IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO (P), KOOME & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 25 OF 2015

BETWEEN

SULEIMAN SAIDI HAJI...............................APPELLANT

AND

REPUBLIC... RESPONDENT

(Appeal from a Judgment of the High Court at Kakamega (A.S. Mrima, J.) dated 20th November, 2014

in

H.C.CR.A 67 OF 2014)

****

JUDGMENT OF THE COURT

Upon substitution of the original charges, the appellant was tried on six counts, three of which being burglary contrary to **section 304 (2)** and stealing contrary to **section 279(b)** of the Penal Code; one count of office breaking and stealing contrary to **section 306(a)** of the Penal Code; one count of preparation to commit a felony, contrary to **section 306(1)** of the Penal Code and one count of failing to register as a Kenyan citizen contrary to **section 5** of the Registration of Persons Act. The trial court found some of the counts and alternative counts proved beyond reasonable doubt and upon conviction sentenced the appellant as follows; six (6) months imprisonment on the alternative to count I; one (1) year imprisonment on each limb to run concurrently on count II; three (3) months imprisonment on count III; one (1) year imprisonment on each limb to run concurrently on count IV; one (1) month imprisonment on count V and in the alternative to count VI the trial court was persuaded that the appellant was only a handler and sentenced him to six (6) months imprisonment.

The prosecution presented evidence which both the trial and first appellate courts believed that the appellant was involved in a spate of house breaking and theft which occurred on different days during the month of May, 2012 at Chemnego village within Kakamega County; that members of the public reported to the police they suspected the appellant to have in his possession some of the items stolen from the villagers; and that based on this information, the police went to the appellant's residence where they undertook a search and recovered items which were identified by several complainants as having been stolen from them. The appellant's father (PW4) portrayed him as an errant son and testified of the many threats by the appellant to harm him; that the appellant went as far as digging a grave to bury him (PW4), hence the count on preparation to commit a felony; and that on one occasion the appellant sent PW5 to

purchase kerosene with which he had threatened to burn his father.

The appellant, in his defence, denied the charges and maintained that he had been framed up; that his arrest and subsequent trial was instigated by his mother with whom he did not relate well; that his mother wanted him in prison out of their differences involving land, witchcraft and religion; that he was digging a pit latrine and not a grave as alleged and; that the items which were produced in court were not the same ones recovered from his house. The appellant however conceded that he had never registered as a national and therefore had not been issued with an identification card as a Kenyan.

Following his conviction and sentence, the appellant moved to the High Court to challenge that decision. The learned Judge, Mrima, J, upheld the conviction on the alternative to count I. He however set aside both the conviction and sentence in the main charge on count II but found the appellant culpable of the alternative charge of handling stolen property. On count III he concurred with the findings of the trial court on conviction. Again the Judge set aside both the conviction on count IV but agreed with the findings of the trial court on count V; and upheld the finding of the trial court on conviction on count VI. Just to stress that the appellant was acquitted on count IV.

However, with regard to the sentence imposed on each count, the learned Judge was of the view that they were less commensurate to the charges and dealt with the issue as follows:

> **"35. Further, a look at Sections 304 and 306 of the Penal Code vis-a vis section 322 of the Penal Code clearly reveals that the one found guilty of handling stolen property is liable to a severe penalty than the actual thief. Infact, the law imposes a ceiling of 14 years' imprisonment on the handler.**
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> **36. It is on this background that this Court is of the very considered view that the sentences handed down to the appellant were too far less commensurate to the charges he faced and hence reviews the sentences as under:-**
>
> **1. On the alternative charge to count 1, the sentence of 6 months is reviewed to 3 years' imprisonment.**
>
> **2. On the alternative charge to count 2, this court sentences the appellant to 3 years' imprisonment.**
>
> **3. On count 3, the sentence is reviewed to 1-year imprisonment.**
>
> **4. On count 5, the sentence of one month's imprisonment is appropriate.**
>
> **5. On the alternative charge to count 6, the sentence is reviewed to 3 years' imprisonment.**
>
> **6. The Appellant shall further be under police supervision for 2 years upon completion of the above imprisonment terms.**
>
> **As the offences were not committed in the cause of a single transaction, the sentences shall run consecutively."**

Once again aggrieved by these findings, the appellant has lodged this second appeal on six grounds. Bearing in mind that the appellant was self-representing, most of those grounds raise issues of fact which are beyond our consideration on a second appeal as explained in **Kaingo V. R** (1982) KLR 213 where this Court explained that;

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did".**

In our estimation the only ground that falls within **section 361 (1)** of the Criminal Procedure Code is that which contends that the case against the appellant was not proved to the required level. For which reason, he urged that the appeal be allowed, conviction quashed and the sentence set aside.

The respondent through Mr. Kakoi opposed the appeal insisting that the grounds proffered by the appellant did not raise any points of law and therefore did not meet the threshold set in the cases of **Njoroge V. Republic** (1982) KLR 388 and **Chemagong V. Republic** (1984) KLR 611. Though the respondent did not file a cross-appeal or notice of enhancement of the sentence, counsel merely pointed out from the bar that there was no record to the effect that the appellant was warned of the possibility of enhancement of sentence in the event his appeal failed as the Court cautioned in **J.J.W V. R.** (2013) eKLR.

