



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 70 OF 2016

(Appeal originating from the sentence by Hon. R.KEFA SRM in Nyeri CR. CASE NO.865 of 2016)

MARGARET WAIRIMU GACHARU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant together with another was charged with 8 counts as set out hereunder;

Count 1:-House breaking contrary to Section 304(1) and Stealing in a dwelling house contrary to Section 279(b) of the Penal Code:

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the 21st day of August, 2016 at Kimenju village, Kieni West Sub-county in Nyeri county within the Republic of Kenya jointly with another not before court broke and entered the dwelling house of Cornelius King'ori Gathiru and stole therein one Television set make Tousda Model No. 1916T, one remote and one Meko gas all valued at Kshs.18,000/- the property of Cornelius King'ori Gathiru.

Alternative charge to court 1.

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the 24th day of August, 2016 at 8.00 a.m., Kimenju village, Kieni West Sub-county of Nyeri County within the Republic of Kenya otherwise then in the course of stealing dishonestly retained one Television set make Tousda Model No. 1916T and one Remote Control make Tousda having reason to believe them to be stolen property.

Count II: Shop breaking and committing a felony contrary to Section 306(a) of the Penal code.

Margaret Wairimu Gachuru: ON the 10th day of August, 2016 around 3.00 a.m., Kimenju village, Kieni West Sub-County of Nyeri County with the Republic of Kenya jointly with another not before court, broke and entered into a building namely a shop of Peter Wamiti Wagichuhi and committed therein a felony namely theft of one Radio Cassette make Panasonic, one Thermos flask, 10 packets of maize

flour, 8 packets of wheat flour, 30 pieces of candles, 10 kg of Rice, 8 pieces of Tissue paper, 3 pieces of Arimis oil, 20 packets of match box, 3 pieces of Sunny girl, one packet of sweets, one dozen of tooth paste, 3 pieces of bar soap, six pieces of pens, 10 pieces of pencil, 20 pieces of tea leaves and 16 sachets of Ariel soap all valued at Kshs.11,000/- the property of Peter Wamiti Wagichuhi.

Alternative court to Court II: Handling stolen goods contrary to Section 322(2) of the Penal Code. Margaret Wairimu Gachuru: On the 24th day of August, 2016 around 8.00 am at Kimenju village, Kieni West sub-county, Nyeri County with the Republic of Kenya, otherwise than in the course of stealing dishonestly retained 3 candles, 8 tissue paper, 3 Arimis oil, 20 packets of matchbox, 3 sunny girl, 1 packet of sweets, one dozen of Colgate tooth paste, 3 bar soaps, 6 pens, 10 pencils, 20 packets of tea leaves and 16 Ariel soap having reason to believe them to be stolen property.

COUNT III: Butchery breaking and committing a felony contrary to Section 306(a) of the Penal code.

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the night of 27th and 28th July, 2016 at Kimenju village, Kieni West Sub-county of Nyeri County within the Republic of Kenya jointly with another not before court, broke and entered into a building namely a butchery of Juliana Wanjiru Kagathi and committed therein a felony namely theft of one weighing scale, weighing stones, one padlock and one Radio make Sonitec all valued at Kshs.10, 000/- the property of Juliana Wanjiru Kakathi.

Alternative charge to Count III:

Handling stolen goods contrary to Section 322(2) of the Penal Code:

On the 24th day of August, 2016 at Kimenju village, Kieni West Sub-county of Nyeri County in the republic of Kenya, otherwise than in the course of stealing dishonestly retained one radio make Sonitec, one padlock and one weighing scale place knowing them to be stolen properties.

Count IV: Shop breaking and committing a felony contrary to Section 306(a) of Penal Code.

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the night of 27th and 28th July, 2016 at Kimenju village Kieni West, sub county of Nyeri County in the Republic of Kenya jointly with another not before court broke and entered into a building namely a shop of Emma Wairimu Ndungu and committed therein a felony namely theft of 50 kg sugar, 50 kg rice, 4 dozen of Omo soap, 6 dozens of tea leaves, 4 dozens of milking jelly, one bale of wheat flour , one packet of pencil, one packet of tooth brush, 50 kg of beans, 2 pairs of shoes all valued at Ksh.90,000/- the property of Emma Wairimu Ndungu.

Alternative charge to count IV: Handling stolen goods contrary to Section 322(2) of the Penal Code:

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the 24th day of August, 2016 at Kimenju village, Kieni West Sub-county of Nyeri County within the Republic of Kenya, otherwise than in the course of stealing dishonestly retained a pair of open shoes knowing them to be stolen property.

Count V: Burglary contrary to Section 304(2) and stealing in a dwelling house contrary to Section 279(b) of Penal code.

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the night of 20th and 21st June, 2016 at Kimenju village, Kinei West Sub-county of Nyeri County within the Republic of Kenya jointly with others not before court broke and entered into the dwelling house of Julia Muthoni Karimi with intent to steal therein and did steal from therein 20 pieces of iron sheets valued at kshs.18, 000/- the property of the said Julia Muthoni Karimi.

Alternative charge to count V:

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the 24th day of August, 2016 at Kimenju village Kieni West Sub-county of Nyeri County in the Republic of Kenya, otherwise than in the course of stealing dishonestly retained 21 iron sheets knowing them to be stolen property.

