



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 90 OF 2017**

**VICTOR WAMBUA KALOKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being Appeal against the sentence by Hon. C. K. Kisiangani (RM) in Machakos CMC CR. Case No. 304 of 2017 on 10<sup>th</sup> July, 2017)

**JUDGEMENT**

1. The appellant was charged of the offence of burglary and stealing from a dwelling place contrary to section 304 (2) and section 279 (b) of the Penal Code. He was on his own plea of guilty convicted of the same and sentenced to serve 3 years for count 1 and 2 totaling to 6 years imprisonment.

2. He has lodged this appeal seeking that the sentences run concurrently. He cited section 37 of the Criminal Procedure Code. He expressed that he is remorseful and regrets his actions and that he is rehabilitated. He further relied on the cases of **Shadrack Kipkoach Kogo v. Republic Eldoret Criminal Appeal No. 253 of 2003** among others.

3. The respondent submitted that the appellant is not a first offender and it is not favourable for him to be given a non-custodial sentence. Section 14 of the Criminal Procedure Code was relied on and submitted that the offences the appellant was charged with in the two counts were committed in the same transaction and therefore the trial court erred in imposing consecutive sentences as opposed to concurrent sentences. On the issue of leniency, it was submitted that sentencing is discretionary and the appellate court would only interfere where it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to a miscarriage of justice.

4. I have given due consideration to this appeal. The principles that an appellate Court will act upon in exercising its discretion to interfere with a sentence imposed by the trial court are now well settled. The Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue 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 - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoach Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-**

**sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka -vs- R. (1989 KLR 306)"**

5. The appellant was charged with burglary contrary to section 304 (2) of the Penal Code. The particulars were that the appellant on the 5<sup>th</sup> night of July, 2017 at around 0200 hours, at Mathatani location Kyumbi area within Machakos County, broke and entered the dwelling house of Felistus Vunuro Khayumbi with intent to commit a felony therein namely stealing. He faced a second count of Stealing in a dwelling house, contrary to section 279 (b) of the Penal Code. The particulars being that the appellant on the 5<sup>th</sup> at night of July, 2017 at around 0200 hours, at Mathatani location in Kyumbi area within Machakos County, stole one carpet, one blanket, two bedsheets, six duffet bedcovers, one table cloth and ten window curtains all valued at KShs. 50,000/- the property of Felistus Vunuro Khayumbi from the dwelling house of the said Felistus Vunuro Khayumbi.

6. The Court of Appeal in **William Kimani Ndichu v. Republic [2015] eKLR** 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 faced clearly arose from the same transaction. 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 Traveyan 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.”** [Emphasis mine]

7. In the end, I find that the trial court was in error to have the sentences run consecutively and I set aside the same. The sentence is however not excessive bearing in mind the gravity of the offence and the fact that the trial court considered the appellant’s mitigation as well as the appellant’s past antecedents. Accordingly, the sentence of three (3) years on each count shall run concurrently from 10/07/2017.

**Dated and delivered at Machakos this 11<sup>th</sup> day of December, 2018.**

**D. K. KEMEI**

**JUDGE**