Both courts below made concurrent findings on the credibility of the witnesses who testified and found that their evidence displaced the accusations of malice and ill will as alleged by the appellant. There are no sound reasons for us to disturb the concurrent finding. The two courts below us properly analyzed the evidence and arrived at the correct decision.

There are only two aspects of the decision of the High Court that has concerned us. In count V the appellant was charged with the offence of failing to register as a Kenyan citizen contrary to **section 5** of the Registration of Persons Act. This section deals with the power of the Principal Registrar to keep a register of all persons in Kenya, in which certain particulars are to be entered. It does not therefore create the offence with which the appellant was charged. It, likewise does not prescribe the penalty for failing to register. Rather, the provision that creates the offence in question is **section 14** which reads:

"14. (1) Any person who—

> **(a) fails to apply to be registered in accordance with the provisions of this Act; or**
>
> **(b) ...**
>
> **…**
>
> **(n)…**
>
> **shall be guilty of an offence and liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding eighteen months or to both…"**

The trial court sentenced the appellant to imprisonment for one month, which the learned Judge upheld yet a term of imprisonment is only imposed in default of a fine. To begin with, the defect in the charge sheet is one of those defects that are curable under **Section 382** of the Criminal Procedure Code as the same did not prejudice the appellant or occasion a failure of justice. The appellant was well informed of the specific charge on this count and was not prejudiced in his defence. See **John Irungu V. Republic**, Criminal Appeal No. 20 of 2016, where this Court stated:

> **"In the same vein section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice. As this Court observed in Samuel Kilonzo Musau v Republic, Cr. App No. 153 of 2013, that provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. (See also George Njuguna Wamae V. Republic, Cr. App. No. 417 of 2009)."**

On the sentence, and as we have observed, in respect of count V, the trial court ought to have imposed a fine, in default of which a term of imprisonment would have been justified. But the more serious infraction was the learned Judge's decision to, respectively enhance the sentence to 3 years from 6 months imprisonment; 3 months to 1 year imprisonment; and from 6 months to 3 years' imprisonment.

Then these orders;

> **“ (a) The Appellant shall further be under police supervision for 2 years upon completion of the above imprisonment terms.**
>
> **As the offences were not committed in the cause of a single transaction, the sentences shall run consecutively.”**

No doubt **section 304** of the Penal Code under which the appellant was charged provides that a person convicted will be liable to imprisonment for seven years and if the offence is committed in the night, the offender is liable to imprisonment for ten years. The punishment under **section 306,** on the other hand is also seven years and fourteen years if the offence is brought under **section 322.**

It has been emphasized on many occasions that for an appellate court to enhance sentence the appellant must have notice of it and the court, on the other hand is duty bound to warn him or her of the possibility of the sentence being enhanced should the appeal fail.

It is useful to illustrate this duty by reproducing the passage below from this Court’s decision in the case of **J.J.W V. Republic**, Criminal Appeal No. 11 of 2011:

> **“In this appeal, the prosecution did not urge enhancement of sentence and did not file cross appeal to that effect. The court did not warn the appellant of that possibility or in any case there is no record of such a warning if any was issued, yet all of a sudden, in the judgment, the learned judge enhances the sentence from seven years to ten (10) years. The need for prior information to be given to the appellant in such a situation is to enable him to prepare and argue his side of the case as regards such intended enhancement. In this case, the enhancement of the appellant’s sentence to ten (10) years was done without affording him opportunity of persuading the court against such a proposal. We have perused the Memorandum of Appeal that was before the first appellate court and we note that save for a small part in passing, the appellant did not specifically appeal against sentence in that court and hence the need to inform him of the possibility of enhancing the sentence.”**

See also: **Josea Kibet Koech V. Republic [2010] eKLR** and **Isaac Muriithi Wambui V. Republic,** Nyeri Criminal Appeal No. 42 of 2013.

The enhanced sentences, including an order directing the appellant to be under police supervision for 2 years upon completion of the above imprisonment terms, were, for the reasons specified, unlawful and warrants our interference.

In the result we find no merit in the appeal in so far as conviction is concerned. We, however find merit in the complaint about sentence, and accordingly set aside the enhanced sentence and order of police supervision. In their place we substitute them with and revert to the original sentences of the trial court. We also set aside the order by the learned Judge that the sentences should run consecutively with an order that they will run concurrently. For avoidance of doubt, the sentence is in the following terms:

a. **Alternative charge to count I – six (6) months’ imprisonment.**

b. **Alternative charge to count II – six (6) months’ imprisonment.**

c. **Count III – 3 months’ imprisonment.**

d. **Count V – 1-month imprisonment.**

e. **Alternative charge to count VI – six (6) months’ imprisonment.**

As stated above, the sentences shall run concurrently.

Dated and delivered at Kisumu this 21st day of November, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

F. SICHALE

....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR