REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 25 OF 2019

ABDI AZIZ MAALIM...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence in the

Senior Resident Magistrate Court at Hola Criminal Case No. 337 of 2016

by Hon. A.P. Ndege (PM) dated 16th March *2017)*

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

JUDGEMENT

The appellant was charged with burglary contrary to section 304(2) and stealing contrary to section 279(b) of the Penal Code. The particulars of the offence was that on the night of 9th December 2016 at around 0400Hrs at Bura Manyatta in Tana North Sub-County within Tana River County with others not before the court broke and entered into a dwelling house of **Annastacia Njeri Maina** with intent to steal therein and did steal from therein Ksh. 1,000/-, one handbag valued at Ksh. 1500/-, identity card no. 23233174, 2 mobile phones, techno Txxx S/No. xxxx and Techno H6 S/No. xxxx valued at Ksh. 1,500/- and Ksh 10,500/- respectively, one woofer make golden Tech S/No. A.256 USR valued at Ksh. 4,500/-. All valued at Ksh. 19,000/- the property of **Annastacia Njeri Maina.**

He was charge with an alternative count of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the penal code. The particulars of the offence were that on 9th December 2016 at 6:30 am at Bura Manyatta within Tana North Sub-County within Tana River County, otherwise in the course of stealing, he dishonestly retained 1 identification card No. xxxx and Tecno Txxx S/No. xxxx the property of Annastacia Njeri Maina.

At the end of the trial, the appellant was convicted and sentenced to 5 years imprisonment for the offence of burglary and 7 years imprisonment for the offence of stealing both sentences to run concurrently. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:

1. **That the learned trial Magistrate erred in law and fact by ...**

2. **That the learned trial Magistrate erred in law and fact by ...**

3. **That the learned trial magistrate erred in law and fact by ...**

4. **That the learned trial Magistrate erred in law and fact by ....**

Evidence

(PW1) Anastacia Njeri Maina the complainant testified that she had been away to Nairobi for studies since 23rd October 2016 and returned home on 8th December 2016. When she arrived home on the 8th December 2016 she met the appellant, who was her neighbour for a long time, seated on the corridor. The appellant told her that he was the one taking care of the house while she was away and he wanted to be paid, and if she did not pay she would see. It was (PW1's) evidence that at around 4:00am she had footstep in the table room. She peeped and saw someone with a torch at the wall unit. Out of fear and shock she went back to bed. When she heard the intruders had left she called her neighbour and the police.

It was her testimony that her neighbour arrived with his wife and son and knocked on the door. After she opened the door for them she went to the sitting room where she discovered that her woofer and a large handbag which contained two Tecno phones (H6 and a smartphone), a bible, documents from school, cosmetics and a small handbag with her National I.D No. xxxx were missing. She testified that she suspected the appellant was the intruder since he had threatened her the previous day.

The police arrived at around 5:00am and started their investigations. They went in search of the appellant whom they found jumping over a fence and they arrested him. It was her further evidence that the police searched the appellant and recovered (PW1's) identification card and a padlock in his pockets. The Appellant then took them somewhere in the homestead where they recovered one of the complainant's mobile phones. They then went to the police station where PW1 recorded her statement. She further stated that the appellant refused to produce the other statements.

(PW2) Peterson Njuguna testified that on 9th December 2016 at around 5:00am the appellant woke him up asking him to buy traditional liquor so that they could drink together but he declined and the Appellant left. He stated that the Appellant had a large bag on his shoulder that appeared to be heavy but he could not see the bag clearly as it was partly dark. At around 8:00am PW2 met police officers who were doing investigations and he confirmed that he had met the Appellant. He went and recorded his statement at the police station. PW2 further testified that the Appellant was not a stranger as he had known him for almost 12 years.

(PW3) No. 51664 CPL Peter Mwangi from Bura Police Station was the investigating officer (I.O). It was his evidence that on 9 th December 2016 at around 4:00am he received a call that PW1's house had been broken into. He went to the scene of crime at around 5:00am where they carried out their investigations and established that the intruders had passed through a small opening near the bathroom.

