



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MURANG'A
CRIMINAL APPEAL NO 34 OF 2016
(Appeal from original Conviction and Sentence in Murang'a
CM's Criminal Case No 60 of 2016 - J J Masiga, RM)
WILSON KAMWARO GITAU.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant **Wilson Kamwaro Gitau** was on 16/3/2016 convicted upon his own plea of **housebreaking and theft** contrary to **sections 304(1) (b) and 279(b)** of the **Penal Code**. It was alleged in the particulars of the charge that on 09/01/2016 at Gaitega Village within Murang'a County he broke and entered the house of one **Wilson Kamwaro** and stole from therein cash KShs 20,000/00, one khaki trouser and a pair of safari boots, all valued at KShs 24,000/00, the properties of the said person. He was sentenced to serve 7 years imprisonment. He has appealed against both conviction and sentence.
2. I have considered the submissions of the learned counsel for the Appellant and learned prosecution counsel. I have also perused the trial court record.
3. Initially (on 15/01/2016) the Appellant pleaded not guilty to the charges (there was an alternative count), and the case was scheduled for trial. On 24/02/2016 the Appellant's trial commenced and two prosecution witnesses testified. When the case came up for further hearing on 16/03/2016 however, the Appellant stated to court that he wished to change his plea. The record does not show that the charges were then read to the Appellant afresh, as they ought to have been. The trial court merely recorded –

“PLEA

MAIN COUNT

Accused. It is true.

ALTERNATIVE COUNT

Accused. It is true.”

Facts were then given by the prosecution. The Appellant admitted the facts. The court then convicted

him and subsequently sentenced him.

4. The main ground of appeal, and upon which learned prosecution counsel conceded the appeal, is that the second plea was not properly taken by the trial court. Indeed this is so. The record, as already noted, does not reflect that the charges were read and explained to the Appellant when he stated that he wished to change his plea. This should have been done. It was not sufficient for the trial court to merely ask the Appellant, as it appears it did, if he was now admitting the charges and record that he was.

5. The second plea was thus defective in the manner it was taken, and cannot be said to have been unequivocal. The conviction cannot stand and it is hereby set aside.

6. The learned trial court also committed another error when sentencing the Appellant. It is to be noted that the Appellant was charged in count 1 with two distinct offences – one of house-breaking contrary to section 304(1) (b), and the other one of stealing from the house broken into contrary to section 279(b), both of the Penal Code. He should have been sentenced separately for each offence (the sentences to run concurrently). It was not proper to give one sentence for both offences.

7. Finally there is the issue of retrial. Both learned counsels were in agreement that the Appellant should be retried. The Appellant was arrested on 13/01/2016 and remained in remand custody until he was sentenced on 16/03/2016 (he appears not to have met bail conditions). He has been serving his sentence since. He has therefore been in custody now for a period of nearly eight (8) months.

8. The two offences of housebreaking and theft that the Appellant stood convicted of carried respectively maximum sentences of seven (7) and fourteen (14) years imprisonment. He was a first offender, and I consider that for first offenders the court ought to consider non-custodial sentences, unless of course the circumstances of the case or the law demands a custodial sentence. For the two offences the trial court clearly had discretion to consider non-custodial sentences. I would consider that the Appellant has now served a sufficient sentence had he been properly convicted. I thus decline to order a retrial.

9. The appeal is allowed and both the conviction and sentence are set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF SEPTEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 16TH DAY OF SEPTEMBER 2016