REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 6 OF 2012

TONNY KIPROTICH NGENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kericho Chief Magistrate's Court Criminal Case No. 94 of 2012 Hon. S. N. Andrieseen (SPM) dated 6th February 2012)

JUDGMENT

1. The appellant and his co-accused, Bernard Cheruyoit, were charged with the offence of burglary and stealing contrary to section 304 (2) and 279 (b) of the Penal Code.

2. The charge against them stated that on the night of 12th and 13th day of January 2012 at unknown time at Mobogo sub-location in Rift Valley Province, broke and entered the house of Joel Koskei with intent to steal therein and did steal therein one K-Gas cylinder valued at Kshs.5,500/-; one mattress Tuffoam deluxe valued at Kshs. 4000/- yellow, green and white in colour; one radio Sonitec No. 514848 black and silver in colour valued at Ksh.700/- all valued at Kshs.10,200/- the property of Joel Koskei.

3. When he and his co-accused were brought before the court on 20th January 2012, they both pleaded not guilty and were granted bond of Kshs.60,000/- and the matter was scheduled for hearing on 6th February 2012.

4. When the matter came up for hearing on that day, the appellant changed his plea of guilty and a plea of guilty was accordingly entered. The facts were read to him, and he again stated that they were true. The prosecution informed the court that he was a first offender. In his mitigation, the accused pleaded for forgiveness, saying that he had no parents and his wife was pregnant.

5. In the sentence meted out by the court on that day, the appellant was sentenced to 10 years imprisonment on the first charge and 14 years imprisonment on the second count, the sentences to run concurrently.

6. The appellant filed the present appeal in which he has set out what he terms as 'Grounds of Mitigation'. He states that he pleaded guilty to the charge expecting leniency from the court, that he was remorseful for the offence and was pleading for leniency, and that he has a family that is wholly dependent on him. He asks that the period of 14 years be revised so that he can serve his term and go home, and that he is a first offender who promises not to offend again.

7. In response, Mr. Ayodo for the state argued that the sentence imposed was legal. That the sentences given were very lenient as the court could have ordered that the sentences against the accused should run consecutively Mr. Ayodo urged the court to dismiss the appeal.

8. In his submissions, the appellant elaborates on his plea for reduction of sentence. He argues, among other things, that he was beaten by police, that he did not understand the substance of the charge facing him, and that he, was promised by police that if he pleaded guilty, the court would forgive him.

9. I have considered the record of the trial court and the 'Grounds of Mitigation' filed by the appellant. I have also considered the submissions by the Learned Prosecution Counsel, Mr. Ayodo.

10. The appellant was a first offender, and had pleaded guilty to the charges. He was facing two charges, burglary and stealing contrary to sections 304 (2) and 279 (b) of the Penal Code respectively.

11. Section 304 (2) provides, with respect to housebreaking and burglary, that the offender is liable, upon conviction, to imprisonment for seven years. However, if the offence is committed at night, the offender is liable to imprisonment for ten years.

12. At section 279(b), the Penal Code provides, with respect to the offence of stealing, that the offender is liable to imprisonment for fourteen years:

> ***"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:***

13. It appears to me that the trial court in this case considered that the sentences prescribed by the above provisions were mandatory sentences, and that regardless of the circumstances, he was bound to pass the sentences.

14. I have considered previous decisions in which our courts have considered the meaning of the term 'liable' when used in a penal provision in statutes. In its decision in **M K vs Republic [2015] eKLR** the Court of Appeal stated as follows:

> ***"19. What does "shall be liable" mean in law" The Court of Appeal for East Africa in the case of Opoya -v- Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James -v- Young 27 Ch. D. at p. 655 where North J. said:***
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> ***"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".***
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> ***We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s. 184 which are "shall be sentenced to death".***

15. Similarly, while construing the provisions of the Narcotic Drugs and Psychotropic Substances (Control) Act, Act No. 4 of 1994, the Court of Appeal, in its decision in **Daniel Kyalo Muema vs Republic [2009] eKLR** stated as follows:

> ***"The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs. Uganda [1967] EA 752 where the Court said at page 754 paragraph B:***
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> ***"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".***
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> ***We respectfully adopt that construction which conforms with the opinion of Mr. Kaigai and which is supported by our preceding observations. We have no doubt that the sentences of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of cannabis sativa are the maxima and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although Section 3 (2) (a) of the Act does not expressly provide for a fine, the court can lawfully in accordance with Section 26 (3) of the Penal Code sentence the offender to pay a reasonable fine in substitution for imprisonment."***

16. I am guided by the views expressed by the Court of Appeal in the above matters. A person convicted of the offence of stealing under section 279 (b) 'is liable', upon conviction, to a sentence of ten years imprisonment. That provision, however, on the authority of the decisions which I have cited above, does not impose a mandatory minimum sentence, and the court has discretion to impose a lesser sentence.

17. Similarly, with respect to the offence of burglary under section 304(2), the statute does not require the court to pass a mandatory sentence of 14 years. The court has a discretion, in my view, to pass a lesser sentence, depending on the circumstances of the case. This reasoning, I believe, is what informed the decision of the trial magistrate, E. Ayuka, in sentencing the appellant's co-accused, after a full trial, to imprisonment for 6 years on each of the two counts, the sentences to run concurrently.

18. In the circumstances, I take the view that the sentence of 10 years and 14 years respectively on the two counts imposed on the appellant were excessive in the circumstances.

19. The question is whether, as the appellate court, I should alter the sentence imposed by the trial court. In **Ogolla s/o Owuor, (1954) EACA 270**, the Court stated as follows:

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***

20. I take the view that the trial court in this case failed to consider the circumstances of the case, and the fact that the appellant had pleaded guilty. Further, had the trial court addressed its mind to the meaning of the term 'liable' in a penal statute and considered it against the circumstances of the case, including the fact that the appellant was a first offender, it would not have imposed a term of imprisonment for ten and fourteen years. Even though the sentences were to run concurrently, it is still my view that the sentence was harsh and excessive in the circumstances.

21. As noted above, the appellant's co-accused was sentenced to six years imprisonment, after a full trial. The fact that the appellant had

admitted the offence should have called for a lesser sentence.

22. I note that the appellant has been in prison since his conviction. For reasons that are not clear, his appeal was not brought up for admission and hearing until last year. He has, I believe, paid his debt to society for his offence. Given the fact that he was a first offender, the period already served is sufficient punishment. Accordingly, I allow the appeal and substitute the sentence of 10 years and fourteen years to the time already served. The appellant shall accordingly be set at liberty forthwith unless otherwise lawfully held.

Dated Delivered and Signed at Kericho this 7th day of February 2019

MUMBI NGUGI

JUDGE