



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 70 OF 2018

MAXWELL SAMMY OMONDI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being appeals arising from the conviction and sentence by Hon. R.

Odenyo Magistrate in Migori Magistrate's Criminal Case No. 689 of 2016 . delivered on 18/2/2018)

JUDGMENT

1. The Appellant herein, **Maxwell Sammy Omondi**, was charged with three counts of **Burglary** contrary to **Section 304(2)** of the **Penal Code** and **Stealing** contrary to **Section 279(b)** of the **Penal Code**. He also faced an alternative count of **Handling Stolen Property** contrary to **Section 322(1)(2)** of the **Penal Code**. The offences related to the series of theft that had occurred at Onyalo Secondary School (hereinafter referred to as '**the School**') between the months of August to October 2016.

2. The Appellant denied the charges and a trial was held. Three witnesses testified in support of the charges. **PW1** was **Jacob Onyango Ojwang** who was the Principal of the School. **PW2** was the School's Watchman one **Tobias Saye Anumu. No. 63085 Corp. Richard Kemei** attached at Migori Police Station was the investigating officer who testified as **PW3**. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court.

3. At the close of the prosecution's case the Appellant was placed on his defense and opted to give an unsworn statement and called no witness. By a judgment rendered on 18/12/2018 the Appellant was found guilty of the three counts of burglary and stealing and was convicted. He was sentenced to 6 years' imprisonment on each count which sentences were to run consecutively.

4. Being aggrieved by the said convictions and sentences, the Appellant preferred an appeal with the leave of this Court and raised the following three main grounds: -

a) That I did not plead guilty to the charge herein.

b) That the trial court erred in both law and facts by failing to consider that there was no sufficient evidence to convict me.

c) That the trial court erred in both law and facts by meting a sentence which was excessive and harsh in the circumstances

5. Directions were given and the appeal was disposed of by way of written submissions. The Appellant briefly expounded on the grounds and prayed that the appeal be allowed whereas the Learned Prosecution Counsel **Miss. Achieng** submitted in opposition to the appeal.

6. This being the Appellants' first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse 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.

7. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the counts of burglary and stealing were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.

8. Three witnesses testified before the trial court. PW1 narrated how he was informed of the break-ins and theft of various school items and

he reported the matter to the police. The first incident occurred in the night of 14th and 15th August 2016 where one 13kgs Gas Cylinder was stolen. The next incident followed in the night of 23rd and 24th September 2016 where a replacement of the 13kgs Gas Cylinder which had been stolen was also stolen. The third incident occurred in the night of 11th and 12th October 2016 where several desks were broken into and Text books and set-books stolen. PW1 further stated that as he was at the School on the 12th day of October 2016 restoring order as the students whose properties were stolen were agitated, the Appellant who was a former student of the School was escorted to the School by three people on allegations that they had arrested the Appellant in town trying to sell some books that bore the stamp of the School. The Appellant carried a bag which had 30 books. PW1 called the police and the Appellant was arrested.

9. According to PW1 the Appellant led the police, PW2, himself and others to his home where some more books were recovered, 2 shorts and a pipe used to connect a regulator to the Gas Cylinder. That, the Appellant took them further to a Gas Cylinder dealer next to Agip Petrol Station in Migori town where the 2 Gas Cylinders were recovered. That, a combined Inventory was also prepared.

10. PW2 corroborated the evidence of PW1. He further stated that he used to notice the break-ins and reported the incidents to PW1. He also confirmed that he was present when the police visited the Appellant's home and the dealer's premises where the recoveries were made. PW3 also corroborated the evidence of PW1 as well.

11. I note that the three persons who escorted the Appellant to the School and the Dealer who alleged that the Appellant had sold him the two Gas Cylinders did not testify. Those witnesses were very crucial ones given that the Appellant denied the offences and contended that the charges were planted on him as a result of bad blood between the Appellant's father and PW1 that emanated when the Appellant's father worked at the School as a contractor. I also note the two Gas Cylinders were not part of the Inventory produced in evidence. The three people who allegedly arrested the Appellant in town selling the books with the School stamp ought to have testified so as to settle the issue in light of the denial. Given their absence which was not even explained there lingers a doubt as to whether it is true those people arrested the Appellant as alleged or the Appellant was only sacrificed to cover up the real culprits. The same position covers the recovery of the 2 Gas Cylinders. As held in the famous cases of, among others, **Bukenya & Others versus Uganda (1972) E.A. 594**, **Kingi versus Republic (1972) E.A. 280** and **Nguku versus Republic (1985) KLR 412** if the prosecution fails to avail crucial witnesses without any plausible justification then the court may presume that had such witnesses testified their testimonies would have been unfavorable to the prosecution. I so find in this case and further find and hold that Counts I and II were not proved as required in law.

12. There were however items which were recovered in the home of the Appellant when the Appellant led them there. According to PW1 they were some of the stolen books, 2 shorts and a pipe used to connect a regulator to Gas Cylinder. The items were listed on the Inventory which was produced as Exhibit 1. The Appellant allegedly signed the Inventory and he did not challenge it in any way. I therefore find and hold that the Appellant willfully signed the Inventory. According to the Inventory they were 7 text books and set-books some which had the School reference numbers and official rubber stamps.

13. Count III was in respect to the stolen books. That means the books which were stolen in the night of 11th and 12th October 2016 were recovered in the home of the Appellant in the morning of 12th October 2016. The Appellant did not give any plausible reason as to how the books found their way into his home. In light of the **doctrine of recent possession** the Appellant was hence the thief who had stolen the text books from the School the night before. Count III was hence proved as required in law.

14. As to the cumulative sentences of 18 years' imprisonment, the maximum sentence for Burglary is 10 years' imprisonment whereas that of Stealing is 14 years' imprisonment. The sentencing court did not sentence the Appellant on the twin limbs of Burglary and Stealing but treated the two offences as one and instead gave a lump sum sentence of 6 years' imprisonment on each count which sentences were to run consecutively thereby translating to a total of 18 years' imprisonment. Since there were no previous records against the Appellant meaning that he was to be treated as a first offender then it was imperative that a Pre-Sentence Report be called for before sentencing.

15. Arising from the foregone discussion, the following orders do hereby issue: -

(a) The appeals against the convictions and sentences in respect to Count I and Count II are hereby allowed, convictions quashed and sentences set-aside.

(b) The appeal against the conviction in respect to Count III is hereby dismissed and the appeal against the sentence is allowed. The sentence is hereby set-aside.

(c) A Pre-Sentence Report shall be produced for purposes of sentencing in respect to Count III.

(d) Mitigations and Sentencing on 28/05/2019.

DATED, SIGNED and DELIVERED at MIGORI this 14th day of May 2019

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Maxwell Sammy Omondi the Appellant in person.

Mr. Kimanthi Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the

Respondent.

Evelyne Nyauke – Court Assistant