They then went to Kambi Moto where they met with (PW2) who informed them that he had seen the Appellant with a brownish bag. It was the I.O's evidence that they caught the appellant at his sister's place, which was next to the complainant's compound. They did a quick search on the Appellant and recovered the identification card of the complainant (P.Ex1). The Appellant then took them to an incomplete building where he retrieved a mobile phone (P.Ex2) which the complainant confirmed was hers. (PW3) stated that the appellant refused to show them where the other items were. They took the appellant to the station and recorded statements.

The I.O retrieved receipts for the stolen items from the complainant. He produced two receipts for the Tecno phones as (P.Ex 3) and (P.Ex4). He also produced the receipt for the Goldentec woofer as (P.Ex5).

At the close of the prosecution case, the trial court found that a prima facie case had been established and the appellant was placed on his defence.

The appellant was sworn in and he testified that the complainant, who was his neighbour gave her some work. She then left before Christmas and promised to pay him once she came back. When the complainant returned he asked her for his payment on two occasions but the complainant told him to come back later. It was his evidence that he spent the night drinking and when he returned to the plot in the morning he found the house open. He proceeded to take the items but he did not intend to steal from her but he was drunk. He stated that he went to demand for his right.

Submissions

Appellant's written submissions

The Appellant relied on his written filed on the 13th March 2021. He submitted that the prosecution case was riddled with contradictions in the evidence adduced and relied on **Benjamin Bundeh Gardh v R CR. App No. 90 of 1983** and; **Augustin Njoroge Ritho And Another v R CR. App No. 99 of 1986** for the contention that contradicted and inconsistent evidence was unreliable and could not lead to a conviction. He faulted trial Magistrate for listing irrelevant items in the list of exhibits denying him his right to a fair trial.

It was the appellant's submission that the trial Magistrate did not consider his sworn defence and cited **Oketh Okale v R (1965) EA 555** in support of his submission. The appellant further submitted that the sentence without the option of a fine was harsh considering that he was a sickly person who needed constant medical attention. Lastly, the appellant submitted that he was not assigned an advocate to represent me in violation of his constitutional right under Article 50(2) of the Constitution.

Respondent's submissions

Mr. Okaka for the respondent relied in his written submissions dated and filed on 22nd February 2021. It was his submission that the conditions of a plea of drunkenness under section 13 of the Penal Code had not been met as stated in **Kupele Ole Kitaiga v R (2009) eKLR**. It was submitted that there was no evidence to show that the appellant was intoxicated, accidentally intoxicated or if intoxicated, he did not know what he was doing. It was further submitted that the appellant knew what he was doing and that intoxication was not a mitigating factor.

On sentence, counsel submitted that the court in **Wanjema v R (1971) EA 493** laid down the principles upon which an appellant court could interfere with sentence of a trial court. He contended that in the instant appeal, the appellant was a habitual offender with three past convictions therefore the custodial sentence was just and sound and the trial court could not be faulted.

Mr. Okaka further submitted that the court took into consideration the fact that the appellant was asthmatic and urged that the correctional facilities were equipped with competent personnel to handle the Appellant's health status.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R [1972] EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the appellant.

There is no contention that the complainant's items were stolen from her house on 9th December 2016. It was her testimony that on the night of the incident at around 4:00am she heard someone in her house. She took a peek and confirmed that there was someone in her table room. It was her evidence that when the intruder left she called her neighbour who came to her house. She went into the table room where she found that her woofer and her handbag containing her National Identification card, two phones among other items were missing. PW3, produced the receipt of the phone recovered as proof that it belonged to the complainant.

It is also not in dispute that the appellant was the one who broke into the house and stole the items. **(PW1)** stated that she was suspicious of the appellant after he threatened her with unknown consequences the previous day if she did not pay him for allegedly watching the house when she was away. **(PW3),** the investigating officer, arrested the appellant at his sister's house and the complainant's National Identification Card was retrieved from the back pocket of his trouser. The appellant then took **(PW3)** to an abandoned building where he recovered one of the complainant's phone.

