



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.81 OF 2017

(FORMERLY NAKURU HCRA.333/15)

(Appeal Originating from Nyahururu CM's Court Cr.No.930/13 by: Hon. A.P. Ndege – P.M.)

SAMUEL NJUNGE BEN.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant herein is Samuel Njunge Ben alias Julius. On 21/6/2013 he was jointly charged with Salome Wanjiru Wanjiku in Criminal Case No.930 of 2013, with the offence of House Breaking and Stealing Contrary to Section (304) (b) and 279(g) of the Penal Code. The facts were that on 14/4/2013, at Nyakinyua Farm in Nyandarua County, jointly broke and entered a building used as a dwelling house by James Muigai Njoroge and stole one 14" coloured TV make Wegasonic, one Panasonic Radio and one Royal Tech DVD Serial No.RT3800m all worth Kshs.18,840/=, the property of the said James Muigai Njoroge.

In the alternative, the two accused faced a charge of handling stolen goods contrary to Section 322(1)(2) of the Penal Code.

The particulars of the charge were that on diverse dates between 14th day of April, and 22nd day of April, 2013, at Canaan Estate in Mairo-Inya trading centre, Nyandarua County, jointly, otherwise in the cause of stealing, dishonestly retained one coloured TV make Wegasonic, one Panasonic Radio, one Royal Tech DVD Serial No.RT3800 all worth Kshs.18,840/= the property of James Muigai Njoroge knowing or having reason to believe them to be stolen goods.

Later on 21/11/2013, the prosecution sought to have Criminal Case No.930 of 2013 consolidated with Criminal Case No.962 of 2013 where the appellant and 2nd accused person faced other similar charges and a fresh charge was substituted with five counts including the above charge. The other charges were counts 2 – 5 which are as follows:

Count 2:

House breaking Contrary to Section 304(1)(b) and stealing Contrary to Section 279(b) of the Penal Code.

Particulars:

Samuel Njunge Ben Alias Julius and Salome Wanjiru Wanjiku: On the 21st day of April, 2013 at Muthaiga Estate in Kwakungu Trading Centre within Nyandarua County jointly broke and entered the building used as a dwelling house by **CHARLES THIGA WAMAHI** and stole one royal sub-woofer, one speaker and one pair of sports shoes all valued at Kshs.5,900/=, the property of the said **CHARLES THIGA WAMAHI**.

Alternative Charge:

Handling stolen goods Contrary to Section 322(1)(2) of the Penal Code.

Particulars:

Samuel Njunge Ben Alias Julius and Salome Wanjiru Wanjiku: On diverse days between 21st day of April and 22nd day of June, 2013 at Canaan Estate in Mairo-Inya Trading Centre within Nyandarua County jointly otherwise than in the course of stealing dishonestly retained one royal sub-woofer, one speaker and one pair of sports shoes all valued at Kshs.5,900/=, the property of the said **CHARLES THIGA WAMAHI** knowing or having reason to believe them to be stolen goods.

Count 3:

House breaking Contrary to Section 304(1)(b) and stealing Contrary to Section 279(b) of the Penal Code.

Particulars:

Samuel Njunge Ben Alias Julius and Salome Wanjiru Wanjiku: On the 2nd day of June, 2013 at Nyakinywa Farm in Karai Village within Nyandarua County jointly broke and entered the building used as a dwelling house by **GABRIEL MURANGA MACHARIA** and stole one Neelam bicycle size '22' black serial number 51165238, 4 curtains, 8 table cloths and 2 pillow cases all valued at Kshs.9,500/=, the property of the said **GABRIEL MURANGA MACHARIA**.

Alternative Charge:

Handling stolen goods Contrary to Section 322(1)(2) of the Penal Code.

Particulars:

Samuel Njunge Ben Alias Julius and Salome Wanjiru Wanjiku: On diverse days between 2nd day and 22 day of June, 2013 at Canaan Estate in Mairo-Inya trading centre within Nyandarua County jointly otherwise than in the course of stealing dishonestly retained one Neelam bicycle size '22' black serial number 51165238, 4 curtains, 8 table cloths and 2 pillow cases all valued at Kshs.9,500/=, the property of the said **GABRIEL MURANGA MACHARIA** knowing or having reason to believe them to be stolen goods.

