



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO.67 OF 2018

PINEAS KOOME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in Nanyuki CM Criminal Case No 9 of 2016 – E Ngigi, SRM)

J U D G M E N T

1. The Appellant herein, **PINEAS KOOME**, was convicted after trial of five (5) offences, as follows –

- CountS I and IV: ***Burglary and stealing*** contrary to

sections 304(2) and 279(b) of the

Penal Code.

- CountS II and III: ***Shop breaking and committing a***

felony therein contrary to **section**

306(a) of the Penal Code.

- Count V: ***Having suspected stolen property***

contrary to **section 323** of the Penal

Code.

All these offences were alleged to have been committed variously between 19th and 31st December 2015 at Ngusishi Centre in Timau, Meru County jointly with others not before court. Various household electronics and other items as listed in the particulars of the offences were stolen.

2. On 18/05/2018 the Appellant was sentenced as follows –

Count I: 7 years imprisonment on each limb of the offence, to run concurrently.

Count II: 5 years imprisonment

Count III: 5 years imprisonment

Count IV: 7 years imprisonment to each limb of the offence, to run concurrently.

Count V: 2 years imprisonment.

The trial court further directed that the terms of imprisonment in each count shall run consecutively. That means that the Appellant would serve a cumulative sentence of twenty-six (26) years imprisonment.

3. The Appellant has appealed against both conviction and sentence. In his petition of appeal he raised the following grounds –

- (i) That, in effect, the charges were duplex.
- (ii) That there was no direct evidence linking the Appellant to the offences.
- (iii) That the charges were not proved beyond reasonable doubt.
- (iv) That the sentences were illegal or otherwise manifestly harsh and excessive.

In amended grounds of appeal subsequently filed the Appellant added the following grounds –

- (v) That Counts I and IV were incurably defective for duplicity.
- (vi) That the trial court failed to consider the Appellant's defence.

The Appellant filed written submissions, which I have read and considered.

4. Learned counsel for the Respondent supported all the convictions. He submitted that all the charges were proved beyond reasonable doubt.

5. I have read through the record of the trial court in order to evaluate the evidence tendered and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.

6. Let me first of all deal with the complaint that Counts I and IV were duplex. In Count I, the offence is burglary and stealing contrary to sections 304(2) and 279(b) of the Penal Code. The particulars were that the offence took place in the night of 19th and 20th December 2015 at Ngusishi Centre of Timau Area in Meru County. The dwelling house burglarized belonged to one PETER TAMBORI. One TV set make LG, one remote control and one USB, all valued at KShs 7,000/00 were stolen.

7. The offence in Count IV was also burglary and stealing contrary to sections 304(2) and 279(b) of the Penal Code. However, this offence, though committed in the same locality, was in the night of 30th and 31st December 2015. The dwelling house burglarized belonged to one ROBERT RUKUNGA. Cash KShs 3,000/00, a mobile phone and other items, all valued at KShs 10,000/00 were stolen.

8. Clearly, though the offences in Counts I and IV were similar, being burglary and stealing, they were separate and distinct offences committed at different dwelling houses belonging to different owners and on different nights. There was no duplicity at all.

9. In Counts I, II, III and IV, indeed there was no direct evidence of the Appellant's participation in the burglaries and shop-braking. The Appellant was convicted upon evidence of his possession of recently stolen goods. These were goods recently stolen from the dwelling houses and shops variously of PW1, PW2, PW3, PW4 and PW5. These goods were found in the possession of the Appellant in his own house. The complainants positively identified the goods as belonging to them.

10. The Appellant laid no claim to the goods but offered no plausible explanation of his possession of them. The trial court properly rejected the story that he had concocted regarding PW1's television set and torch. Without a plausible explanation of his possession of recently stolen goods, there was a presumption that he was one of the persons who burglarized the dwelling houses and shops of the complainants and stole the various goods therefrom. He was properly convicted.

11. Regarding Count V, though no complainant claimed the items in the particulars of that offence, the Appellant, who had just been found in possession of many recently stolen goods, offered no plausible explanation of his possession of them. Some of the items were not ordinary household goods, being medical/surgical items that would ordinarily be found in a clinic or hospital. The goods were reasonably suspected of having been stolen, and the Appellant was properly convicted in that count as well.

12. In the result, and upon my own evaluation of the evidence, I find that the Appellant was convicted in all five counts upon good and sound evidence. The convictions are safe. There is no merit in the appeal against conviction, and the same is hereby dismissed.

13. As for sentence, a cumulative sentence of 26 years imprisonment for offences of this nature, is without doubt manifestly harsh and excessive in the circumstances. Though the offences were committed on different nights, nevertheless they were successive nights, and they were all in the same locality. The trial court of course had discretion under **section 14(1)** of the *Criminal Procedure Code, Cap 75*, which it exercised the way it did. That discretion however, is curtailed to some extent by **subsection (3) (a)** of the same section, to the effect that the cumulative or aggregate imprisonment should not amount to more than fourteen (14) years. In this case it amounted to 26 years, clearly illegal.

14. I hold that the ends of justice will be met in the present case by all the sentences meted out to the Appellant running concurrently. I will therefore set aside the order of the trial court that the sentences in each count do run consecutively, and substitute therefor an order that those sentences do run **concurrently**. It is so ordered.

15. To re-cap, the Appellant's appeal against conviction is dismissed; all the five convictions are upheld. The appeal against sentence succeeds to the limited extent explained above.

DATED AND SIGNED AT NANYUKI THIS 21ST DAY OF JULY 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 22ND DAY OF JULY 2021