first because the appellant threatened to beat him and he was known to have violent tendencies. He denied seeing any phone, and stated he was not there when items were recovered from the appellant's house. He did not know that the beans he had been sent to sell were part of the beans that the appellant had stolen from the complainant.

8. PW3 was Moses Njue Namu a farmer. He stated that the Chief told him about the report made by the complainant. He was with the Chief when the appellant and PW2 were arrested and PW2 confided in him that the stolen items were hidden in a thicket. They went to the hide-out and recovered beans packed in 2 gunny bags. Later, the Police came and they recovered the stolen phone at the home of the appellant.

9. PW4 was Esteria Wanjigi Mundigi, the Assistant Chief Kariru sub-location. He stated that the complainant reported to her that her house had been broken into and some items stolen while she was away. She gathered intelligence on the issue and found the suspects to be the appellant and PW2. She went to the thicket indicated by PW2 and found three packages of beans. Both PW2 and accused were arrested at a shop playing table pool. A search of the appellant's home revealed that he had some beans although he was not known to engage in any farming activities. They also found the stolen phone in the appellant's house The items were collected as exhibits in the case.

10. PW5 Boniface Nthia Ireri, was a village elder in Kigwachari village. He stated that the complainant made a report which he investigated. He then assisted with arresting the appellant and PW2 as suspects. PW2 told him that he had been given some beans by the appellant to sell and return the proceeds of the sale to him. PW2 showed them where the stolen beans were hidden and they were recovered as exhibits. When the police came, he accompanied them to accused's house. The stolen phone was recovered from the appellant's house.

11. PW6, CPL Paskware Ireri was the investigating officer in the case. He stated that PW4 informed him of the incident and that the appellant and PW2 had been arrested as suspects. The stolen beans had been recovered as exhibits (PMFI 2) and he produced them as P.Exbs 2 - 4. The phone recovered as (PMFI 1) was produced as P.Exhb1. All these items had been handed over to the police. The appellant was placed in police custody and charged with the offence.

Defence case

12. The trial court found that the appellant had a case to answer and he was placed on his defense. In his defense, he stated that he was being framed for the charges because of an existing land dispute between him and his step brother. He said that he found goats belonging to his step brother and the complainant in his miraa farm, and he removed them. The duo then threatened to have him imprisoned.

13. He stated that PW2 had gone to his house severally and at some point, PW2 gave him a phone saying that he wanted to sell it at Kshs.700/- to raise money to go to Nairobi. The appellant took the phone and kept it in his house since he did not have money to pay for it immediately. Later, he was surprised when he got arrested, with PW2 helping the authorities. He said that he knew nothing about the beans but some beans were allegedly recovered from his house. It was his case that all the people involved in investigating the case and arresting him had differed with him over land.

Submissions

14. Parties filed submissions on the appeal as directed by the Court.

15. The appellant submitted that the phone's identity was only given by its model and no specific IMEI number was provided. Further, that no inventory of the exhibits was made or produced as evidence. That none of the prosecution witnesses saw him committing the offence, besides PW2 whose testimony should be discredited. He submitted that the trial court did not consider the provisions of section 333(1) and (2) of the *Criminal Procedure Code* and he ordered that the sentences run consecutively. He urged the court to re-evaluate the evidence and allow the appeal.

16. The respondent submitted that the ingredients of the offence were proved beyond reasonable doubt. That the court should consider and apply the doctrine of recent possession as set out in the case of Athuman Salim Athuman v Republic [2016] KECA 697 (KLR). That the offence the appellant was convicted of arose from the same act, thus the sentences imposed should remain to be served concurrently.

Issues for Determination

17. The issues for determination are:

    1. Whether or not the offences in the first and second counts were proved beyond reasonable doubt; and

    2. Whether the sentences imposed should be upheld, and if so, should they run concurrently or consecutively?

Analysis and Determination

18. As a first Appellate Court, this court is tasked with re-evaluating the evidence adduced at trial and making its own finding. In so doing, it must bear in mind that the trial court had the opportunity to see the witnesses testifying, an advantage that this court lacks. This was echoed in the case of Okeno vs. Republic [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> "....It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

19. The appellant was convicted of 2 offences arising from the same incident. The offences arise from Sections 304 and 279(b) of the *Penal Code* which provide:

> " 304. 304. (1) Any person who -
>
> (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
>
> (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

279. If the theft is committed under any of the circumstances following, that is to say -

(a ....;

(b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;....

the offender is liable to imprisonment for fourteen years"

20. PW1 testified that she was away in church and upon her return she found out that the house where she kept her food had been broken into. She discovered that some 95kgs of beans and a phone which she was charging in the said house had been stolen. The appellant and PW2 were arrested in connection with this incident.

21. PW2 testified that he saw the appellant leaving his house with a hammer and he went towards the complainant's house. Soon afterwards, he heard a banging sound and then he saw the appellant carrying some bags into a thicket nearby. PW3, PW4 and PW5 who are members of the local administration are the ones who accosted the appellant and with the help of PW2, they recovered the stolen beans from a thicket near his house and the phone from his house.

