



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.18 OF 2016

(An appeal from original conviction and sentence of Kilgoris PM Criminal Case No. 495 of 2015 by Hon. A. k. Mkoross – SRM dated 18TH May, 2015))

PETER OLE KESINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein **PETER OLE KESINA** was charged with the offence of house breaking contrary to **Section 304 (1)** and stealing Contrary to Section 279 (b) of the **Penal Code**.

The particulars of the charge were that on 3rd May 2015 at Kerigani area in Transmara West District of Narok County, broke and entered a building used as a dwelling house by **CHRISTINE KWAMBOKA** and stole a mobile phone make Nokia 1616-2 and cash 500/= all valued at Kshs. Seven Thousand Five Hundred the property of the said **CHRISTINE KWAMBOKA**.

2. The appellant also faced the alternative count of handling stolen property contrary to **Section 222 (2) of the Penal Code**. The particulars of the alternative charge were that on 3rd May 2015 at Keringani area in Transmara West District of Narok County otherwise than in the course of stealing, dishonestly received or retained one mobile phone make Nokia 1616-2 knowing or having reason to believe it to be stolen.

3. He was convicted on his own plea of guilty on the main count of housebreaking contrary to **Section 304 of the Penal Code**; and was sentenced to 5 years imprisonment.

4. On 18th January 2016, the applicant was granted leave to file his appeal out of time after which the court directed the deputy registrar to call for the lower court file with a view to preparing the case for the hearing of the appeal.

5. The appellant then filed a home-made petition of appeal titled **MITIGATION – AMENDED GROUNDS OF APPEAL** which were filed within the Misc. Cr. 38/2015 in which the appellant had earlier on applied for leave to appeal out of time.

6. Being aggrieved by both the conviction and the sentence of the trial court, the appellant listed the grounds of appeal which can be summarized to be in the form of mitigation as the appellant acknowledges that even though he was convicted, he seeks for leniency on the basis that he is a young man with a young family.

7. The appellant adds that he has reformed and is willing to be a law abiding citizen if given a second chance at freedom.
8. The appellant states that he is willing to join forces with law enforcement agencies in abid to eradicate crime in the society.
9. He prays for a setting aside of the sentence so that he can be set at liberty.
10. At the hearing of the appeal, the appellant, who appeared in person chose to rely entirely on his grounds of appeal.
11. Miss. Mochama, counsel for the state opposed the appeal and submitted that the appellant had pleaded guilty to the main count of housebreaking and stealing and was thus convicted on his own plea of guilty.
12. Miss Mochama added that the appellant was a habitual repeat offender having been previously convicted and sentenced in criminal cases and therefore, the sentence of 5 years imprisonment was lenient and lawful in the circumstances taking into account the fact that the maximum sentence for the offence of stealing is 14 years.
13. Miss Mochama argued that the appeal had no merit and sought its dismissal.
14. In considering this appeal and in view of the fact that the appellant was unrepresented before the lower court. It is imperative that I first considered whether the plea was taken in a proper manner in line with the provisions of **Section 207 (1) and (2) of the Criminal Procedure Code** and the test set in the case of **Adan vs Republic (1973) EA 443**.
15. The said sections read as follows:

207 (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

207 (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

16. In the case of **Adan –vs- Republic (supra)** the procedure for taking of a guilty plea is stated as follows:

(i). The charge and all the essential ingredients of the offence should be read and 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 guilty in reply must be recorded and a 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 the sentence together with the accused's reply should be recorded."

17. In the instant case, the proceedings were recorded in the following manner.

"COURT- Charges read to the accused person in Kiswahili which he understands and he pleads as follows:

COUNT 1

Accused- It is true.

PROSECUTOR

The facts are that on 3/5/2015 at around 7 a.m. the accused person went to the house of the complainant called Christine Kwamboga and asked for drinking water. The complainant wanted to take a shower she gave him the water and accused person left. The complainant locked the door, went to the bathroom and when she returned she found her mobile phone Nokia 1616-2 valued at Kshs. 2000 and Kshs. 5000 was missing from the house. She asked around and was told by a neighbour that he had seen the accused return to the house open the door and enter. Members of the public searched for the accused and arrested him at Chebitet village. He was searched and the Nokia 1616 was found on him. He was taken back to the house of the complainant and the complainant identified the phone. But at the time he did not have a battery, the case was reported and the accused was rearrested. The phone without the battery is in court and we produce it as exhibit 1.

ACCUSED

The facts are correct.

COURT

Accused convicted on his own plea of guilt.

PROSECUTOR

There are other previous records. The accused was charged with stealing in Criminal File No. 329/2009 he was given 2 years probation, the second one was also a charge of stealing in Criminal case No. 1094 and was sentenced to 2 years in prison. The third one was 419 of 2012 and was sentenced to 6 months in prison. He was also sentenced to 3 hours CSO in Criminal No. 108/2013. He was similarly sentenced to 6 months in prison for being in possession of bhang in Criminal Case No. 725/2013, he was also sentenced 3 hours CSO in Criminal Case No. 74/2014. The accused is habitual offender and I pray for a custodial sentence.

ACCUSED

The records of previous convictions are true.

MITIGATION

Accused- I plea for leniency I don't have parents.

SENTENCE

The accused is sentenced to suffer imprisonment for a period of 5 years in prison on limb of housebreaking and 5 years in prison on limb of stealing contrary to Section 279 (b) of the Penal Code. Both sentence shall run con-currently. 14 days right of appeal."

18. The foregoing extract of the proceedings clearly demonstrates that the procedure of taking a plea of guilty was strictly adhered to by the trial court. The charge was read out to the appellant in the language he understood and he replied affirmatively. He also affirmed that the facts and the information about his previous convictions were correct.

19. I find that an unequivocal plea of guilty was entered. At no time during the entire plea taking and mitigation process did the appellant raise any objection about what had been said about him or the offence before the court.

20. The appellant was further given a chance to mitigate before sentence and still, he did not say anything that can be construed to have meant that he had recanted his earlier plea of guilty.

21. Furthermore, even in his petition of appeal filed before this court, the appellant has not alluded to the fact that he was not guilty of the offence for which he was convicted before the lower court. Instead, the appellants appeal has taken the tone of a plea for the leniency of this court as he has aptly worded the heading of his appeal as a "MITIGATION".

22. **Section 348 of the Criminal Procedure Code** prohibits an appeal from a plea of guilty in the following words:-

"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."

23. In view of the above section and the fact that the appellant has confirmed his guilt to this court, the appeal on conviction fails.

24. On sentence, I note that the same was within the limits provided for under **Sections 304 (1) and 279 (b) of the Penal Code** under which the appellant was charged. The said sections provide as follows:

Section 304 (1) Any person who

(a). breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

(b). having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

Section 279 (b)- if the thing is stolen in a dwelling house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house; the offender is liable to imprisonment for fourteen years.

25. In view of the above provisions of the coupled with the appellant's past criminal record and the fact sentence is at the discretion of the trial court, I find that the sentence of 5 years imprisonment passed on the appellant for each limb of the charge was reasonable, fair and lawful. I find no reason to interfere with the said sentence.

26. In sum, I find that this appeal lacks merit and it is therefore dismissed.

27. It is so ordered.

Dated, signed and delivered in open court this 5th day of July, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

Mbelete for the State

N/A for the Appellant

Omwoyo court clerk