



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. E010 OF 2021

LK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against conviction and sentence by Hon. Njoki Kahara (SRM) in the

Chief Magistrate's Court at Chuka in Criminal Case No. 208 of 2020 on 21st June 2021.

J U D G M E N T

1. The Appellant was convicted for the offences of burglary contrary to **Section 304 (2)** and stealing contrary to **Section 279 (b) of the Penal Code (Chapter 63 of the Laws of Kenya)** which was passed upon the Appellant herein on 21st June 2021 by the **Senior Resident Magistrate Court (Chuka) in Criminal Case No. 208 of 2020**. After a full trial process, the Appellant was found guilty of the charges and sentenced to serve to serve five (5) years imprisonment on each limb of the charge.

2. This appeal was originally against both the conviction and sentence. The Appellant however abandoned his appeal against the said conviction on 18th October 2021. Before this court therefore is the Appellant's appeal against the said sentence. The same is premised on the amended supplementary grounds of appeal filed on 12th October 2021 which are:

- a. **THAT** the learned magistrate convicted the Appellant notwithstanding the fact that he was a child at the time he committed the offence, thus the sentence was in contravention of **Article 53** of the **Constitution** and other provisions of the law.
- b. **THAT** the learned trial magistrate erred in matters of law and fact by failing to comply with **Section 191** of the **Children Act**.
- c. **THAT** the learned trial magistrate erred in matters of law and fact by failing to order the sentence of 10 years to run concurrently instead of consecutive.
- d. **THAT** the trial magistrate erred in law and fact by... sentencing the Appellant without considering the facts of the case and the law provisions.

3. The Appellant relied on his written submissions that he filed on 12th October 2021 while the State Counsel orally submitted that the sentence was proper.

Issue for Determination

4. The only issue for determination by this court in this case is whether the sentence meted out against the Appellant should be interfered with.

Analysis

5. On the authority of ***Okeno v. Republic [1973] EA 31*** and ***Kiilu & Another vs. Republic [2005] 1KLR 174***, this court is obligated to re-evaluate the evidence adduced before the trial court, analyse it, and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to assess their demeanour.

6. The imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime is one of the prime objectives of criminal law. The Court of Appeal in the case of **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** where the court expressed itself as follows:

“There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

7. The severity of a sentence alone is a question of fact. As a principle, this court can only interfere with the sentence imposed by the trial court when it is demonstrated that the trial court acted on a wrong principle or overlooked material facts or took into account irrelevant considerations or on the whole the sentence was manifestly excessive. See the cases of **Ogolla s/o Owuor (1954) EACA 270** and **Wanjema v. Republic [1971] E.A. 493**.

8. The Court of Appeal expressed itself as follows on this issue in the case of **Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000** :

“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.”

9. The sentence prescribed for the offence of burglary under **Section 304(2)** of the **Penal Code** is ten (10) years imprisonment. On the other hand, the penalty for offence of stealing under **Section 279** of the **Penal Code** is fourteen (14) years. In this case, the Appellant was sentenced to serve five (5) years imprisonment for burglary and five years for stealing.

10. In this case, the particulars of the offences were that on 18th February 2020, the Appellant broke and entered the dwelling house of Jeremiah Muriithi Boore with intent to steal and did steal from there one mobile phone make of Tecno F1 valued at Kshs. 5,298/=, the property of the said Jeremiah Muriithi Boore.

11. PW1 was Jeremiah Muriithi Boore, the complainant herein who lived at Weru Market. He testified that on the material day, he was sleeping inside his house and had put his phone to charge. He woke up and found his phone missing but the charger was there. He suspected that the Appellant of committing the offence as the previous day, he had borrowed from him a matchstick to help him connect the phone charger to the socket. He informed the Chief who reassured him that he would investigate the same. On 24th February 2020, the Chief went to the Appellant's house and found around 10 mobile phones lined up on his table. The Appellant was however not in the house. PW1 was then informed of this and asked to go check from the house whether his phone was among those that had been found in the Appellant's house. PW1 was able to find his phone and when the Appellant was asked about it, he stated that the phone was his.