22. In his defense, the appellant told the trial court that he had a somewhat complicated relationship with his nephew, PW2, who had taken his house key earlier on the day of the incident. He said that there is an existing land dispute between him and his step brother and that the complainant took advantage of that dispute to implicate him. He denied any knowledge of the beans recovered from near his house in the thicket. As for the phone that was recovered from his house, he stated that PW2 brought it to him intending to sell it to raise money for his journey to Nairobi. He said that since he did not have money to buy the phone immediately, he kept it in his house and would pay PW2 later. That is how the phone was found in his house.

23. From the available evidence, PW2 was a key witness, whose evidence the trial court relied heavily upon. He testified that he had seen the appellant go to the complainant's house. He heard a bang. He saw the appellant carry out sacks to a thicket. It was also from PW2's information that the stolen items were recovered from the places and in the manner he had specified. Those items were produced as exhibits in court. Considering the appellant's defense, nothing he said displaced the prosecution's evidence in any way. The prosecution proved the 2 counts of breaking in and stealing against him beyond reasonable doubt.

24. On the issue of sentence, the provisions of section 304 and 279 cited above, prescribe sentences to be imposed where a conviction is reached. In the first count, the trial court sentenced the appellant to 2 years imprisonment although section 304 of the *Penal Code* prescribes 7 years imprisonment. For the second count, the trial court sentenced the appellant to 5 years imprisonment although section 279 of the *Penal Code* prescribes 14 years imprisonment.

25. The trial court considered that the appellant was a first offender who also offered mitigation that persuaded that court to depart from the prescribed sentences. The court noted the time spent in custody pending trial and the prevalence of these offences in the region before sentencing the appellant. The trial court exercised its discretion in sentencing the appellant and applied sentences that are more lenient than those prescribed.

26. This does not mean that the trial court erred at all. Rather, it shows that leniency was already exercised and the sentences imposed are, thus, not excessive. The appellate court can only set aside a sentence that was imposed without regard to the laid down principles of sentencing in law. In the case of Ogalo Son of Owuor v. Republic (1954) 21 EACA 270 it was stated as follows:

> " The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364."

27. The trial court ordered that the sentences imposed should run consecutively. The appellant has taken issue with this. However, Section 14 of the *Criminal Procedure Code* provides thus:

> " (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently."[Emphasis added]

28. The trial court correctly stated how the sentences would run. This expression is well within the law as cited hereinabove.

29. In his written submissions, the appellant also faulted the trial court for failing to consider time spent in custody pending trial according to section 333(1) and (2) of the *Criminal Procedure Code*. During sentencing, the trial court considered time spent in custody pending trial, hence the sentence complies with section 333(2) of the *Criminal Procedure Code*.

30. According to the court record, the appellant took plea on 08th August 2023 and on the same day, the court ordered that he be released on bond of Kshs.100,000/= with a surety of a similar amount. However, he was committed to remand where he remained until the judgment and sentencing. He was convicted through the judgment of the trial court delivered of 19th March 2024 and sentenced 1 month later of 19th April 2024. For clarity, the time spent in custody pending trial and sentencing makes a total of 256 days. The appellant is entitled to the benefit of having those days reduced from the sentences imposed by the trial court.

Conclusions and Disposition

31. In light of the foregoing, I find that the conviction was correctly entered as the evidence proved the offence beyond reasonable doubt. On this, the appeal fails.

32. On the sentence, the trial Court cannot be impugned as to the sentences meted for each count or from the fact that they were expressed to run concurrently. In this regard, the appeal also fails as each offence has a different punishment.

33. However, although the trial Court indicated it "had [taken] into account time spent in custody pending trial," this fact was not reflected in the duration of the sentences imposed.

34. Section 333 (2) of the CPC reads as follows:

> " Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" [Emphasis added]

35. Whilst it is clear that every sentence commences from the date is pronounced, there are exceptions otherwise indicated elsewhere in the CPC. The Proviso obliges the Court issuing the sentence to take into account the time the accused spent in custody prior to sentencing.

36. The import of this obligation on the Court means that whilst generally a sentence commences on the day it is pronounced, credit must be given to the accused for the time he or she spent in prison prior to imposition of the sentence. The practical effect is that the time the sentence commences must, in applying the proviso to Section 333, be backdated to accurately reflect the time spent by the accused in custody prior to being sentenced.

37. Ideally therefore, the warrant committing the accused into prison must indicate the date when sentence is deemed to commence in light of the proviso to Section 333(2), where such time is taken into account. If such time is not stated clearly, the accused may suffer double jeopardy by being incarcerated under a sentence commencing from the date of the sentence, which denies the accused the benefit of being credited the time spent in pre-sentence custody.

38. In this case, the Court found that 256 days were spent in custody. However, the committal warrant does not indicate that the 256 days of time spent in remand custody has been taken into account for purposes of commencement of the appellant's sentence.

39. Accordingly, for clarity it is hereby determined that the appellant's sentence is deemed to have commenced on 07/08/2023 which takes into account the 256 days he spent in pre-sentence custody.

40. In all other respects the appeal is dismissed.

41. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 2ND DAY OF APRIL, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Appellant present at G.K Prison Mwea

Ms. Nyika for the Respondent

Francis Munyao - Court Assistant