



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**CRIMINAL APPEAL NO. 26 OF 2020**

**BONFACE WAKUMU WANGWE.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(An appeal from the conviction and sentence by Hon T M Mwangi (SPM) in original Bungoma Law Courts Case No. 176 of 2018 delivered on 3<sup>rd</sup> April, 2018)

**JUDGMENT**

1. The Appellant, BONIFACE WAKUMU WANGWE, was charged with the offence of burglary Contrary to **section 304(2)** and stealing contrary to **section 279(b)** of the of the **Penal Code**. Particulars of the offence were that on the night of 9<sup>th</sup> October, 2017 at Mukhuyu village, Maraka location in Webuye east sub-county within Bungoma county, with other not before court, broke and entered Friends Church with intent to steal from there in and did steal; Two generators, four speakers, amplifier, six micro phones, two receivers, a printer, ten plastic chairs, a key board, two bags of maize, one bag of beans valued at kshs.550,000/= property of Friends Church Mukhuyu.
2. He faced an alternative charge of handling stolen property contrary to **section 322(1)** of the **Penal Code**. Particulars being that on the 21<sup>st</sup> day of November 2017 at lugulu market, Mitukuyu sub-location within Bungoma county, otherwise than in the course of stealing was found handling a printer make HP Laserjet knowing it to be stolen property.
3. The Appellant was convicted in the main charge on his own plea of guilt and was sentenced to 8 years imprisonment in each limb of the charge to run concurrently. He was however dissatisfied with both the conviction and sentence and sought to appeal on the grounds that the 8-year sentence for each was excessive as it meant he would serve more than 14 years in prison.
4. The Appellant in his submissions contended that the main charge upon which he was convicted and sentence was bad due to duplicity. He argued that the duplicity compromised the fairness of the process because he did not understand exactly what he was being charged with. He relied on the case of **Republic Vs Mongella (1934) EACA 152**.
5. He also submitted that the sentence imposed was contrary to guideline of section 14(3)(a) & (4) of the CPC. He contended that judgment issued ordered that he serve 8 years in each count concurrently but the committal warrant indicated that he was serve the 8 years sentence of each limb consecutively.
6. The Respondent opposed the appeal on grounds that the sentence imposed was adequate.
7. After considering the grounds of appeal, submissions thereon and evidence adduced in the trial Court, I find that the main issues raised by the Appellant in his appeal are firstly, whether the charge sheet was defective for duplicity; and secondly, whether the 8 year sentence on each limb was to run concurrently or consecutively.
8. I have analyzed and re-evaluated the evidence on record to make my own findings and draw my own conclusions, in line with what was stated by the Court of Appeal in **Nzivo vs. Republic Criminal Appeal No. 81 of 2003 [2005] 1 KLR PG 700**. In the stated case, the learned Judges of Appeal, Tunoi, O'kubasu and Waki JJA, held *inter alia* that:

**“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts’ own decision on the evidence.**

**The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and**

**conclusions; 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."**

9. On the first issue, the rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence. Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.

10. The Appellant was charged with an offence under section 304 (2) of Penal Code which describes provides inter-alia;

**Any person who - breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or 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.**

**(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.**

Section 279(b) **If the theft is committed under any of the circumstances following, that is to say - (a) if the thing is stolen from the person of another; (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**

11. In his submission he contended that the count was bad for duplicity and that his sentence on the two counts amounted to failure of justice and relied on the case of *Republic Vs Mongella (supra)*. The upshot of the foregoing case is that if the accused had not been embarrassed or prejudiced in fact when making his defense on a duplex count then his conviction ought to stand.

12. This court is guided by the Court of Appeal decision in *Reuben Nyakango Mose & Another vs Republic*, the charge therein that was alleged to be duplex was that of burglary and stealing contrary to sections 304 (2) and 279 (b) of the Penal Code, which offences can be subsumed in each other, and which are allowed to be charged together. The Court of Appeal held as follows in this regard in the said case:

**"It will in any event be seen that the framing of the charge of burglary in the Criminal Procedure Code envisages that another offence may be committed in the course of burglary. That is why the relevant form is couched to include burglary and stealing in the same charge. The authorities we have visited and all relevant law envisage that because a thief who breaks into a dwelling house or a vessel will have had ulterior motives when he formed the intention to break into the house or vessel then what follows – this will ordinary but not necessarily be stealing – should be included in the burglary charge. There cannot therefore be duplicity when the offence of burglary and stealing are combined in the same charge. "**

13. From the foregoing case, it is clear that the offence of burglary goes hand in hand with other offences such as stealing and thus the charge cannot be said to be duplex.

14. On the issue of sentencing, the Appellant submits that he was sentenced to 8 years imprisonment on each limb to run concurrently but that the committal warrant indicated that the sentence would run consecutively.

15. The record shows that the trial court sentenced the Appellant to 8 years imprisonment on each limb of the charge, to run concurrently. The trial court on 3<sup>rd</sup> April 2018 pronounced itself as follows;

**"I sentence the accused to eight (8) years in prison on each limb of the charge. Sentences run concurrently."**

16. The above order is clear and the same should have been reflected in the committal warrant. In view of his remorse and the fact that he pleaded guilty and did not waste the courts time, the court hereby reduces his sentence to 5 years on each limb. The sentences will run concurrently.

17. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1<sup>ST</sup> DAY OF DECEMBER, 2021**

.....

**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Appellant in person**

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