



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 110 OF 2017

BETWEEN

SAMUEL MAKOKHA KOKONYA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from original conviction and sentence by Hon. C. N. Sindani, Senior Resident Magistrate, dated 13/1/2017 in Mumias PM. Cr. Case No. 18 of 2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

The appellant herein, SAMUEL MAKOKHA KOKONYA pleaded guilty to the offence of **burglary** contrary to **Section 304 (2)** and **stealing** contrary to **Section 27 (h) of the Penal Code**. Upon his plea of guilty, the appellant was sentenced to five (5) years imprisonment on each limb of the offence. The sentences were to run concurrently.

The particulars of the offence are that on the night of 7th/8th December, 2016 at [an] unknown time at Wananchi village Kholera location in Matungu sub-county within Kakamega county, jointly with others not before court, he broke and entered the dwelling house of ISMAEL MUKATIA MAMATSI and stole from therein one TV flat screen make SONY, one DVD machine, one pair of leather open shoes and two shirts all valued at Kshs 35,500/= the property of the said ISMAEL MUKATIA MAMATSI.

Facts of the Case

The facts are that on 7/12/2016, the complainant one Ismael Namatsi locked up his house to go to work. On 8/12/2016 at around 2.00 p.m. while the complainant was at his place of work, his father visited him and informed him that his house had been broken into and a number of items stolen. The complainant rushed home and on checking found the items listed in charge sheet and Kshs 500/= in cash (in coin form) missing. The value of the stolen items was Kshs 35,500/=.

The complainant went and made a report at Harambee police station and investigations commenced. After a few days a friend of the complainant informed him that a man who had visited his shop was wearing a shirt which closely resembled the complainant's checked shirt with red and black stripes. On the 7/1/2017, the complainant got another report that the same man whom his friend had seen wearing what he believed was the complainant's shirt had gone to the friend's shop again dressed in the same shirt. The complainant rushed to the friend's shop and found the appellant dressed in the checked shirt with red and black stripes. When questioned about it the appellant alleged he had bought the shirt in Busia. As the complainant and his friend engaged the appellant in the conversation the appellant stripped and threw the shirt off before running away.

Thereafter the complainant went back to the police station and reported his encounter with the appellant. The complainant handed over the shirt to the police. Following leads provided by the complainant and his friend the appellant was traced and arrested on 11/1/2017. Upon arrest the appellant was positively identified as the man who was seen wearing the complainant's checked shirt with red and black stripes before throwing it off and running away. He was subsequently charged. The complainant's recovered shirt was produced in evidence as an exhibit.

The Appeal

Being dissatisfied with the conviction and sentence the appellant brought this appeal vide the Petition of Appeal dated 20/9/2017. The appellant raises the following grounds:-

1. ***THAT the learned trial magistrate heavily erred in law and facts in handing a harsh custodial sentence upon my own plea of guilty without considering other options set out in law.***
2. ***THAT the learned trial magistrate grossly misdirected himself in law and facts in handing me a harsh sentence not commensurate with first offenders.***
3. ***THAT the learned trial magistrate erred in law and facts in failing to consider the forms of punishment including but not limited to probation and CSO which were appropriate for a remorseful first offender.***
4. ***THAT the learned trial magistrate grossly erred in law and facts in ignoring my mitigation.***
5. ***THAT in all circumstances the sentence imposed was harsh and inconsiderate.***

The appellant prays that the appeal be allowed and sentence of five (5) years imprisonment (be) set aside.

As is clear from the grounds of appeal, the appellant's appeal is only against sentence. The appellant also said so during his oral submissions. He promised that once he is out of prison he will not continue associating with bad company. In response, prosecution counsel Mr. P. O. Juma said he would leave the issue to the discretion of the court.

Analysis and Determination

From an analysis of the record, there are just two issues for this court to determine:-

a. Whether the plea was unequivocal.

b. If the answer to (a) above is yes, whether this court in its appellate jurisdiction can interfere with the sentence imposed by the trial court.

a Whether the plea was unequivocal

I have carefully considered the record against the principles set out in the case of ***Aden -vs- Republic [1973] EA 101***. Save for a small omission at the very tail end of the process where the trial court wrote "***Plea of Guilty***" after the facts instead of writing "***Accused convicted on his own plea of guilty***" the process of recording the plea of guilty was in accordance with the principles set out in the ***Aden case*** (above).

In his written submissions, which I think were ill-informed by the person who helped the appellant to draft the same, the appellant purported to claim that his trial was not fair; prosecution called five (5) witnesses, that the trial court failed to avail the facts upon which the conviction was based and finally that the learned trial court did not warn him of the consequences of pleading guilty to such a serious offence.

In my considered view all those written complaints are unfounded. First, the case did not proceed to trial for the five intended witnesses to testify. On the day of the plea, the appellant pleaded not guilty to the charges but when he appeared for mention on 26/1/2017, he told the trial court – "***Accused 1- I wish to plead afresh.***" He also told the court that he understood Kiswahili. The charge was then read out to him in Kiswahili and in his response, he admitted the charge.

The prosecution proceeded to give detailed facts up to the time of his arrest and thereafter, he confirmed that the facts as read were correct. I have mentioned earlier that the trial court made a slight technical mistake when instead of recording "***Accused convicted on his own plea of guilty***", he wrote "***Plea of Guilty.***" I am of the view that the said error did not cause any prejudice to the appellant as far as the plea taking was concerned.

Further, the guilty plea was taken two weeks after the initial plea. The appellant who on his own motion informed the court of his desire to plead afresh with a view to changing his plea from one of "***Not guilty***" to one of "***Guilty.***" The appellant's various complaints about the trial in general or the magistrate in particular are therefore of no consequence.

b. Whether this court can interfere with the sentence

In ***Kyalo -vs- Republic [2009] KLR 325*** and ***Omuse -vs- Republic [2009] KLR 214***, the court held that

"an appellate court would only be entitled to interfere with the exercise of discretion of sentencing where it was shown that the court whose exercise of the discretion was impugned had either not taken into account a relevant factor or had taken into account an irrelevant factor or that short of those two, the exercise of the discretion was plainly wrong."

In this case the appellant was charged under ***section 304 (2)*** because the offence took place in the night, and for that the maximum sentence for the offence is ten years while the offence of stealing under ***section 279 (b)*** is punishable by imprisonment for fourteen years. The appellant herein was sentenced to five (5) years on each limb of the offence.

From the record the trial court considered the appellant's mitigation while noting that the offence was rampant in the region before imposing the five (5) year sentences. In my considered view, I find no valid reason to interfere with the sentencing discretion exercised by the trial court in this case.

Conclusion

In light of all the above, I find and hold that the appellant's appeal has no merit and the same be and is hereby dismissed. The conviction by the trial court is also confirmed. Right of appeal within 14 days from the date of this judgment.

Orders accordingly.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 9th day of October, 2019.

WILLIAM M. MUSYOKA

JUDGE