



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUNGOMA

CRIMINAL APPEAL 236 OF 2016

EMMANUEL NAKAMBO MUSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising from the Conviction and Sentence in Webuye SPM CRI. Case No. 902 of 2016 by Hon. C.N. ORUO (RM).

J U D G M E N T

The appellant Emmanuel Nakambo Musa was charged with the following offences; Count I Breaking into a building and committing a felony contrary to section 306(A) of the Penal Code. The particulars of the charge were that on the 3rd day of March 2016 at Nyange Street Webuye Township in Bungoma East Sub-county jointly with others not before court broke and entered the shop of AMINA WESONGA with intent to steal and stole assorted clothes, battery, shoes, one Radio valued at Kshs.299,000/=.

He also faced an alternative charge of handling stolen property contrary to section 322(1) (2) of the Penal Code. The particulars of the alternative charge were that on the 1st day of December 2016 at Nyange Street Webuye Township in Bungoma East Sub-county within Bungoma County. Otherwise in course of stealing dishonestly retained one radio battery and shoes all valued at Kshs.24000/= knowing it to be stolen property.

Count II Malicious Damage of property contrary to section 339(1) of the Penal Code The particulars of the charge were that on the 3rd day of March 2016 at Nyange Street Webuye Township in Bungoma East Sub-county within Bungoma County jointly with others not before court willfully and unlawfully damaged CCTV Cameras Kshs.77,000/= property of AMINA WESONGO MURONO in course of stealing dishonestly retained one radio battery and shoes all valued at Kshs.24000/= knowing it to be stolen property.

Count III Breaking into a building and committing a felony contrary to section 306(A) of the Penal Code. The particulars of the charge were that on the night of 17th October 2016 at Nyange Street Webuye Township in Bungoma East Sub-county jointly with others not before court broke and entered the shop of CATHERINE MIKUSI with intent to steal and stole shaving machine, wall clock and assorted motor vehicle parts all valued at Kshs.80,000/= property of CATHERINE MIKUSI

He also faced an alternative charge of handling stolen property contrary to section 322(1)(2) of the Penal Code. The particulars of the alternative charge were that on the 1st day of December 2016 at Nyange street Webuye Township in Bungoma East Sub-county within county within Bungoma County. Otherwise in course of stealing dishonestly retained weighing scale valued at Kshs.5000/= knowing it to be a stolen property.

Count IV Breaking into a building and committing a felony contrary to section 306(A) of the Penal Code. The particulars of the charge were that on the night of 21st October 2016 at Nyange Street Webuye Township in Bungoma East Sub-county jointly with others not before court broke and entered the shop of ESTHER NYAMBURA with intent to steal from therein and did steal from therein assorted clothes, shoes and ladies handbags valued at 29,000/= property of ESTHER NYAMBURA.

He also faced an alternative charge of handling stolen property contrary to section 322(1) (2) of the Penal Code. The particulars of the alternative charge were that on the 1st day of December 2016 at Nyange street Webuye Township in Bungoma East Sub-county within county within Bungoma County. Otherwise in course of stealing dishonestly retained three pairs of shoes and one ladies hand bag valued at Kshs.7000/= knowing it to be a stolen property.

Count V Breaking into a building and committing a felony contrary to section 306(A) of the Penal Code. The particulars of the charge were that on the night of 21st October 2016 at Nyange Street Webuye Township in Bungoma East Sub-county jointly with others not before court broke and entered the shop of PAUL KARANJA MAINA with intent to steal from therein and did steal from therein one LG TV set, DVD digital, Solar Lamps and Safaricom Credit cards all valued at Kshs.20,000/= property of PAUL KARANJA MAINA.

He also faced an alternative charge of handling stolen property contrary to section 322(1)(2) of the Penal Code. The particulars of the alternative charge were that on the 1st day of December 2016 at Nyange street Webuye Township in Bungoma East Sub-county within county within Bungoma County. Otherwise in course of stealing dishonestly retained L.G TV set and DVD Digital valued at Kshs.15,000/= knowing it to be a stolen property.

The Appellant pleaded guilty on all counts and was convicted on his own plea of guilty as charged counts and sentenced seven years imprisonment on count 1, sentenced to five years imprisonment on count 2, sentenced to seven years imprisonment on count 3, sentenced to seven years imprisonment count 4 and sentenced to seven years imprisonment on count 5 and the sentences were to run consecutively.

Being dissatisfied with the sentencing the appellant has preferred this appeal on the following grounds that: the sentence imposed upon the appellant was harsh and excessive; that the learned magistrate did not consider his mitigation as the sole bread winner of his children and family

The appellant made oral submissions that he was charged with breaking and stealing and he decided to plead guilty because he had committed the offence and was sentenced to 33 years in the 5 counts and he prays for reduction of the sentence.

Mrs. Okindi for the state opposed the appeal and submitted that the maximum sentence for count 1 breaking and stealing is 7 years and in count 2 for malicious damage of property was sentenced to 5 years the maximum and magistrate allowed the sentence to run consecutively. The sentence were meant to run concurrently.

I have considered the Appellant's mitigation and the arguments by the Prosecution, and find that the issue for determination by the court are whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code and whether the said sentence is amenable to reduction and /or variation.

Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-

“In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence”.

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - Vs- Shershowsky (1912) CCA 28TLR 263)."

In the instant appeal, the Appellant was charged with, and convicted of various offences. The first offences on count I, III, IV and V were breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code.

Section 306 on the other hand provides for the offence of breaking into a building and committing a felony as follows:

Any person who—

(a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or

(b) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.

The Appellant was also charged with and convicted of the offence of malicious damage contrary to section 339(1) of the Penal Code, which provides as follows:

“Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years”

It was argued by the Appellant that the imprisonment sentences meted out on him should be reduced and run concurrently and not consecutively. The principles that apply for sentences to run concurrently or consecutively are stated in *section 14 of the Criminal Procedure Code* as follows:

“(1) Subject to sub-section (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 therefore 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 less or

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

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 and/or 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.

In *Ondiek -v- R (1981) KLR 430*, it was also stated by the Court 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 ought to run concurrently. Likewise, in *Nganga -v- R, (1981) KLR 530*, the High Court held that concurrent sentences should be awarded for offences committed in one criminal transaction.

The issue in this appeal therefore is what criminal transaction or act led to the offences the Appellant is convicted of. I note from the particulars in the charge sheet that the offences were committed by the Appellant on different dates and of different items, and for the offences committed on the same date and time, the trial magistrate did not order that the sentences for those offences were to run concurrently. There was therefore an error made by the trial magistrate in this respect.

However, the Court notes that for those offences arising from the same transaction, the sentence imposed although lawful was excessive in the circumstances, and also in light of the value of the items alleged to have been stolen by the Appellant. The Appellant was also found not to have any previous record.

The Appellant's appeal therefore succeeds only to the extent of sentence only. I therefore order that the imprisonment term imposed on the 5 counts to run concurrently with the result that the appellant will serve a maximum of seven (7) years imprisonment from the date of sentence on 20th January, 2016.

Dated and Signed at Bungoma this 21st day of November, 2018.

S.N. RIECHI

JUDGE.