Count 4:

House breaking Contrary to Section 304(1)(b) and stealing Contrary to Section 279(b) of the Penal Code.

Particulars:

Samuel Njunge Ben Alias Julius and Salome Wanjiru Wanjiku: On the 7th day of June, 2013 at Nyakinywa Farm in Karai Village within Nyandarua County jointly broke and entered the building used as a dwelling house by **PETER GATHOGO WARUIHI** and stole one pair of simbaland brown shoes, one black cap, one shirt and one black and white stripped jacket all valued at

Kshs.2,500/=, the property of the said **PETER GATHOGO WARUIHI**.

Alternative Charge:

Handling stolen goods Contrary to Section 322(1)(2) of the Penal Code.

Particulars:

Samuel Njunge Ben Alias Julius and Salome Wanjiru Wanjiku: On diverse days between 7th day and 22 day of June, 2013 at Canaan Estate in Mairo-Inya trading centre within Nyandarua County jointly otherwise than in the course of stealing dishonestly retained one pair of simbaland brown shoes, one black cap, one shirt and one black and white stripped jacket all valued at Kshs.2,500/=, the property of the said **PETER GATHOGO WARUIHI** knowing or having reason to believe them to be stolen goods.

Count 5:

House breaking Contrary to Section 304(1)(b) and stealing Contrary to Section 279(b) of the Penal Code.

Particulars:

Samuel Njunge Ben Alias Julius and Salome Wanjiru Wanjiku: On the 18th day of June, 2013 at Karai Farm within Nyandarua County jointly broke and entered the building used as a dwelling house by **ELIUD NJUNGE KARURI** and stole one high density mattress blue in colour, one thermo flask, one Nokia 1200 mobile, two hot dishes, 2kgs of baking flour, 45kgs of dry maize and cash Kshs.1,200/= all valued at Kshs.15,100/=, the property of the said **ELIUD NJUNGE KARURI**.

Alternative Charge:

Handling stolen goods Contrary to Section 322(1)(2) of the Penal Code.

Particulars:

Samuel Njunge Ben Alias Julius and Salome Wanjiru Wanjiku: On diverse days between 18th day and of June, 2013 at Canaan Estate in Mairo-Inya trading centre within Nyandarua County jointly otherwise than in the course of stealing dishonestly retained one high density mattress blue in colour, one thermo flask, one Nokia 1200 mobile, two hot dishes, 2kgs of baking flour, 45kgs of dry maize and cash Kshs.1,200/= all valued at Kshs.15,100/=, the property of the said **ELIUD NJUNGE KARURI** knowing or having reason to believe them to be stolen goods.

After the charges were read to the appellant, he pleaded guilty to count I and the facts were read to him. He was asked if the facts were correct and he replied:

“ni kweli kuhusu DVD and TV.”

He was convicted on his own plea and was sentenced to 7 years imprisonment on each limb and the court ordered that the sentences run concurrently.

On 5/2/2014 when the appellant appeared before Hon. Ndege Ag.P.M., the remaining charges, Count II - IV were read to him and he pleaded guilty to counts II to V and the matter was put off for the reading of the reading of the facts to the appellant. On 7/2/2014, the facts were read to the appellant to which he confirmed that the facts were correct and he was convicted on his own plea. He prayed for a sentence of fine and was sentenced as follows:

Count II:

1st limb Kshs.15,000/= in default 12 months imprisonment;

2nd limb Kshs.27,000/= in default 12 months imprisonment;

Count III:

1st limb Kshs.27,000/= in default 12 months imprisonment;

2nd limb Kshs.27,000/= in default 12 months imprisonment;

Count IV:

1st limb Kshs.6,000/= in default 12 months imprisonment;

2nd limb Kshs.6,000/= in default 12 months imprisonment;

Count V:

1st limb Kshs.45,000/= in default 12 months imprisonment;

2nd limb Kshs.45,000/= in default 12 months imprisonment;

The court ordered that the sentences do run consecutively.

The case against the 2nd accused did not proceed to hearing but she was discharged under Section 87(1) of the Criminal Procedure Code after the parties allegedly agreed.

The appellant is aggrieved by the conviction and sentence and filed this appeal based on the following grounds:

(1) That the trial court did not follow due procedure in convicting him on his own plea of guilty;

(2) That the court failed to order that the sentences do run concurrently;

(3) That the sentence was harsh and excessive.

