REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO.29 OF 2017

PETERSON KAMUNGE KAGAI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

An appeal from the conviction and sentence of the Principal Magistrate's court Honourable A.N. Makau – SRM) at Gichugu, Criminal case no.259 of 2016 delivered on the 12th April, 2017.

JUDGMENT

1. The appellant was charged and convicted of theft contrary to Section 275 of the Penal Code. The prosecution called a total of five witnesses and in his defence, the appellant gave sworn evidence and called 3 witnesses. The trial court sentenced him to 2 years imprisonment.

2. The appellant filed an appeal based on the following grounds, that the learned Magistrate erred both in law and fac by;

1. Not considering that the case was not proved beyond reasonable doubt.

2. Failing to consider that evidence adduced was incredible.

3. Not considering investigation done was shoddy

4. Not considering that ownership of the alleged stolen window was not proved.

5. Not considering that the property from which the window was allegedly stolen belonged to his late father and by the time of his death the property had not been transferred to any person.

6. Not considering the case was full of contradictions and inconsistencies.

7. Not considering the appellant's defence and mitigation.

8. Not considering he was a first offender.

9. Giving him a harsh and excessive sentence without option of fine.

The state opposed the appeal and filed submissions praying that the appeal be dismissed. The Court gave direction that the appeal be disposed off by way of written submissions.

3. For the appellant, submissions were filed by KinuthiaWandaka Advocates. He submits that the evidence adduced against the appellant was insufficient to warrant his conviction. That the ownership of the plot No.33 at Kiamutugu where the window was allegedly stolen was not established and was the subject of an ongoing succession matter. It is further submitted that the defence of the appellant was not considered and the sentence was manifestly harsh. He relies on ***WycliffAnyonaNyambuto Vs. Republic 2014 eKLR*** where the sentence was reduced for being excessively harsh. Also ***JosphatMasakuMutunga Vs. Republic 2010 eKLR***where the Court of Appeal in reducing an excessive sentence stated;

> ***"in situations where an appellate court would interfere with the discretion of a trial court on the issue of sentence have in the past been clearly defined by the predecessors to this Court at the Court itself. Thus, the general rule is that, an appellate court would only interfere where there exists, to a sufficient extend, circumstances entitling it to vary the order of the trial court. Those circumstances were well illustrated in the case of Nelson Vs. Republic [1970]E.A. 599 following Ogalo Son of Owuora Vs. R. [1954] EACA 270 as follows;***
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> ***"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James Vs. Rex [1950], 18 EACA 147, it is evidence that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criteria namely, that the sentence is manifestly excessive in view of the circumstances of the case R. V. Shershewsity [1912] C.CA 28 T.LR 364"***
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> ***We take the view that, in the appeal before us, the sentence meted out to the appellant was not informed by the mitigation recorded from the appellant's counsel and in particular, the fact that he was a first offender".***

4. Further Counsel submits that the appellant ought to have been given the benefits of doubts. He relies on Phillip Mururi Vs. R 2016 eKLR where the court held;

> ***"To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge"***

He finally submits that the conviction was against the weight of the evidence and urged the court to quash the conviction.

5. For the state submissions were filed by Geoffrey Obiri Assistant D.P.P. He submits the prosecution overwhelmingly proved that it was the appellant who committed the offence of theft. The appeal has not merits. It be dismissed.

6. I have considered the grounds of appeal and the submissions. This is a first appeal and I have a duty to evaluate the evidence and come upto with my own independent finding. I only need to bear in mind that I did not see the witness when they testified and I leave room for that. This was the holding in ***Okeno V. R. [1972] E.A. 32.***

7. As I evaluate the evidence I will consider the grounds of appeal.

ISSUES ARISING

1. OWNERSHIP OF WINDOW

PW1 confirmed that he bought the said plot and he adduced sale agreement and confirmation of grant. PW2 and PW3 confirmed that they were tenants of PW1. The defence alleged that there was a different grant but he same was not produced in court. The evidence tendered was sufficient and proved that the complainant was the owner.

2. DID THE PROSECUTION PROVE ITS CASE BEYOND REASONABLE DOUBT

And it is trite that the burden of proof always lies with the prosecution to prove their case.

PW1 the alleged owner of the window stated that he bought the land in 2011 and sale agreement was entered between the families of Justin, Kanyotu and himself. The families were being represented by AnielKagai and Kennedy MurimiNgubiru whereby the appellant was the son of Kagai. The said transfer was revoked by the County Council but upon presenting his complaint they returned it to him. He confirmed that there were family disputes on the plot for Kagai's family.

PW2 was a tenant of the PW1 and saw the appellant removing the window with a claw bar. The appellant told her he was the owner of the place.

PW3 was employed by PW1 at the butchery. PW1 called him and told him one Peter Kagai had removed the window and he called PW1. He was told to go confirm and on the way he met the appellant carrying a window frame. He recognized the window since he helped the fundi to carry it to the house.

PW4 received warrant of arrest of the appellant and he proceeded to his home whereby he effected the arrest. He visited the appellant's mother's house found the window.

PW5 the Investigating officer PW 1 brought the documents to confirm ownership of the plot together with others. He visited the premises and confirmed the window frame was removed. Later, PW1 told them the whereabouts of the window, they arrested the appellant and recovered the window frame at his mother's house. He stated that he knew there was ownership issue of the plot.

DW1 stated he was called by one of the tenant of the plot Peter MureithiGichobi and informed that there was construction ongoing. He went to the plot and found a fundi was fixing windows and doors. Later Danson Mwaniki (the only surviving owner of the plot) informed him they had fixed the window improperly and he had it removed. He was arrested thereafter and confirmed he has ownership dispute with PW1.

DW2 confirmed that he owns the plot jointly with DW1's father KagaiKanyotu, Richard Gatimu and Justine Ngubiri.

DW3 confimed he is a partner in the said plot and his father is DW2. On 27.10.2015 someone removed the window of the kitchen and they reported to police vide OB No.18/27/10/2015. Later the Appellant called him informing him they have replaced the window but was improper. He called a fundi Joseph Mureithi to remove it which he did.

DW4 stated the appellant went to the plot together with Mugo, Kamunde and Muchiri Michael and said the window had not been fixed properly. Muchiri instructed the fundi to remove it and kept it in the kitchen. Later someone came saying their mother had sent him to pick the window.

8. Considering the evidence adduced by the prosecution in it's entirety it has proven his case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant removed the window, he was seen carrying it away and later it was discovered at his step-mother's home. The defence evidence was that they did not know who had fixed the window but that the same was improperly done and they removed it. The trial court considered all the evidence presented and having

done son came to a proper and inevitable conclusion. The guilt of the appellant was proved beyond reasonable doubt by overwhelming evidence on record.

9. The appellant submitted that the sentence was harsh. I have considered the ground. The value of the stolen property was Kshs.800/=. It was recovered. The complainant did not suffer loss. This was a mitigating factor. The sentence of two years was manifestly harsh and excessive. I therefore find that this is reason enough to interfere with the sentence. I order that the appellant is sentence to imprisonment for the period already served. He will be set at liberty unless otherwise lawfully held.

The appeal on the conviction has no merits and is dismissed.

Dated at Kerugoya this 13th day of February 2020.

L. W. GITARI

JUDGE