REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 17 OF 2017

(Being an Appeal from the original conviction and sentence in Criminal Case No. 855 of 2016 at Embu Chief Magistrate's Court)

AMOS KARIUKI NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. The appellant was convicted by Embu Principal Magistrate of two counts of house breaking and stealing contrary to Section 304(1) and Section 279(b) of the Penal Code. For each of the two counts namely count I and III the appellant was sentenced to serve (5) years imprisonment for the 1st limb and four (4) years on the 2nd limb of both counts.

2. Being dissatisfied with the entire judgment of the trial magistrate, the appellant lodged this appeal.

3. Precisely the amended grounds of appeal were that the case was not proved beyond any reasonable doubt for reasons that no recovery of the stolen property was made against the accused; that the complainant did not produce a receipt of ownership of the gumboots or identify the stolen property positively. It was further contended that the ownership of the laptop was not proved and that the sentences imposed were harsh and excessive and that they were contrary to the law. Finally, the appellant contented that this defence was not considered by the trial court.

4. The parties filed written submissions to argue their respective positions regarding the appeal.

B. The Appellant's Submissions

5. The appellant in his submissions reiterated the grounds of appeal to the effect that PW4 was not present when his house was invaded and that no one witnessed the incident; that no agreement was produced in regard to the soft loan PW6 allegedly lent the appellant. Neither did any witness testify as to the alleged sale of a phone by the appellant to PW6. He further submitted that PW4 did not produce receipt to prove that the gumboots in question belonged to him nor did he mention the marks which he pointed out in the dock while making the report to the police. As such he submitted that the evidence in count I did not connect him with the offence in count I.

6. In relation to count III, the appellant argued that PW1 and PW3 did not witness the incidence and further that no exhibits belonging to PW1 were found in the appellant's possession during the arrest. Further that the evidence by PW2 was to the effect that he was arrested a far distance on the main road away from the scene of crime and the laptop bag which was alleged to be part of PW1's property was never produced in court. Further that the metal bar allegedly found in one of the rooms by PW1 was never produced in court. It was his submission therefore that there was no evidence to support the main counts and that failure by the trial magistrate to have made any finding in respect of the alternative charges, meant that the main counts also failed.

7. On sentence, the appellant contended that it was harsh and excessive and contrary to the law.

C. The Respondent's Submissions

8. The respondent in opposing the appeal submitted that the ingredients of the offence of housebreaking were substantially proved but that there was no evidence on record that there was a threat or use of violence by the appellant during the commission of the offence as depicted in the second limb. It was further submitted that the gumboots produced as exhibits were positively identified by PW4 and that evidence was

corroborated by PW8 and never rebutted by the defense. Further that there was sufficient evidence from PW8 to the effect that the exhibits produced in court were recovered from the appellant's house and which evidence was corroborated by the evidence of PW5 and PW6.

9. It was the respondent's submission that there PW6's evidence was to the effect that the appellant was the one who owed him Kshs. 200/- as a debt and that lack of an agreement on sale of the phone couldn't dislodge the undeniable evidence that it was the appellant who gave PW6 the said stolen phone make Techno on assertion that he was the "owner" thereof. The respondent conceded to the ground that the sentence was harsh and excessive relying on the case of **Paul Kinuthia Thiga –vs- Republic (2005) eKLR** to the effect that the trial court ought not to have sentenced the appellant on the offence of house breaking and stealing. The Respondent however reiterated that the conviction on the counts of house breaking were safe.

D. Issues for determination

10. I have considered the grounds of appeal herein and the submissions by the parties and I am of the opinion that the main issues for determination are: -

a. Whether the prosecution tendered sufficient evidence to prove the elements of the offences which the appellant faced.

b. Whether the sentence meted upon the appellant was harsh and excessive.

E. Applicable law and determination of the issues

11. In determining the above issues, I appreciate the duty of the first appellate court as set out by the Court of Appeal in **Okeno v. Republic [1972] EA 32** and re-stated in **Kiilu and another vs. R (2005) 1 KLR 174** and where it was held *interalia* that this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

12. On the same breath the court notes that the burden of proof rests on the prosecutions as was held in *locus classicus* in **Woolmington –vs- DPP [1935] A.C** and to the standards of beyond any reasonable doubts as was held in **Miller Versus Minister of Pensions [1942] AC**. if there exists an iota of doubt the accused must be acquitted.

i. Whether the prosecution tendered sufficient evidence to prove the elements of the offences which the appellant faced?

13. The appellant was convicted of the offence of housebreaking contrary to Section 304 (1)(b) and stealing contrary to Section 279(b) of the Penal Code. As for the offence of housebreaking and stealing in count one, **Section 304(1) of the Penal Code** provides as follows in relation to housebreaking: -

"Any person who-

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

b. 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 (7) years.

14. Section 279(b) of the Penal Code provides: -

If the theft is committed under any of the circumstances following, that is to say -

a. ……

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;

15. Briefly, the evidence of PW1 was that on 28/08/2016, he was in church when he received information that his house had been broken into and some property stolen. He found the suspect under arrest on arrival at his home. He then confirmed the information that several things had been stolen including his wife's mobile phone, laptop, two computer cables, GPS belonging to his employer and a flash disk.

