



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.24 OF 2020

ZKN.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original conviction and sentence by Hon. B. R. Kipyegon (SRM) in Kericho Criminal Case No.3625 of 2018 delivered on 1/3/2019)

J U D G M E N T

1. The Appellant was convicted with the offence of House Breaking and Stealing Contrary to Section 304(1)(b) of the Penal Code and he was sentenced to Seven (7) years imprisonment.
2. The particulars of the charge were that on 20/6/2018 at [particulars withheld] Location Kipkelion Sub-County within Kericho County, the Appellant broke into the dwelling house of ALOYS MOMANYI ORANGI and stole therein one mobile phone, startimes decoder, 2 memory cards, 1 D-light and cash Kshs.19,200/= all valued at Kshs.35,000/=.
3. The Prosecution evidence in brief is that the house of the Complainant was broken into while he was away at work and the phone, decoder and money were stolen.
4. PW.4 tracked the phone through Safaricom and arrested the Appellant three months after the theft and charged him with this offence.
5. The Appellant in his defence said he did not steal the phone. He said he found it and gave it to his mother and he was later arrested after being tracked.
6. The Trial Court convicted him with the offence of house breaking and stealing Contrary to Section 304(1) (b) of the Penal Code and sentence him to Seven (7) years imprisonment.
7. The Appellant filed this mitigation appeal and filed his mitigation in which he stated as follows:-
 - (i) THAT the trial Court did not take into account his mitigation before sentencing him to Seven (7) years imprisonment.
 - (ii) THAT he has been in jail for one year and he was totally reformed and he has generally been rehabilitated.
 - (iii) THAT he is continuing with Primary Education and that he was in Standard Seven at [particulars withheld] Primary School when he was arrested.
 - (iv) THAT he is an Orphan and his father died leaving his mother with little income to raise him.
 - (v) THAT he is seeking a non-custodial sentence and also a lesser sentence.
8. The Respondent opposed mitigation appeal on the grounds that the Appellant is a repeat offender who had committed a similar offence.
9. The first duty of the 1st Appellate Court is to weigh the evidence adduced before the Trial Court and to arrive at its own conclusion bearing in mind that the Trial Court had the advantage of seeing the witnesses.
10. The Court of Appeal in the case in the case of **KARIUKI KARANJA VS REPUBLIC [1986] KLR 190** stated as follows;

“On first appeal from a conviction by a Judge or Magistrate, the appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the Judge or Magistrate with such materials as it may have decided to admit.”

11. The Appellant’s only ground of appeal was that the sentence was excessive and further that his mitigation was not taken into consideration.
12. The Respondent opposed the appeal and said the Trial Court took into account the said mitigation and further that the Appellant is not a first offender and therefore the sentence of 7 years imprisonment should not be disturbed.
13. I find that the Appellant did not challenge the conviction but his appeal is on sentence only.
14. The Pre-Sentence Report by the Probation Officer which was relied on by the Trial Court stated that the Appellant is 18 years old and further that he is a repeat offender but no details were given of his previous sentence.
15. The prosecution did not avail the Appellant’s previous records before the sentence was meted by the Trial court.
16. The Appellant has now been in custody for 18 months.
17. I uphold the conviction since the same is not challenged by the Appellant and I reduce the sentence to the period of eighteen (18) months already served.
18. I order that the Appellant be released from custody unless lawfully held for any other reason.

Delivered, Dated and Signed at Kericho this 2nd Day of October, 2020

A.N. ONGERI

JUDGE