

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO. 9 OF 1982

(From original convictions and sentences in criminal case No.1302 of 1981 of the District Magistrate's Court at Kikuyu)

GATUNDU JAMES.....APPELLANT

Versus

REPUBLICRESPONDENT

CORAM SACHDEVA, J..

Appellant absent, not wishing to be present and unrepresented, K.J. Kinyanjui (State counsel) for Respondent.

JUDGMENT

The appellant was convicted by the 2nd Class District Magistrate at Kikuyu of housebreaking contrary to section 304(1) (a) of the Penal Code Cap 63) and stealing in a dwelling house contrary to section 279(b) of the Penal Code and sentenced to "serve 12 months imprisonment on each count plus two strokes of the cases. Sentences to run concurrently."

I have given due consideration to the appellant's grounds of appeal, but he was seen coming out of the appellant's home during day-time by two witnesses. He could not be apprehended at the time because he was armed with a knife with which he threatened the persons chasing him. It is true that he was not seen carrying anything but things like watches and cash might well be visible to persons who saw him. Although the chargesheet also lists a coat amongst the stolen property the complainant has made no mention of it in her evidence. Upon my independent assessment and evaluation of the evidence I am satisfied that the appellant was convicted upon cogent evidence.

However the judgment of the magistrate leaves a lot to be desired. The prosecution case should not be considered in isolation and consequently the defence rejected (see Okethi Okale & others VR [1965] EA 555 and cases referred to therein). However, in the instant case there has been no prejudice occasioned to the appellant upon consideration of the evidence as a whole.

This is a composite charge of 2 limbs and not 2 limbs and counts. The first limb of the charge does not carry corporal punishment but the second does so that the award of corporal punishment should have been expressly attached to the second limb. In order to avoid any doubt, the sentence is re-phrased as follows:

"Accused sentenced to 12 months imprisonment each of the 2 limbs of the charge with 2 strokes of corporal punishment on the second limb. Sentences of imprisonment to run concurrently. Total sentence 12 months imprisonment with 2 strokes of corporal punishment."

Except as aforesaid in regard to the sentence this appeals is dismissed.

Date at Nairobi and delivered this 30th day of July, 1982.

S.K. SACHDEVA

JUDGE.