In support of the above grounds, the appellant filed written submissions which are not very clear but what I can decipher from them is that he denies having pleaded guilty to Counts II to V; that he was not informed of the consequences of pleading guilty to the charges and that the court did not accord him adequate time to give his mitigation; that the court should have enquired from him to find out why he had changed his mind to plead guilty; that he changed plea because he had been intimidated and threatened by the prosecution. It is also the appellant's contention that the fines were harsh and excessive in the circumstances. He therefore prays that the conviction be quashed and the sentence be set aside and he be set at liberty.

The appeal was opposed. Mr. Mong'are learned counsel for the State argued that the prosecution never induced or threatened the appellant to plead guilty nor did he raise such allegations in court at the time of plea; that there was no plea bargain in the case and the sentence of 15 years imprisonment is not excessive nor is it harsh. Counsel relied on the decision in **Criminal Appeal No.78 of 2011 Philip Makokha Keya v Republic** where the court observed that sentence should not be excessive so as not to serve as a deterrent measure. As regards the appellant's complaint of being denied mitigation, counsel submitted that the record is clear that he was allowed to mitigate before sentence.

This is a first appeal and the court is guided by the decision in ***Okeno v Republic (1972) EA 32***. This court is required to evaluate all the evidence before the trial court, analyze it and make its own determinations and give reasons for the decisions. In the instant case, however, the appellant pleaded guilty to all the five counts and was convicted on his own plea. The court did not hear the evidence of the witnesses in order to have an opportunity to evaluate it and make its own independent findings. The appellant's contention that he was not accorded an opportunity to defend himself is therefore misplaced.

Where an accused pleads guilty and is convicted on his own plea, Section 348 of the CPC bars the appellant from appealing. The Section reads:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

There are exceptions to Section 348 where the court finds that the plea was not unequivocal. Although Section 207 CPC provides for plea taking, it does not give guidelines on how a court should take plea. However, the case of ***Adan v Republic (1973) EA 443*** elaborately sets out the procedure for taking plea. In ***Adan v Republic*** the court said:

“(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 to 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.”

When the plea in regard to the first charge was taken, the appellant was asked if the facts were correct and he replied ***“Ni kweli kuhusu DVD and TV.”*** The particulars of the charge read that three items were stolen from the 1st complainant, i.e. DVD, Radio and Television. The appellant only admitted to stealing two items. The court should have enquired from the appellant whether or not he did not steal the radio. It means that the appellant did not admit to all the facts as read to him. In my considered view, the answer by the appellant rendered the plea equivocal and he was irregularly convicted.

As regards the plea to counts II to V, the appellant pleaded guilty to the charges on 5/2/2014. The facts were not available on that day. On 7/2/2014, even without reminding the appellant of the charges and asking whether he still wished to plead guilty, the prosecutor went straight ahead to read the facts to the appellant. That was irregular. Between 5/2/2011 to 7/2/2011, the appellant may have changed his mind and the proper procedure should have been that the charges be read to the appellant afresh before the facts were read to him. But the worst irregularity I have found in this case is that the facts in respect to count II to V were never read to the appellant. The record clearly shows that the prosecution merely repeated the facts in relation to count 1 where the complainant was James Muigai Njoroge. In the other counts the complainants were Charles Thige Wamahi, Gabriel Muranga Macharia, Peter Gathogo Waruhi and Eliud Njoroge Karuri (Ct II – V). The exhibits in respect of counts II - IV were not produced in court and it is surprising that the Magistrate did not notice this very serious omission. In my view, that anomaly leads to a serious miscarriage of justice because it seems that the appellant did not understand what went on in court and he was convicted and sentenced for offences he had not really admitted because the facts were never read to him. Either the magistrate did not pay much attention to the charges or he was in a great hurry to dispose of the case that he did not notice that the facts were not correct and exhibits were not

produced. I find that either it was a serious oversight on the part of the court or pure negligence. In the end, I do agree with the appellant that the plea was not unequivocal and the convictions are not properly founded.

