



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO 77 & 79 OF 2019

EVANS SIMIYU.....1ST APPELLANT

FRED WANYONYI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original sentence in criminal case number 247 of 2019

in the Senior Principal Magistrate's Court at Webuye)

JUDGMENT

1. This is the first appeal of Fred Wanyonyi who was jointly charged with Evans Simiyu, with the offences of Burglary contrary to **section 304(2)** and stealing contrary to **section 279(b)** of the **Penal Code**. The first Appellant was also charged with Handling Stolen Goods Contrary to **section 322(1)** of the **Penal Code**. The two Appellants were convicted on the main charges by Senior Resident Magistrate Hon N.N. Barasa of Webuye on their own pleas of guilty. They were each sentenced to serve 4 (four) years imprisonment.

2. The appeal is against sentence only and not conviction. Two sets of mitigation have been filed in the appeal. One set is by one Evans Wafula Nyongesa who does not appear to be the same as Evans Simiyu who was the second Appellant's co accused in the Lower court. His mitigation indicates that he was sentenced to a term of three (3) years imprisonment by Senior Resident Magistrate G.P. Omondi of Bungoma. It is therefore likely that the mitigation in relation to Evans Wafula Nyongesa belongs to a different appeal file and was misfiled in this file. In any case the said Evans Simiyu was not present at the hearing of the appeal and was said to have escaped from custody.

3. This appeal is therefore only in respect of the Appellant Fred Wanyonyi. In his mitigation the Appellant states that he is remorseful and regrets having committed the offence. He also states that he has acquired some workmanship skills and prays for leniency and further that the remaining period of his sentence be converted into a noncustodial one.

4. The appeal was opposed by the ODPP on grounds that the Appellant pleaded guilty to the charge and that the court gave justification for the sentence it imposed. Further, that the sentence imposed was within the stipulated range in light of what is provided for by the law.

5. I have considered the value of the property that was stolen from the complainant. The property that was stolen from the complainant included one TV, one radio, one Go TV Decoder, ten plastic chairs, two bales of wheat flour and one bale of maize flour all worth ksh50,000/-. Only one radio and four plastic chairs were recovered. The Appellant who appears to be young and strong decided not to work and chose to take from someone else who was just trying to earn a living by the sweat of his brow.

6. There are however two issues of note that I must address in this appeal. First that the offence for which the Appellant was convicted carries two limbs the first being Burglary contrary to **section 304(2)** and the second stealing contrary to **section 279 (b)** of the **Penal Code**. Having convicted the Appellant on both limbs the court erred in failing to pass a separate sentence on each limb and to pronounce itself on whether the sentences would run concurrently or consecutively.

7. **Section 14(1)** of the **Criminal Procedure Code** provides as follows:

“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.”

8. In the instant case the Trial Court should have meted out two distinct sentences and ordered that the sentences be served concurrently since the offences were committed in a single transaction as provided under clause 7.13 of the Sentencing Policy Guidelines.

9. The issue of concurrent and consecutive sentences was discussed in detail by the Court of Appeal in **Peter Mbugua Kabui vs. Republic [2016] eKLR**, stated as follows: -

“..... In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”

10. In the instant case, it was just and proper to have the Appellant sentenced on each limb separately and for the sentences to run concurrently since the offences for which he was convicted were part of the same transaction. The burglary in the first limb was intended to facilitate the theft in the second limb.

11. The second issue is on the conclusion of the learned Trial Magistrate that the offences for which the Appellant had been convicted were rampant in her area of jurisdiction. The learned Trial Magistrate did not indicate how she arrived at such a conclusion. The procedural way to draw such a conclusion is from the submissions of the prosecution who are in touch with the investigations officer. The record does not reflect any such submissions from the prosecution.

12. The offence of Burglary contrary to **section 304(2)** of the **Penal Code** carries a sentence of seven (7) years imprisonment while that of Stealing under **section 279(b)** of the **Penal Code** carries a sentence of fourteen (14) years imprisonment. The Appellant was sentenced to serve 4 (four) years imprisonment. From the foregoing the Court is of the considered view that the sentence meted against the Appellant by the Trial Magistrate was commensurate with the gravity of the charges for which the Appellant was convicted.

13. Reasons wherefore I find that the appeal for review of sentence lacks merit, save to indicate that the appellant will serve four (4) years imprisonment on each of the two limbs and that the sentences shall run concurrently.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 13TH DAY OF OCTOBER, 2021

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Appellants in Person.

In the presence of.....State Counsel.