12. PW2 was Geoffrey Muriuki Boore, the Senior Assistant Chief of Weru sub-location. He knew the appellant as he lived in Weru market. He testified that the Appellant and the complainant lived in the same house as they were neighbours. He recalled that on 24th February 2020, he went to the Appellant's house while in search for a schoolgirl who had been reported to be missing. In the Appellant's house, he found 9 mobile phones, several phone batteries, sim cards and Safaricom airtime. He called PW1 who had reported that his phone was missing. PW1 then went to PW2's office and identified his phone among those that had been recovered.

13. PW3 was the investigating officer. He recalled that on 24th February 2020 at 6.00 p.m., PW1 went to Marima Patrol Base with PW2 to report that PW1's phone had been stolen on the material date. He produced the phone which they recovered from the Appellant's house as P.Exhibit 2 as well as the receipt of the phone that PW1 had as P.Exhibit 1.

14. In his defense, the Appellant stated that on 24th February 2020 at around 4.00 p.m., two (2) people came to his house and found two (2) mobile phones. He was then arrested as one of the people claimed that one of the mobile phones was his. The Appellant then denied stealing the mobile phone and stated that the same belonged to his cousin. The trial court, based on the above evidence, found the Appellant guilty of the two (2) offences and sentenced him to five (5) years' imprisonment on both counts.

15. The Appellant now alleges that the sentence imposed on him by the trial court was in contravention of **Article 53(1)(f)** of the **Constitution**. The said Article provides as follows:

“53. (1) Every child has the right –

(a)...

(b)...

(c)...

(d)...

(e)...

(f) not to be detained, except as a measure of last resort, and when detained, to be held—

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age.”

The appellant has raised the issue that when he committed the offence and at the time he was tried he was a minor and that the trial magistrate failed to comply with **Section 191 of the Children Act**. The question of the age of the offender at the time he committed the offence is of important consideration by the trial court in view of the provision of **Article 53 of the Constitution** *supra* as it will ultimately affect the sentence which the trial court may impose. provides as follows:-

(1) *“In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways –*
(a) *by discharging the offender under section 35 (1) of the Penal Code;*
(b) *by discharging the offender on his entering into a recognisance, with or without sureties;*
(c) *by making a probation order against the offender under the provisions of the Probation of Offenders Act;*
(d) *by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;*
(e) *if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school welfare.*
Friendly setting of children's court. Words conviction” and “sentence” not to be used of child. Restriction on punishment.
Methods of dealing with offenders.
f) *by ordering the offender to pay a fine, compensation or costs, or any or all of them;*
(g) *in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;*
(h) *by placing the offender under the care of a qualified counsellor;*
(i) *by ordering him to be placed in an educational institution or a vocational training programme;*
(j) *by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;*
(k) *by making a community service order; or*
(l) *in any other lawful manner.*
(2) *No child offender shall be subjected to corporal punishment.”*

This clearly shows that when sentencing a child offender, there are various sentencing options and a custodial sentence is a measure of a last resort. It also provides that where a sentence of imprisonment is imposed, it must be for the shortest appropriate period of time.

Section 191 of the Children's Act does not however rule out imprisonment. The section provides that the court has discretion to deal with the offender in any other lawful manner. The Court of Appeal to deal with **Section 191** *supra* in **OPP (minor) –v- Republic (2004) eKLR** the court held that the court should have sentenced the offender as a minor as provided under **Section-191 of the Children Act**. Further in the case of **Denis Mokula Motanya & Another –v- Republic (2014) eKLR** the Court of Appeal while considering **Section 191 of the Children Act and Section 25 (2) of the Penal Code**, held that the Court has discretion to deal with the child in any other manner.

16. The question which this court has to consider is whether the question of the age of the appellant was in issue before the learned trial magistrate.