16. It was PW1's evidence that when he interrogated the appellant at the scene, he told him that he gained access to the house through the window whose lock he had cut and that he used a metal bar in breaking. The metal bar was recovered in one of the rooms of the house with the help of the appellant. PW1's evidence was corroborated by that of PW2 a neighbour who testified that the saw the appellant coming from PW1's house carrying a bag. He dropped the empty bag at the scene and ran away. PW2 raised alarm and pursued the appellant. Assisted by members of the public, they arrested the appellant about 200 meters from PW1's house. It was after the arrest that the appellant led PW1 and other members of public to where he had kept the GPS locator. PW3 testified that when he came from the church, he went to PW1's home and he found the crowd gathered and wanting to lynch the appellant but they were restrained by PW2 and PW3.

17. PW1 said access had been gained through the widow in the absence of the owner of the house. This evidence supports breaking and entering. PW1 identified all th stolen items with the assistance of the suspect within the precincts of the house and confirmed that all of them

were identified from his house.

18. In count I, the appellant was arrested near the house of PW1. PW2 had seen him coming from the home and suspected he was a thief. He pursued him and assisted by others managed to arrest him.

19. The defence of the appellant was that he had been framed but gave no details of the allegation. In cross-examination of the prosecution witnesses the appellant did not suggest in any way that he had been framed. This defence was an afterthought. The trial magistrate had nothing in way of defence before him. His defence was a mere denial and not plausible in view of the overwhelming evidence of the prosecution. It is therefore not correct that the trail magistrate failed to consider the defence.

20. In regard to the count III, PW4 testified that when he and PW5 visited the house of PW6, he gave them the phone in question and told them that he had bought the phone from the appellant. The two witnesses proceeded to the appellant's house where they recovered the gumboots of PW4 which had been stolen from his house together with the phone. PW6 told PW4 and PW5 that it was the appellant who had given him the said phone as security for a soft loan of Kshs. 200/=. PW6 testified in court that he gave the appellant a soft loan while PW8 a police officer testified that he arrested the appellant.

21. PW4 testified that he had gone to church very early that morning. He was later informed by his wife that his house had been broken into. He proceeded home where confirmed that a laptop, phone, a pair of gumboots and a bunch of keys had been stolen from the house which had been broken into and access gained through the front door by damaging the padlock. The appellant was found in possession stolen gumboots. The lap top had been sold to one Mugendi and the phone given by the accused to PW6 as security for a soft loan. All the items recovered were with the help of the appellant.

22. The accused raised a number of issues in his arguments in support of the appeal. Firstly, that the phone was not positively identified by PW1. However, even in the absence of a purchase receipt, the evidence of PW4, PW5 PW6 was sufficient on both recovery and identification of the stolen property. It is imperative to note that the appellant did not claim ownership of any of the stolen items. The said gumboots and the phone were positively identified by PW4 as his property. He testified to the effect that his house was broken into through the front door and that the accused had passed the items t 3rd parties

23. The appellant having been found with the gumboots in his possession can be said to be a recent possessor. Evidence of PW5 and PW6 was that the appellant had sold or given two items to them. For doctrine of recent possession to be applied, there must be positive proof of the offence unless a reasonable explanation as to possession is given. There was evidence that the pair of gumboots was recovered in the house of the appellant; that the property was positively identified as the property of the complainant and that that the property was stolen from the complainant as was held in the case of **John Kahongo Mwangi v Republic [2014] eKLR).** The gumboots in question was found with the appellant and was positively identified by PW4 the complainant as his property.

24. The appellant did not tender any evidence as to how he came about the said gumboots and neither did he claim ownership thereof. Despite PW6 having testified to the effect that he bought the phone from the appellant, there was no explanation as to how the appellant came about the phone. As was stated in the case of **Hassan –vs- R (2005) 2KLR: -**

> **Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or the receiver".**

25. The appellant having been found in possession of the gumboots which had been stolen from PW4 after his house was broken into, the only conclusion which can be drawn from that is that he was then one who broke and entered the complainant's house. The said entry was with intention to commit a felony and which was stealing and which intention he indeed actualized. The said house was a dwelling house belonging to PW4.

26. I reach a conclusion that the prosecution tendered sufficient evidence to prove that the appellant herein broke and entered a dwelling house belonging to PW4 and indeed committed a felony. The ingredients of count III for the offence of house breaking under count three.

27. The appellant submitted to the effect that there was no evidence to support the main counts and that failure by the trial magistrate to have made any finding in respect of the alternative charges, meant that the main counts also failed. However, it is my opinion that this ought not to be correct legal position is that once an accused person is convicted on the main count, the court ought not to make a finding on the alternative count. **(David Ndumba Vs Republic [2013] eKLR)**. This ground of appeal lacks factual or legal basis.

