



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL 4 OF 2020

(CORAM: F. GIKONYO M. J.)

(From the conviction and sentence of Hon. G.N. Wakahiu (C.M) in Narok CMCR No.

314 of 2018 on 30th December 2019)

VINCENT OMONDI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1]. The appellant was charged with house breaking contrary to Section 304 (1) (B) and Stealing contrary to Section 279(B) of Penal Code. It is alleged that on the 6th day of April 2017 at government quarter in Narok North Sub- County within Narok County with others not before court , broke and entered a building used as a dwelling house by Harris Ondengo and stole a mobile phone make techno, iron box make Philips, radio make techno two mobile charges, two power extension cables, 3 litres cooking oil , masaji aleti model no. jt-889, six window curtains, one pair of black shoes, passport book number Bxxxxxx and assorted photos all valued at 60,420/= the property of the said Harris Ondengo.

[2]. He was charged with an alternative charge of handling stolen goods contrary to section 322(1) as read with section 322 (2) of the penal code. Particulars were that on 30th October 2017 at London estate in Narok North Sub County within Narok County otherwise than in the course of stealing dishonestly retained one passport book number Bxxxx and assorted photos knowing or having reason to believe them to be stolen.

[3]. Count II. He was charged with house breaking contrary to section 304 (1) (b) and stealing contrary to section 279 (b) of the penal code. The particulars were that on 7th February 2017 at Lenana estate in Narok North Sub County within Narok County jointly with others not before court, broke and entered a building used as a dwelling house by Mr. Solomon Muntet and stole private firearm make Ceska Mini pistol CZ75P-07 S/NO B 131111 with 8 rounds of 9mm ammunition, sonny braviva TV 26 inches, dell laptop, Panasonic DVD , bread toaster, 15 pieces of bed sheets, 4 clothes bags, 1 suit case, 2 flash discs of 16 GB, mobile phone make Nokia 1208, assorted remote control, phone charges, 2 pairs of black gum boots , 4 pairs of leather shoes all valued at Kshs. 440,000/= property of the said Mr. Solomon Muntet.

[4]. The alternative charge was handling stolen property contrary to section 322(1) as read with section 322(2) of the penal code. The particulars were that on 30th October 2017 at London Osotua in Narok North Sub County within Narok County otherwise than in the course of stealing dishonestly retained a firearm make Ceska Mini pistol Cz75p-07 serial no. B 131111 with 8 rounds of 9mm ammunition the property of Mr. Solomon Muntet knowing or having reason to believe it to be stolen.

[5]. The appellant was convicted on the two main charges and sentenced to serve five years' imprisonment. Sentence to run concurrently.

[6]. Being dissatisfied with the said conviction and sentence he preferred an appeal as set out in his grounds of appeal.

i. That the sentence awarded is highly excessive and punitive.

ii. That he is remorseful of the offence committed and have since been rehabilitated by the harsh conditions in both remand and prison environment

iii. That he suffers from erotic duodenum peptic ulcers a condition that is seriously complicated and aggravated by the harsh conditions within the prison environment. That he used traditional medicinal herbs a facility that is not available in prison.

iv. **That he is a first born in a family of nine and his wife is epileptic and is not able to play an active role in upbringing and fending off the family task that was squarely on his shoulders with his confinement in prison, the family is likely to suffer.**

v. **That he earnestly pray that the sentence awarded therein be reviewed and a lesser sentence be considered.**

vi. **That in consideration of his wife's ailment he be awarded a suspended sentence so that he may amend broken life.**

[7]. Ultimately, he prayed that this appeal be allowed and sentence be quashed or that this court evaluates the evidence and make its own finding in conviction and sentence.

[8]. The appellant orally urged this court to consider time spent in custody and that he is now reformed.

Respondent's submissions

[9]. Mr. Karanja the prosecution counsel, submitted that, the charge of house breaking was proved and an appropriate sentence was imposed. The appellant faced two accounts the trial court ordered the sentence to run concurrently. Discretion was properly exercised. He urged this court to uphold the sentence.

ANALYSIS AND DETERMINATION

Court's duty

[10]. As first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See **Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.**

[11]. After carefully considering the submissions of the respective parties and the record of appeal, and the oral submission by the appellant to the effect that he has only one prayer before this court that he wishes to pursue, that is, time spent in custody to be taken into account pursuant to section 333(2) of the CPC, this constitutes the main issue for determination by the court.

[12]. Section 333(2) of the Criminal Procedure Code provides that: -

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) Every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis mine).”

[13]. Court's duty under and the purpose of section 333(2) of the CPC has been explained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) thus:

“The provision to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

[14]. Proper grounding is necessary. This matter was among the matters listed for review aimed at decongesting the prisons following the effects of Covid 19 pandemic. On 18th June 2021 this court (Githinji J.) upon considering the nature of the offence and the community service officer's report and in exercise of the revisionary powers under Section 362 and 364 of the Criminal Procedure Code as read with Section 354 (3) (iii) varied and reduced the sentence imposed by the lower court from 5 years to three years. The sentence to run from 30/12/2019.

[15]. In review of sentence careful consideration is of matters such as time spent in custody before and after conviction, the objects of punishment especially rehabilitation and re-integration of the offender back into the society, the conduct of the offender after conviction, the condition of the appellant, only to mention but a few. Section 333(2) of the CPC therefore assists the court to determine appropriate sentence.

[16]. It has not been argued or even suggested that review and reduction of sentence by this court (Githinji J.) from 5 to 3 years was arbitrary. It was upon consideration of the sentencing principles, relevant factors and the law. The original sentence was five years and the reduction thereof by a whopping 2 years embodies a consideration of relevant factors required in law in sentencing. Thus, the mere fact that the reduced sentence of 3 years commences from the date of conviction does not, in the circumstances of this case, offend section 333(2) of the CPC.

[17]. As a consequence of this analysis, I find the appeal to lack merit and is dismissed. It is so ordered.

DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH DAY OF DECEMBER 2021

F. GIKONYO M.

JUDGE

In the presence of:

1. Applicant
2. Karanja for Respondent
3. Kasaso - CA