The appellant also complained that the fines were excessive and harsh. The appellant pleaded guilty to all the charges. He was sentenced on 7/2/2014. Under Section 304(b) and Section 279(g) under which the appellant was charged, was liable to be sentenced to 7 years on the 1st limb and up to 14 years of the second limb. Ordinarily the sentences would be ordered to run concurrently because the offences were committed in the same transaction. The appellant was sentenced to pay a total of Kshs.186,000/= in default 96 months (or 8 years), on counts II – V. He had been sentenced to 7 years on Count I, making the total sentence 15 years. Having pleaded guilty, I think that the sentence was harsh. Besides, it did not make sense giving the appellant the option of fine in Counts II – V when he was already serving 7 years imprisonment on Count I.

The offences which the appellant faced are felonies. Ordinarily, the sentence on the two limbs of the offence of house breaking and stealing run concurrently. There is no provision for sentence of a fine under the said provisions. It therefore means that it was irregular for the trial court to fine the appellant on each limb.

Further to the above, I find that the sentences were illegal. Section 28(2) of the Penal Code provides for fines and the default sentences thereto. It provides as follows:

<u>“Amount</u>	<u>Maximum Period</u>
<i>Not exceeding Sh.500.....</i>	<i>14 days</i>
<i>Exceeding Sh.500 but not exceeding Sh.2,500.....</i>	<i>1 month</i>
<i>Exceeding Sh.2,500 but not exceeding Sh.15,000.....</i>	<i>3 months</i>
<i>Exceeding Sh.15,000 but not exceeding Sh.50,000....</i>	<i>6 months</i>
<i>Exceeding Sh.50,000.....</i>	<i>12 months”</i>

The sentences on Counts II – V were all illegal because the default sentence was 12 months yet all the fines were below Kshs.50,000/= and hence contrary to section 28(2) of the Penal Code.

On allegations that the appellant was intimidated by the prosecution, I find no evidence on record that it happened. The appellant never revealed to the court that he was ever threatened or induced in anyway. Even in this appeal, the appellant has not demonstrated how he was threatened or intimidated in order for him to plead guilty. In the case of ***Olal v Republic*** the court said:

“Mere detention long or short in itself cannot be a factor to determine whether or not a plea is unequivocal. It is what may be done to the appellant while in detention that may affect the character of his plea. Since there is no material except the record of the proceedings on which we can judiciously determine the question, we must go by the record and accept as true the position stated therein. In our view, to do otherwise would be tantamount to substitute the known and admitted facts of the case with unjustifiable speculation”.

That ground is baseless and must fail.

The appellant complained that the court did not warn him of the consequences of pleading guilty. Article 50(2)(b) of the Constitution requires that an accused person be informed of the charges he is facing with sufficient detail and I believe it includes being warned of the consequences of pleading guilty, that is, the likely sentence, that he forfeits his right to a full trial and that if the plea is unequivocal he can only appeal on the legality and extent of the sentence. That was not done by the court which is a fatal

omission on the part of the court.

The appellant had been charged with five offences of housebreaking and stealing which are quite serious in nature. The question is whether the court can order a retrial. The law on when a retrial should be ordered has long been settled. In the case of ***Fetahali Manji v Republic 1966 EA 343***, the East African Court of Appeal gave the following guidelines:

“In general, a retrial will be ordered only when the original trial was illegal or defective: It will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.”

In ***Muiruri v Republic 2003 KLR 552***, the court added:

“It (retrial) will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial see Zedekiah Ojuondo Manyala v Republic Cr.A.57/1980 ; the length of time which has lapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution’s making or the court’s?”

In ***Mwangi v Republic 1983 KLR 522***; the court further stated:

“.....a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result.”
(Braganza v Republic (1957)CA.

In the instant case, though one of the mistakes may have been committed by the prosecution, most of the mistakes were made by the court. The appellant had pleaded guilty and did not waste the court’s time. So far he has served about 3 years imprisonment. I think that the ends of justice would not be served if he is called upon to start the trial afresh. The case against his co-accused was compromised. Even though the witnesses may be available, to order a retrial would be prejudicial to the appellant unless the prosecution decides to charge the co-accused again. Besides, the appellant has served a substantive part of the sentence and an order for retrial would be prejudicial.

For all the above reasons, the appeal must succeed. The plea was equivocal, the sentences illegal and harsh in the circumstances. I quash the convictions and set aside the sentences. The appellant will be set at liberty forthwith unless otherwise lawfully held.

Dated and Signed at NYAHURURU this 6th day of June, 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei for Prosecution Counsel

N/A for appellant

Soi - Court Assistant

Appellant - present