



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CRIMINAL APPEAL NO. 70 OF 2014

NICHOLAS MUNYITHYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with three counts and an alternative charge. Count 1 was for burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code. The particulars of the offence were that on 12th July 2014 at about 10.30pm at Mwingi Township Mwingi District of Kitui County broke and entered the dwelling house of Felistus Kithee with intent to steal and did steal there from assaulted household items valued at Kshs. 2,000/= the property of the said Felistus Kithee. Count 2 was for stealing contrary to section 275 of the Penal Code. The particulars of the offence were that on the same day, time and place stole one shirt valued at Kshs. 500/= the property of Irene Peter. Count 3 was also for stealing contrary to section 275 of the Penal Code. The particulars of the offence were that on the same day, time and place stole one shirt valued at Kshs. 300/= the property of Muthiki Mue. In the alternative he was charged with handling stolen goods contrary to section 322 (1) (2) of the penal code. The particulars of the offence were that on the same day and place at around 11pm otherwise than in the cause of stealing dishonestly retained one sufuria, two knives, four spoons, one stove, 3 cups, 6 bowls, one sieve, 3 lids, 1 cooking stick, one tray, one shirt and one blouse knowing or having reason to believe them to be stolen goods.

When the charges were read to him, he was recorded as having pleaded guilty to count 1, count 2 and count 3. a plea of guilty was thus entered. After the facts were summarized he was convicted. He was sentenced to serve 3 years imprisonment in each count and the sentences were ordered to run consecutively.

Aggrieved by the decision of the trial court, the appellant filed the present appeal. The grounds of appeal are as follows:-

1. That learned magistrate erred in law and fact by convicting and sentencing him very severely yet he had pleaded guilty without giving the court hard time in hearing the case.
2. The learned magistrate erred in law and facts while convicting and sentencing him without considering that no exhibit was reported in the matter at the police station.
3. The learned trial magistrate erred both in law and facts when convicting and sentencing him severely without considering that he was the daily bread winner of his family and their mother and

that his children were in school.

4. The learned magistrate erred in law and fact when convicting and sentencing him without considering that he only had one parent his mother who was very aged and depended on him together with his young siblings who are in primary and secondary schools and depended on him for their school fees.

5. The learned magistrate erred in law and facts while convicting and sentencing him very severely without considering that he was a first offender.

At the hearing of the appeal the appellant submitted that he was the bread winner of his family as his father had died. He contended that his mother was elderly and could not work. That he was educating his sister who was in form 3. He also stated that he had a wife and children. He thus asked the court to review the sentence so that he could get an opportunity to build his country like other citizens.

Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel stated that the charges were read to the appellant in Kiswahili language which he was using in this appeal, and that he admitted the three main counts. The prosecution then summarized the facts and produced exhibits and the appellant agreed with the facts. Counsel contended that the plea of the appellant was therefore unequivocal.

Counsel also submitted that the mitigation of the appellant was considered before sentencing. Therefore in counsel's view the sentence was proper.

In response the appellant stated that he admitted the offence but thought that he would be ordered to compensate rather than be imprisoned for so long. He stated that he had never been in a court of law before.

This being a first appeal I am duty bound to re-evaluate all the evidence on record and come to my own conclusions. No witness evidence was tendered before the trial court. This was because the appellant was recorded as having pleaded guilty to the charges. I have perused the record of the subordinate court. The charges were read and explained to the appellant in Kiswahili language. He admitted all the three main counts. The prosecutor then summarized the facts which supported the three counts. The appellant admitted the facts as being true. He was thus convicted. In my view the conviction for the appellant was proper. His plea of guilty to the charges was unequivocal. I thus dismiss the appeal on conviction.

The appellant has faulted the sentence as being very severe. He was sentenced to serve 3 years imprisonment on each of the three counts. The sentences were ordered to run consecutively. From the record the appellant was not a first offender. He was convicted in Kitui Criminal Case No. 872 of 2011 on 12th April 2012 and sentenced to serve a probation term of 8 months for assault causing actual bodily harm. In his own mitigation the appellant stated that there was no reason to deny the charges and that his parents were aged and depended on him. He said that he was a barber aged 23 years. He did not state that he had a wife and children or that his siblings depended on him. Though the prosecutor stated that the appellant was a first offender, that was not the true position as disclosed by the probation report.

I observe that the maximum sentence for theft contrary to section 275 of the penal code is 3 years imprisonment. The learned magistrate sentenced the appellant to the maximum sentence for the offence. This related to count 2 and 3. The function of sentencing is a discretion of the trial court. The sentence was actually lawful. However taking into account the fact that the items stolen were of small value, I would think that the sentence should have run concurrently rather than consecutively. I will thus exercise this appellate court discretion and order that the sentence will run concurrently. In my view such an order would serve the best interest of justice in the circumstances and facts disclosed in the case especially the fact that the appellant pleaded guilty and did not waste the courts time, and that the items stolen were of small value and were all recovered.

To conclude I dismiss the appeal on conviction. I however allow the appeal on sentence and order that the sentences of the imprisonment pronounced by the trial court will run concurrently.

Dated and delivered at Garissa this 4th day of May, 2015

GEORGE DULU

JUDGE