Count VI: House breaking contrary to Section 304(1) and stealing in a dwelling house contrary to Section 279(b) of the Penal Code:

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the 10th day of August, 2016 at Kimenju village, Kieni West Sub-county of Nyeri County in the Republic of Kenya, jointly with others not before court broke and entered into the dwelling house of Dancun Ndirangu Macharia and stole therein one water pump make Honda, a pair of shoes and one torch all valued Kshs.40, 000/- the property of Dancun Ndirangu Macharia.

Alternative charge to count VI: Handling stolen good contrary to Section 322(2) of Penal Code:

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the 24th day of August, 2016 at Kimenju village, Kieni West Sub-county of Nyeri County with the Republic of Kenya, otherwise than in the course of stealing dishonestly retained one pair of Safari boots knowing them to be stolen property.

Count VII: Shop breaking and committing a felony contrary to section 306(a) of the Penal Code:

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the night of 16th and 17th August, 2016 at New City Trading Centre, Kieni West Sub-county of Nyeri County in the Republic of Kenya jointly with others not before court, broke and entered into a building namely a shop of Bernard Mwaniki Mwai and committed therein a felony namely theft of one Blow dry, 7 exercise books, 8 single shoes of different design, one hair dry, one pair of slippers and one pair of sports shoes all valued at Kshs.15,000/- the property of the said Bernard Mwaniki Mwai.

Alternative charge to Count VII. Handling stolen goods contrary to Section 322(2) of the Penal Code

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the 24th August, 2016 at Kimenju village, Kieni West Sub-county of Nyeri County in the Republic of Kenya otherwise than in the course of stealing dishonestly retained one blow dry, 8 single shoes, one hair dry a single slippers and sports shoes having reason to believe them to be stolen properties.

Count VIII: Being in possession of Narcotic drugs contrary to Section 3(1) as read with Section 3(2) of the Narcotic drugs and Psychotropic substance control Act No. 4 of 1994

1. Daniel Muchemi Macharia 2. Margaret Wairimu Gachuru:

On the 24th day of August, 2016 at Kimenju village Kinei West Sub-county of Nyeri County with the Republic of Kenya, was found being in possession of five Rolls of cannabis which were not to the form of medical preparation estimated street value of Kshs.100/-

The appellant pleaded guilty to all the 8 counts. She was convicted and sentenced as follows:-

Count 1:- Fine of kshs.20, 000/- in default 6 months imprisonment

Count II:-Fine of Kshs.20, 000/- in default 6 months imprisonment

Count III:-Fine of Kshs.20, 000/- in default 6 months imprisonment

Count IV:-Fine of Kshs.50, 000/- in default 12 months imprisonment.

Count V:-Fine of Kshs.20,000/- in default 6 months imprisonment.

Count VI:-Fine of Kshs.50,000/- in default 12 months imprisonment.

Count VII:-Fine of Kshs.20,000/- in default 6 months imprisonment

Count VIII:-Fine of Kshs.10,000/- in default 2 months imprisonment

Sentences to run consecutively. Right of appeal 14 days. The 8 rolls of bhang to be destroyed. The exhibits to be returned to the owners.

The appellant appealed on sentence. She urged the court to order that the sentences do run concurrently. The grounds she advanced are that she was a first offender, she has three children to take care of. She added that she has been in prison for one year and has greatly reformed and that she is unable to raise fine due to poverty. She prayed for leniency.

On perusal of the trial court record I note that count 1 and 6 have two limbs of the charge but one sentenced was imposed whereas each limb should have attracted separate sentences. I also note that 7 of the 8 counts are house, shop, butchery breaking and burglary. There are 7 complaints whose items were stolen. The appellant admitted the charge and said that the items were recovered from her house. The provisions under which the appellant has been charged in count 1 to 7 provide for sentence of between 7 to 14 years imprisonment. In all the 7 counts the appellant has been fined with alternative jail term in default. The fine ranges from 20,000 to 50,000 and default jail term of between 6 months to 1 year. I have considered grounds raised by the appellant in urging court to allow the sentences to run concurrently. I however note that Sentences in the second limb of count 1 and 6 were omitted. The offences committed are serious and they attract higher sentences. The trial court was too lenient to the appellant in respect of the 7 counts. The appellant never raised any health issue in the lower court neither did she produce before me any treatment record if she contracted a disease in prison. The trial court considered that the appellant was a first offender. From the foregoing I find that the magistrate was too lenient to the appellant and I decline to interfere with the sentences imposed in count 1 to 7.

In so far as count 8 is considered I wish to refer to ***Mombasa criminal Appeal no.65 of 2014 Caroline Auma Majabu vs Republic (2014) e KLR*** where the court of Appeal held that the court should consider the value of cannabis and imposed a lenient sentence if the value is low. Particulars of count 8 show the value of cannabis as kshs 100. Fine imposed was kshs10, 000 or 2 months imprisonment. In view of the value of cannabis found in the appellant's possession I find a fine of kshs 10,000 excessive. From the foregoing I do substitute sentence in count 8 with a fine of kshs 2000 in default 1 month imprisonment.

Dated, signed and delivered at Nyeri this 9 DAY OF JUNE 2017.

RACHEL NGETICH

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HIGH COURT JUDGE