



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 67 OF 2018

ERICK MUSYOKA MUTEMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kitui Senior Principal Magistrate's Court Criminal Case No. 487 of 2017 by Hon. J. M. Munguti (PM) on 08/05/17)

J U D G M E N T

1. **Erick Musyoka Mutemi**, the Appellant, was charged as follows:

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 night of **6th/7th May, 2017** at unknown time at **Mutitu Trading Centre** in **Kitoo Sub-Location, Mutitu Location** within **Kitui County**, jointly broke and entered a building namely Top Life Bar of one **Erick Mutia** and committed a felony namely theft of cash **Kshs 1,500/=** the property of **Erick Mutia**.

In the alternative he was charged with the offence of **Handling Stolen Goods** contrary to **Section 2** of the **Penal Code**. Particulars of the offence were that on the **7th day of May, 2017** at around **8.30 a.m.** at **Nzambani Roadblock** in **Nzambani Location** within **Kitui County**, otherwise than in the course of stealing, dishonestly retained coins cash **Kshs. 1,200/=** knowing or having reason to believe them to be stolen.

Count 2 – Malicious Damage to Property contrary to **Section 339(1)** of the **Penal Code**. Particulars of the offence were that on the night of **6th/7th May, 2017** at unknown time at **Top Life Bar, Mutitu Trading Centre** in **Kitoo Sub-Location, Mutitu Location** within **Kitui County**, jointly, willfully and unlawfully damaged one betting machine valued at **Kshs. 60,000/=** the property of **Erick Mutia**.

2. He admitted the charges at the outset and was sentenced as follows:

Count 1 – To serve four (4) years imprisonment.

Count 2 – To serve two (2) years imprisonment

The sentences were ordered to run consecutively.

3. Aggrieved he appeals against sentence meted out on the ground that the Court directed the sentences to run consecutively instead of concurrently.

4. The State through learned counsel conceded the Appeal.

5. This being the first Appellate Court, I am duty bound to re-consider what transpired at trial and come to my own conclusion.

6. **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.”*

7. In the case of **Peter Mbugua Kabui vs. Republic (2016) eKLR** the Court of Appeal stated 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.”

8. The offences herein were committed on the night of 6th and 7th May, 2017. The door to the premises was broken, the betting machine was vandalized, and Kshs. 1,200/= stolen. The offences were committed in a single transaction therefore should have attracted concurrent sentence.

9. A social inquiry was conducted by the Probation Officer. It was recommended thus:

“The Accused is remorseful and is begging for leniency. He takes responsibility for his mistake and want to make amends. He is respective to rehabilitation and promises to stay away from crime. He had persistent severe headaches that have led him to be hospitalized while serving jail term. He also suffers from ulcers and these conditions make his stay in prison really hard.”

10. In the case of **Bernard Kimani Gacheru vs. Republic Criminal Appeal No. 188 of 2000** the Court of Appeal 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, anyone of the matters already stated is shown to exist.”

11. The Appellant herein was a repeat offender. He needs to be rehabilitated. In the premises, I do set aside the order of the trial Court and substitute it with an order directing that the sentences imposed shall run concurrently.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 3rd day of December, 2019.

L. N. MUTENDE

JUDGE