



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 112 OF 2015**

**MICHAEL NGUYO KOMORO.....1<sup>ST</sup> APPELLANT**

**JOHN NGUYO KOMORO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the Original Conviction and Sentence in Criminal Case No. 336 of 2015**

**of the Chief Magistrate's Court at Malindi – S. Wewa, PM)**

**JUDGEMENT**

The two appellants were charged with the offence of burglary contrary to section 304 (2) of the Penal Code. The particulars of the offence were that the appellants on the 6<sup>th</sup> May, 2015 at around 0500 hours at Watamu village of Watamu location within Kilifi County, jointly broke and entered into a dwelling house of Riziki Vide Yusuf with an intent of committing a felony namely theft therein.

The appellants were also charged with the offence of stealing from a dwelling house contrary to section 279 (b) of the Penal Code. The particulars of the offence were that on 6<sup>th</sup> May, 2015 at around 0500 hours at Watamu Village of Watamu location within Kilifi County, jointly stole 50 (fifty) sufuria, 100 (hundred) cups, 100 (hundred) glasses, 5 (five) dishes, 100 (hundred) plates, 100 (hundred) spoons, 100 (hundred) forks, 1 (one) hotpot, 1 (one) rice cooker, 10 (ten) pieces of timber (each 12 by 2 inches), 3 (three) water pumps, 1 (one) drilling machine, 20 (twenty) t-shirts, 10 (ten) pieces of shorts, 1 (one) metal bar for digging holes, 1 (one) rake, 1 (one) roll of barbed wire, a pair of open shoes, one black cotton jacket and 5 (five) mattress (2 each 5 by 6 inches and three each of small sizes), all valued at Kshs.100,000/= from the dwelling house of Riziki Vide Yusuf.

The appellants pleaded guilty to both counts and were convicted accordingly. The trial court sentenced each one-of them to seven years imprisonment for each count. The sentence is running concurrently.

The appellants filed similar grounds of appeal. These are that they are remorseful and did not waste the court's time, that they are the sole bread winners for their families, that they have now reformed and that taking into account the time they have served in prison, this court should impose a non-custodial sentence.

Similarly, the appellants filed written submissions which are a replica of each other apart from the

names. The submissions are simply expounding on how they are remorseful and have now reformed. They are urging the court to consider the period they have served in prison. They rely on the case of **THOMAS GILBERT CHOLOMONDELEY V REPUBLIC, Nairobi High Court Criminal case No. 55 of 2006**. It is their further submissions that by pleading guilty, it shows that they were remorseful and did not waste the court's time.

Mr. Alenga, prosecuting counsel, opposed the appeal. Counsel submitted that the charges were read over to the appellants on 17<sup>th</sup> June, 2014. The appellants pleaded guilty. The matter was adjourned to another date as the prosecution was not ready with the facts. The facts were read over five days later and still the appellants pleaded guilty. The trial court took into account the fact that the appellants were first offenders.

The record of the trial court shows that the appellants were arrested on the 16<sup>th</sup> June, 2015. They were arraigned in court on 17<sup>th</sup> June, 2015. The charges were read over to them in Kiswahili language and they pleaded guilty. The case was adjourned to 22<sup>nd</sup> June, 2015 when the facts were read over and the appellants once again pleaded guilty.

Given the record of the trial court, it is established that the appellants had ample time to reflect on their respective pleas. The plea of guilty is unequivocal. They wanted to plead guilty. The plea was taken on 17<sup>th</sup> June, 2014. The facts were read over on 22<sup>nd</sup> June, 2014. This is ample time for someone to reflect on his plea. The conviction is proper.

The appellants were charged under section 304 (2) of the Penal Code. That section relates to the offence of burglary. The main ingredient of the offence of burglary is that it is committed at night. The offence herein was committed at 5.00 pm. The facts of the case show that the complainant was taking her child to the salon. It was a case of house breaking under section 304 (1). The difference is that burglary attracts a maximum sentence of 10 years imprisonment while house breaking attracts a maximum sentence of 7 years. Under section 279 (b) for the offence of stealing from a dwelling house, the maximum sentence is 14 years imprisonment. The appellants were sentenced to serve 7 years for each count. The first appellant informed the court that he is 20 years old while the second appellant is 31 years old. The value of the items stolen is Kshs.100,000/= . The items include cooking utensils, a drilling machine and clothes.

Taking into account the fact that the appellants pleaded guilty to the offence and noting that they are first offenders, I do find that there is need for them to be accorded an opportunity to reform. The sentence is lawful but excessive in the circumstances. I do set aside the seven years imprisonment sentence and replace it with three (3) years imprisonment.

In the end, the appeal on conviction fails. The sentence is set aside each accused shall serve three (3) years imprisonment.

**Dated and delivered in Malindi this 13<sup>th</sup> day of September, 2016.**

**S.J. CHITEMBWE**

**JUDGE**