The importance of establishing the ownership of the house where stolen goods are recovered was highlighted in the case of **Dan Imbiri Agoi & 2 others v R [2019] eKLR** where **Musyoka J** stated that:-

> **"...It was said in Boniface Gitonga Muchira & another vs. Republic [2013] eKLR, that the ownership of the house where stolen goods are recovered as critical for it provides an essential link between accused person and the goods allegedly recovered. It would also eliminate the possibility that the goods were in the custody or possession of persons other than the accused. See also James ole Silanga vs. Republic [2010] eKLR...It was critical in the circumstances to obtain further evidence as to who owned the particular house where those recoveries were made as that was the only way to link the 2nd appellant to it."**

Additionally, the appellant in his testimony admitted that he took the items from the complainant's house. He stated that when he went into the homestead, he saw the appellant's house was unlocked, he then went and took the items to claim what was rightfully his. Even during the hearing, the appellant never disputed the evidence of the complainant and the investigating officer as he chose not to cross-examine them.

The only issue is whether the defence of intoxication is applicable to the appellant. It was his defence that he was drunk the whole night and it was not his intention to steal from the complainant but was taking what was rightfully his.

Intoxication as a defence to a criminal charge is provided for under **Section 13 of the Penal Code** which states as follows:

> **"13. (1) Save as provided in this section, intoxication <u>shall</u> <u>not</u> constitute a defence to any criminal charge.**
>
> **(2) Intoxication <u>shall be a defence</u> to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of <u>did</u> <u>not know that such act or omission was wrong or did not know what he was doing and</u> -**
>
> > **(a) <u>the state of intoxication was caused without his consent by the malicious or negligent act of another person</u>; or**

(b) <u>the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission</u>.

3. Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

4. Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

***5.* For the purpose of this section, "intoxication" includes a state produced bynarcotics or drugs."** *(Emphasis added).*

The Court of Appeal in **Roba Galma Wario v R [2015] eKLR** stated that:

"Though provided by law, it is clear that the defence of intoxication is very narrow in its application. S. 13(4) of the Penal Code should not be read in isolation. It should be read within the confines of Sections 13)(1),(2)(a)&(b). The learned Judge considered this defence in her judgment. Was the appellant so drunk that he was driven to temporary insanity? Or was the appellant so drunk that he did not know what he was doing? The learned Judge considered both instances and in citing the case of Manyara v R, (supra) she was well aware that the burden of proof remained on the prosecution in the latter case. She determined that the prosecution had succeeded in proving its case. In the former case, she held that the appellant had done nothing to show insanity due to intoxication."

In the present case, appellant states that he was drunk and it was not his intention to drink, however none of the witnesses stated he was drunk. **(PW3),** the investigating officer who was also the arresting officer never stated that the appellant was drunk and the appellant never put the question to him. Further, **(PW2)** who the appellant woke up in the wee hours of the morning testified that the appellant was not drunk but in fact he wanted **(PW2)** to purchase tradition liquor so that they could drink together. There is no evidence that the appellant was drunk on the day of the offence.

Even if it is assumed that the appellant was drunk it was his testimony that he noticed the appellant's door was open. He went into the house and took the items. He then went and hid one of the phones at an incomplete building from where he retrieved it after he was arrested. The actions of the appellant are not synonymous with some so who was so intoxicated that he was temporarily insane. From the unrebutted evidence of the complainant that the appellant had threatened to take an unspecified action against her, it is probable that the appellant had formed the intention to steal things considering that the offence occurred in less than a day after the threat.

