



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 108 OF 2017

JOSEPH MUTUA MUISYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the sentence in Kangundo Senior Principal Magistrates Court

No.s 697, 698, 701, 726, 727 of 2017 and 700 consolidated with 717 of 2017

delivered by Hon. Orimba (SPM) on 3rd October, 2017.)

JUDGEMENT

1. The Appellant was charged in 6 criminal cases in Kangundo Senior Principal Magistrates Court; Nos 697, 698, 701, 726, 727 of 2017 and 700 consolidated with 717 of 2017. He was charged as follows:

Criminal Case No. 697 of 2017

Breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code.

Count II

Stealing contrary to section 268 as read with section 275 of the Penal Code.

Count III

Handling stolen goods contrary to section 322 (1) (2) of the Penal Code.

Criminal Case No. 698 of 2017

Breaking into a building with intent to commit felony contrary to section 307 of the Penal Code.

Count II

Stealing contrary to section 268 as read with section 275 of the Penal Code.

Alternative charge

Handling stolen goods contrary to section 322 (1) (2) of the Penal Code.

Criminal Case No. 701 of 2017

Burglary contrary to section 304 (2) of the Penal Code.

Count II

Stealing in a dwelling house contrary to section 279 (b) of the Penal Code.

Criminal Case No. 726 of 2017

Burglary contrary to section 304 (2) of the Penal Code.

Count II

Stealing in a dwelling house contrary to section 279 (b) of the Penal Code.

Count III

Handling stolen goods contrary to section 322 (1) (2) of the
Penal Code.

Criminal Case No. 727 of 2017

Burglary contrary to section 304 (2) of the Penal Code.

Count II

Stealing in a dwelling house contrary to section 279 (b) of the Penal Code.

Alternative charge

Handling stolen goods contrary to section 322 (1) (2) of the Penal Code.

Criminal Case No. 700 of 2017

Burglary contrary to section 304 (2) of the Penal Code.

Count II

Stealing in a dwelling house contrary to section 279 (b) of the Penal Code.

Count III

Burglary contrary to section 304 of the Penal Code.

Count IV

Stealing in a dwelling house contrary to section contrary to Section 279 (b) of the Penal Code.

Alternative charges Handling stolen goods contrary to section 322 (1) (2) of the Penal Code.

Handling stolen goods contrary to section 322 (1) (2) of the Penal Code.

Criminal Case No. 717 of 2017

Burglary contrary to section 304 (2) of the Penal Code.

Count II

Stealing in a dwelling house contrary to section 279 (b) of the Penal Code.

Alternative charge

Handling stolen goods contrary to section 322 (1) 920 of the Penal Code.

2. The Appellant pleaded guilty to the said charges. He was convicted and sentenced and the said sentences were to run concurrently totaling to 34 years. He sought leniency from the court stating that he is a single parent and that he is remorseful for his actions. That he has improved

his behavior and conduct. He stated that the sentence in Criminal Case No. 700 of 2017 is manifestly excessive in view of its circumstances. He urged that the sentences be ordered to run concurrently rather than consecutively. In support of his argument he cited among others **Sayeka v. Republic [1989] KLR 306** and section 37 of the Penal Code.

3. The Respondent on the other hand submitted that in accordance to section 348 of the Penal Code, no accused person who has pleaded guilty should be allowed to appeal except as to the extent or legality of the sentence. In this regard the case of **Olel v. Republic [1989] KLR 444** and **Aden v. Republic [1973] EA 445** were cited. With regard to the gravity of the sentence, it was submitted that in considering the appropriate sentence to impose, it is important that similar offences attract fairly similar punishment in terms of sentences meted out so that there is uniformity and certainty. That while applying the said principles, it is important to remember that sentencing is at the discretion of the trial court and a court sitting on appeal should be slow in interfering with the said discretion unless there are reasonable grounds to do so. It was submitted that the general practice is that if an accused person commits a series of offences at the same time in a single act, a concurrent sentence should be given. That on the other hand, 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 thereby the trial court did not err.

4. The Court of Appeal in **William Kimani Ndichu v. Republic [2015] e KLR** observed as follows with regard to the meaning of the phrase same transaction thus:

“The former Court of Appeal has defined the phrase “same transaction” in Rex v Saidi Nsabuga s/o Juma and another (1941) 8 EACA 81 and revisited it again in Nathani v R (1965) EA 777, where the court said that the proper construction of the phrase “same transaction” is that:-

“If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”

Applying the test, the offences the appellant herein faced cannot be said to have arisen from the same transaction bearing in mind the fact the said were committed on different dates.

5. With regard to sentencing, the same court held:

“It is now trite law that in cases where a person has been charged with and convicted of two or more counts involving the same transaction in a charge sheet or information or a trial, the practice is to direct that the sentences should run concurrently: see R v Fulabhai Jethabhai & Another (1946) 13 EACA 179. See Ng’ang’a v. Republic (1981) KLR 530 decision by Travelyan and Sachdeva Ag. J, and the case of Ondiek v. Republic (1981) KLR 430, Simpson J and Kneller J; where the Judges were unanimous on the position that the practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances the sentences imposed should run concurrently... The Court of Appeal sitting in Nyeri recently in the case of BMN v Republic [2014] eKLR (Criminal Appeal No. 97 of 2013) when dealing with a similar situation pronounced itself as follows:-

“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.”

6. The Court of Appeal in **Aden v R [1973] 443** gave directions on how a plea should be recorded thus:

“ i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

ii) the accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;

iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts;

iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

v) if there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused’s reply should be recorded.”

The appellant has not demonstrated that the said principles were not adhered to. Having arrived at that, it is to be noted as correctly submitted by the respondent that Section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. There is no hint of an illegality in the sentences meted out by the trial court. The Appellant duly pleaded guilty to the charges and gave his mitigation which was considered by the trial court. Some of the offences took place on different dates and as such were not of the same transaction and hence there was nothing wrong for the trial court to order the sentences to run consecutively.

7. In the result, the appeal is devoid of merit. The same is dismissed. The sentences by the trial court are upheld.

Orders accordingly.

Dated and delivered at Machakos this 4th day of October, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Joseph Mutua Muisyo - the Appellant

Machogu - for the Respondent

Josephine - Court Assistant