17. The appellant in his submissions has stated that he was aged between 12-17 at the time he committed the offence. According to him at his first appearance in court on 25/2/2020 he informed the court that he was twelve years and the court directed that he avails a birth certificate. That despite the appellant claiming to be a minor, the learned trial magistrate failed to make an enquiry about his age by making an order for age assessment.

18. I have perused the record of 25/2/2020 page 4 line -2- where the trial magistrate stated-

“ On 27/2/2020 the accused to avail a birth certificate. He claims to be 12 years old.”

Further at page 16 at line 19 of the record, the appellant raised the issue of his age and at page 17 line 1 and 2 the learned magistrate stated that the age could be proved for the purposes of the court's further directions. This was not done and there is nothing on record to prove that the age of the appellant was determined where he was a minor or an adult.

19. The importance of having the age of the offender determined when it is raised in criminal proceedings cannot be over emphasized. This is because I have stated above, there are different approaches when it comes to sentencing minors and adults.

That is why it is important for the trial Judge to satisfy himself or herself that the person appearing before him is an adult or a minor. To ascertain the age of the offender when it becomes an issue lies with the prosecution. It is true that an accused person does bear any burden to

prove any matters in dispute during the trial. The prosecution had the burden to prove the age of the appellant and ought to have made an application before the learned trial magistrate to order for an age assessment.

20. I find that the sentence imposed on the appellant was irregular for failure to determine the age of the appellant before sentencing him. If by any chance the appellant was a minor, the sentence imposed was not in line with **Article 53(i)(7) of the Constitution** and **Section 191 of the Children Act**.

21. The sentence imposed read as follows:-

“On the first limb of Burglary under Section 304 (2) of the Penal Code he is sentenced to serve five (5) years imprisonment.

22. The appellant has challenged the sentence on the basis that the trial magistrate failed to order the sentence to run consecutively or concurrently.

23. The charge which was preferred against the appellant states as follows:-

“ Burglary contrary to Section 304(a) and stealing contrary to Section 279(b) of the Penal Code.”

The particulars then state that he broke into the dwelling house of the complainant and stole from therein. The offences were committed in the same transaction. In sentencing a where an offence is committed in the same transaction, a concurrent sentence should be given.

The court of Appeal in ***Peter Mbugua Kabui-v- Republic (2016) eKLR*** the Court of Appeal stated as follows:-

“ As a general principle the practice is that if an accused person commits a series of offences at the same time in a single 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.”

In the case the offences were committed at different times and against different complainants. In ***Sawedi Mukasa S/o Abdullah Aligwaisa 1946 13 E.A.C.A*** the court considered the issue of consecutive as opposed to concurrent sentence and held the view that it was good practice to impose concurrent sentences where a person commits more than one offence at the same time and in the same transaction save in very exceptional circumstances.

24. This question has also been addressed in the Judiciary Sentencing Police Guidelines, No.T.13 where it states as follows:-

“ Where the offence emanate from a single transaction, the concurrently. However where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.”

Section 14(1) of the Criminal Procedure Code provides:-

(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.”

In this case the offences charged were committed in the same transaction. I find in the circumstances of this case the trial court erred in imposing consecutive sentences.

25. It is my view that the sentence passed on the appellant was irregular as the court failed to ascertain the age of the appellant when it was raised. The question whether he committed the offence when he was a minor was left in doubt. In criminal matters benefit of any doubt is given to the accused person. The trial magistrate erred in principle when she failed to order the sentence to run concurrently.

The appellant was sentenced on 21/6/2021 and had been in remand from 25/2/2020. He has been in custody for one year and nine months. I consider this sufficient sentence in the circumstances of this case.

Conclusion

1. The appeal on the sentence has merits and is allowed.
2. The sentence served and the period spent in custody is sufficient punishment.
3. The appellant is sentenced to imprisonment for the period already served.
4. He be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Chuka this 11th day of November 2021.

L.W. GITARI

JUDGE

11/11/21

Judgment has been read out in open court.

L.W. GITARI

JUDGE

11/11/2021