Based on the preceding, it is quite evident that the appellant's defence of intoxication does not hold up to the standards set out in Section13 of the CPC and cannot therefore be relied as a shield from the consequences of his misdeeds. Quite rightly, the Court of Appeal in the case of **Kupele Ole Kitaiga V R [2009] eKLR,** pronounced itself thus:-

"<u>A clear message must also go out to those of the</u> appellants' ilk who deliberately induce <u>drunkenness as a cover up for criminal acts.</u> Unless a plea of intoxication accords with the provisions of section 13 of the Penal Code it will not avail an accused and does not avail the appellant in this particular case." *(Emphasis added).*

The appellant submitted that his right to a fair trial was infringed as he was not assigned an advocate. In **Kanyoike Ntuma v R [2018] eKLR** I stated that:-

"The question which arises is whether lack of a legal representation in this case is sufficient to warrant this court to vitiate the trial and order for an acquittal of the appellant. The issue as to the constitutionality right to legal representation has been briefly alluded to in this analysis of this appeal. To me right to counsel under Article 50 (h) is not really an option when it comes to the administration of criminal justice.

In practical terms with the legislation on legal aid in place courts should now take a pragmatic approach in safe guarding the rights of an accused person on right to counsel during the trial of a case where substantial injustice may result.

Given this background, I have been able to peruse and appraise the entire record and the conduct of the case between the prosecution and the defence. I find no evidence to warrant this court to quash the appeal on grounds that the state failed to provide legal representation. The appellant understood the charge and was able to challenge it by way of cross-examination of the prosecution witnesses. I find no miscarriage of justice in the entire trial."

In the present case, the record clearly shows that the appellant understood the charges before him. On several occasions he accepted the charges as pleaded but always stated that he was drunk. During the hearing, he only chose to cross-examine **(PW2)** and did not pose any questions to **(PW1)** and **(PW3).** He was able to offer mitigation. The appellant has been convicted three time previously. He is not a stranger to the criminal court process and therefore he understands how the court functions. I find no miscarriage of justice in the entire trial process.

On sentence, it is well established that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances as was emphasized by the Court of Appeal in **Ahamad Abolfathi Mohammed & another v R [2018] eKLR** where it stated:-

"As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will

normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000 this Court stated thus:

It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. (See also Wanjema v. R [1971] E.A 493)."

The appellant was convicted of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code and was sentenced to 7years and 5 years imprisonment respectively and the sentences would run concurrently. The offences carry a maximum period of imprisonment of 14 years and 10 years respectively. I must confirm from the outset that the sentences on both counts were lawful and within the discretion of the court. The only question is whether in the face of the facts before it the sentence was excessive and manifestly harsh.

From the trial court records, the prosecution informed the court that the appellant had three previous convictions. One of his previous convictions was on a charge of stealing. He was a habitual offender. The appellant in mitigation told the court that he had Asthma and he had suffered in remand.

It is clear to the court that the appellant is a habitual offender and despite three previous lenient sentences he does not seem to learn his lesson. The objectives of sentencing are outlined in the 2016 Judiciary of Kenya Sentencing Policy Guidelines at page 15, paragraph 4.1 as follows:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

The appellant has refused to be rehabilitated and keeps being at loggerheads with the law. What the appellant requires is a sentence that would deter him from committing further crimes, to provide retribution and to protect the community from a habitual offender. With regard to the appellant's ailment the Trial Magistrate commented that the appellant had medicines.

Clearly the appellant's condition can be kept in check by the use of medicines. He does not need any specialized medical attention. I am sure that if the appellant finishes medicines, he can be assisted by the prison officials and if need be rushed to hospital.

In the circumstances of this case, I find that the trial Magistrate correctly exercised his judicial discretion in sentencing the appellant. I find that both the conviction and sentence were not harsh or excessive.

In the upshot, having evaluated all the evidence on record, it is my finding that the main charge was proved beyond reasonable doubt that the appellant was the culprit. I find no merit in the appeal and consequently dismiss it forthwith.

Orders accordingly.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 AND DISPATCHED VIA EMAIL ON 15TH DAY OF SEPTEMBER 2021

....

R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant

2. Mr. Mwangi for DPP