28. The appellant raised the ground that his defense was not at all considered by the trial magistrate as stipulated by the provisions of Section 169(1) of the Criminal Procedure Code. However, a perusal of the trial court records indicates that the appellant raised the defence to the effect that he was framed. He never proffered any substantial defense as to how for instance he came into possession of the gumboots which were recovered from his house. He did not explain how he came into possession of phone that he sold to PW6. As such, it is my opinion that there was no defense proffered by the appellant during trial and which the trial court ought to have considered and which was not considered.

ii. Whether the sentence meted upon the appellant was harsh and excessive?

29. The appellant contended that the sentence meted upon him was harsh and excessive in respect of breaking and stealing in both counts and that the trial magistrate never ordered them to run concurrently yet the counts were within one file and the sentences were contrary to the law under Section 304(1)(b) and 279(5). This ground was conceded by the Respondent to the effect that the trial court ought not to have sentenced the appellant on the offence of house breaking and stealing. The Respondent however reiterated that the conviction on the counts of house breaking were safe.

30. I have noted that the charge sheet read that the appellant was charged with the offence of "housebreaking contrary to section 304 (1)(b)

and stealing contrary to section 279(b) of the Penal Code." The trial magistrate sentenced the appellant to *five years' imprisonment 2nd limb four years in relation to count I and five (5) years 2nd limb four (4) years.*

31. It is noted that the offences in count I and II were committed on different dates and the victims were two different complainants that is 14/08/2016 and 28/08/2016. The facts of this case are different from the case of **Paul Kinuthia** since in that case, the offences in both counts took place on the same date.

32. I find that the magistrate was within the law to sentence the appellant on both limbs of each count. This is because each limb falls under a separate section. There was no order as to how the sentences in each count were to run. The said sentences of both limbs ought to have been ordered to run concurrently.

33. The Court of Appeal in **Peter Mbugua Kabui v Republic [2016] eKLR** while considering the issue as to the circumstances in which a court can direct sentences to run concurrently or consecutively held as thus: -

> **Section 14 of the Criminal Procedure Code** provides in part as follows*:* -
>
> (I) **Subject to sub-section (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 therefor 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……..**
>
> **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……..."**

34. In his submissions, the appellant said that the charge sheet was defective due to duplicity. The rule against duplicity arises from the provisions of **Section 134 of the Criminal Procedure Code**. It provides: -

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to the nature of the offence charged."**

35. The essence of the rule is that it is impermissible for the prosecution to allege the commission or more than one offence in a single charge sheet. This is because, as a matter of fairness, an accused person is entitled to know which crime they are alleged to have committed so that they can adequately prepare a defence or plead guilty thereto.

36. I have perused the charges in count I and count III and I do not find any duplicity in that the offences were similar being of housebreaking and stealing and the wording had to be similar to some extent. However, the particulars of the charges are different in respect of date and place of the offence, the names of the complainant, the property stolen and the value of the that property.

37. I find no basis in that ground of appeal.

iii. Was the sentence harsh or excessive?

38. The principles upon which an appellate court can in exercise of its discretion review/interfere with a sentence imposed by the trial court are well settled and they include: -

a. when the sentence is manifestly excessive in the circumstances of the case, or

b. that the trial court overlooked some material factor, or

c. took into account some wrong material, or

d. acted on a wrong principle.

39. Even if, the appellate court opines that the sentence is heavy and that the appellate court might itself not have passed that sentence, alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist. (See **Bernard Kimani Gacheru vs. Republic [2002] eKLR).**

40. However, I note that from the court records the appellant was arrested on 28/08/2016 and remained in custody for the trial until 29/09/2016 when he was convicted in Embu CMCR. Case No. 1459 of 2015. He was then sentenced by the trial court for the offences subject to this appeal on 27/02/2017. As such, the appellant herein spent 31 days in custody for the offence subject to this appeal. **Section 333(2) of the Criminal Procedure Code** and the proviso whereof provides 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.

41. As such it is my opinion that the said period ought to have been considered at the time of sentencing which the trial court failed to do contrary to the provisions of Section 333(2) of the Criminal Procedure Code. This court is empowered to correct mistakes of the lower court on appeal.

iv. Was the sentence excessive?

42. Section 304 provides for a maximum sentence of seven (7) years imprisonment where the offence is committed during the day as was the case here. Section 279(b) provides for a maximum sentence of fourteen (14) years imprisonment.

43. The appellant was sentenced to four (4) years and five (5) years imprisonment on count I and on count III. He was not a first offender for he had been convicted of a similar offence by a different court in 2016 and sentenced to three (3) years imprisonment. He was a repeat offender and the trial magistrate considered his mitigation as the record shows.

44. I therefore find that for the foregoing reasons, the sentence in both counts were within the law and were no excessive. I find no reason to interfere with the sentences in the two counts.

45. In conclusion, I find that this appeal is partly successful and I hereby make the following orders: -

a. That the sentences in count I of five (5) years and four (4) years imprisonment on 1st and 2nd limb to run concurrently.

b. That the sentences in count III of five years (5) and four (4) years imprisonment to run concurrently.

c. The sentences in both counts shall run consecutively.

46. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF JULY, 2020.

F. MUCHEMI

JUDGE

In the presence: -

Ms. Mati for Respondent

Appellant through Video Link