



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 64 OF 2017**

**JUMA KILONZO MWANZIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in Kitui Chief Magistrate's Court Criminal Case No. 1166 of 2017 by Hon. R. Ombata (RM) on 01/12/17)*

**J U D G M E N T**

1. **Juma Kilonzo Mwanzia**, the Appellant, was charged thus:

**Count 1: Breaking into a Building and Committing a Felony** contrary to **Section 306(a)** of the **Penal Code**. Particulars of the offence were that on the **1<sup>st</sup>** day of **October, 2017** at unknown time at **Kitui Township** within **Kitui County** broke and entered a building namely the shop of **Ibrahim Ahmed** and committed a felony namely stealing and stole from therein (see attached list), all valued at **Kshs. 201,600/=** the property of **Ibrahim Ahmed**.

In the alternative he was charged with the offence of **Handling Stolen Goods** contrary to **Section 322(1)(2)** of the **Penal Code**. Particulars of the offence were that on the **24<sup>th</sup>** day of **August, 2017** at unknown time at **Kitui Township** within **Kitui County** otherwise than in the cause of stealing, dishonestly retained (see attached list) knowing or having reason to believe it to be stolen goods.

**Count 2: Breaking into a Building and Committing a Felony** contrary to **Section 306(a)** of the **Penal Code**. Particulars of the offence were that on the **24<sup>th</sup>** day of **August, 2017** at unknown time at **Kitui Township** within **Kitui County** broke and entered a building namely the salon of **Nancy Ndanu** and committed a felony namely stealing and stole from therein (1) two blow dryers valued at **Kshs. 9,000/=** (2) one driver valued at **Kshs. 20,000/=**, all valued at **29,000/=** the property of **Nancy Ndanu**.

In the alternative he was charged with the offence of **Handling Stolen Goods** contrary to **Section 322(1)(2)** of the **Penal Code**. Particulars of the offence were that on the **24<sup>th</sup>** day of **August, 2017** at unknown time at **Kitui Township** within **Kitui County** otherwise than in the cause of stealing, dishonestly retained two blow dryers and one drier, knowing or having reason to believe it to be stolen goods.

**Count 3: Breaking into a Building and Committing a Felony** contrary to **Section 306(a)** of the **Penal Code**. Particulars of the offence were that on the **24<sup>th</sup>** day of **August, 2017** at unknown time at **Kitui Township** within **Kitui County** broke and entered a bar of **Racheal K. Ithua** and committed therein a felony namely stealing and stole (1) computerized weighing machine valued at **Kshs. 15,000/=** (2) Kenya Power Token machine valued at **Kshs. 10,000/=** (3) Mandle Holder valued at **Kshs. 7,500/=** (4) Amplifier and a speaker valued at **Kshs. 5,000/=**, all valued at **Kshs. 37,500/=** the property of **Racheal K. Ithua**.

In the alternative he was charged with the offence of **Handling Stolen Goods** contrary to **Section 322(1)(2)** of the **Penal Code**. Particulars of the offence were that on the **24<sup>th</sup>** day of **August, 2017** at unknown time at **Kitui Township** within **Kitui County** otherwise than in the cause of stealing, dishonestly retained a computerized weighing machine, Kenya Power Token machine, Mandle Holder, Amplifier and a speaker, knowing or having reason to believe it to be stolen goods.

**Count 4: Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code**. Particulars of the offence were that on the **13<sup>th</sup>** day of **October, 2017** at about **9.30 a.m.** at **Mjini Estate, Kitui Township** within **Kitui County** assaulted **Yakub Adan Alio** by hitting him with a metal rode thereby occasioning him actual bodily harm.

2. Having admitted the charges at the outset he was convicted on each and every main Count and sentenced thus:

**Count 1: 2 years imprisonment.**

**Count 2: 2 years imprisonment.**

**Count 3: 2 years imprisonment.**

**Count 4: Fined Kshs. 10,000/= in default to serve 2 years imprisonment.**

Sentences were to run consecutively in Count 1, 2 & 4 and the sentence in Count 3 was to run concurrently.

3. Aggrieved, he mitigates on sentence with a view of being released on grounds that he is deeply remorseful; he is the sole breadwinner of his family consisting of a grandmother and two (2) siblings; and he has reformed through the prison integrated correctional course.

4. The State through learned Counsel, **Mr. Mamba** opposed the Appeal on grounds that: Per the Probation Report availed the Appellant was not a first offender who is viewed as a risk if taken back to the society. He also urged that the Appellant had not adduced any evidence to suggest that he had reformed.

5. Principles of interfering with sentence were considered in the case of **Bernard Kimani Gacheru vs. Republic Criminal Appeal No. 188 of 2000** where the Court stated thus:

*“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”*

6. In meting out the sentence the trial Court addressed itself to the fact of the Appellant having not been a first offender and having been at a risk of being harmed by the society. In other words a custodial sentence was most suitable to him. This was as a result of a social inquiry having been conducted.

7. This is a matter where the trial Court exercised its discretion to impose concurrent and consecutive sentences. **Section 14** of the **Criminal Procedure Code** provides thus:

*“(1) Subject to subsection (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.*

*(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.*

*(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—*

*(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or*

*(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.*

*(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.”*

8. In the case of **Peter Mbugua Kabui vs. Republic (2016) eKLR** the Court of Appeal ventilated itself thus:

*“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. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totaling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful” We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same.”*

9. But in the case of **Sawedi Mukasa s/o Abdulla Aligwaisa (1946) 13 EA CA 97** the Eastern Court of Appeal was of this view:

***“... the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences...”***

10. The offences herein emanated from different transactions although Counts 2, 3 and 4 seem to have been committed on the same date. It would however be good practice to consider them running concurrently since the maximum penalty for the offence of stealing is **three (3) years imprisonment. (See Section 275 of the Penal Code).**

11. With regard to the 4<sup>th</sup> Count the sentence provided for is up to **five (5) years imprisonment. (See Section 251 of the Penal Code).** In the event that the Court elects to impose a fine, it ought to be guided by **Section 28 of the Penal Code. Section 28(1)(a)(b) and (2) of the Act** provides thus:

***“(1) Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply—***

***(a) where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive;***

***(b) in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court;***

***(2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale —”***

In the premises the trial Court having reached the decision to fine the Appellant **Kshs. 10,000/=** the default sentence should have been upto **three (3) months imprisonment.**

12. In the premises I set aside the sentence meted out and substitute it with the following orders:

**Count 1: To serve two (2) years imprisonment.**

**Count 2: To serve two (2) years imprisonment.**

**Count 3: To serve two (2) years imprisonment.**

**Count 4: Fined Kshs. 10,000/= in default to serve three (3) months imprisonment.**

13. Count 1, 2 and 3 shall run concurrently. The sentence will take effect from the date the Appellant was sentenced by the trial Court.

14. It is so ordered

**Dated, Signed and Delivered at Kitui this 18<sup>th</sup> day of June, 2019.**

**L. N. MUTENDE**

**JUDGE**