IN THE COURT OF APPEAL

AT NYERI

(Coram: Chunga CJ, Omolo & O'Kubasu JJ A)

CRIMINAL APPEAL NO 115 OF 2001

JOHN WAWERU NJOKA ……………APPELLANT

VERSUS

REPUBLIC…………..………..…… RESPONDENT

(Appeal from the decision of the High Court of Kenya at Nyeri (Justice Juma)

dated 3rd June, 1999 in HCCRA No 1 of 1999)

JUDGMENT

The appellant John Waweru Njoka was tried, convicted and sentenced to prison terms of five years and four strokes by the District Magistrate I Wanguru on 8th December 1998 on a charge of burglary and stealing contrary to section 304 (2) and 279 (b) of the Penal Code cap 63 Laws of Kenya.

The particulars of the charge averred as follows: -

John Waweru Njoka:-

"On the night of 14th day of May, 1997 at Riagicheru Village in Kirinyaga district within Central province, broke and entered the dwelling house of Ephantus Murage with intent to steal therein and did steal from therein, two blankets, one bed sheet, one sweater and one pair of long trousers, all valued at Kshs 1,250/= the property of John Murage."

First, we observe, that the name of the owner of the house into which the appellant allegedly broke and stole, according to the particulars of the charge, is given as Ephantus Murage whereas, the name of the owner of the property stolen from the same house, is given as John Murage. There is discrepancy on the first name but, we assume, that he is one and the same person namely the owner of the house and the owner of the property.

This discrepancy occasioned no prejudice to the appellant because PW1 Ephantus Murage Njeru, gave evidence that he was the owner of the house and the owner of the property stolen therefrom. Although no prejudice was occasioned, care must be taken always, to avoid such discrepancies because of obvious danger of causing confusion which, we do not find in the present appeal.

The owner of the house and the property Ephantus Murage (PW1) was away on *safari* on the night his house was broken into. He had requested his neighbour Julius Githaka Kamakua (PW2) to keep an eye over the house. At about 9:00 pm on 14 May 1997, Julius Githaka heard some disturbance in Ephantus

Murage's house. As a result Julius came out, and walked to Ephantus Murage's house. Julius was joined by another neighbour called Jackson Munene Muriuku (PW3). Both of them gave evidence that they heard commotion in the house, and asked whoever was inside to identify himself and come out. As they did so, other neighbours came and the house was surrounded. The appellant, who was also a well known person in the village, came out of the house through one of the windows. Near the same window, Julius Githaka (PW2) and Jackson Munene (PW3) found two blankets, one pair of long trousers, one cardigan and one bed sheet. These items, had been thrown, from inside the house through the same window. They were subsequently identified by Ephantus Murage as his property which he had left in the house when he went on *safari*.

The appellant was then arrested by members of the public including Julius Githaka and Jackson Munene and was escorted to police. When put on his defence, the appellant denied the offence. He claimed that he met Jackson Munene (PW2) and another person on the fateful night. They told him that he was wanted for stealing cattle. They started beating him and he was taken to a nearby chief's camp. He claimed that Jackson Munene had a previous grudge against him and that is why, Jackson Munene falsely arrested him and escorted him to the chief's camp. The trial magistrate considered all the evidence and rejected the appellant's defence. He believed the prosecution witnesses and convicted the appellant as charged. He sentenced him to five years imprisonment with four strokes on each limb of the charge. He ordered the prison sentences to run consecutively.

Following his conviction and sentence, the appellant appealed to the High Court against both. Upon perusal of the record, the judge dismissed the appeal summarily under section 352 (2) of the Criminal Procedure Code cap 75 Laws of Kenya.

The appellant has now brought a second appeal before us. He has filed eight grounds of appeal out of which, the third one was in the following terms:

"That the learned trial magistrate erred in law by failing to find that the officer who arrested me was not called as a witness despite my vehement application of making him availed."

We have examined the record carefully, and we note that the officer who received and re-arrested the appellant from members of the public was called and gave evidence as prosecution witness No 4. This would dispose of the appellant's complaint in his third ground of appeal. However, before us, he complained that the officer he wanted to be called as a witness, was the administration police officer who received him from members of the public at the nearby chief's camp.

It is true that the appellant was first escorted to the nearby chief's office because PW1 and PW2 who arrested him said so in their evidence. It is also true that the prosecution called no witness from the chief's office.

It is settled law, that where the prosecution fails to call material witnesses, the Court may draw an adverse inference against the prosecution. That however, only applies where prosecution evidence tendered is weak and inadequate to support conviction. That is not the position here as there was ample evidence from PW1 and PW2 who found the appellant right inside PW1's house. Under the circumstances, we find no basis for drawing adverse inference against the prosecution for failing to call a witness from the chief's office.

When the appellant was placed on his defence after close of the prosecution case, the record shows that the magistrate complied with section 211(1) of the Criminal Procedure Code. The record reads as follows:

"Defence : Nil."

Section 211 (Criminal Procedure Code) requires that the rights of an accused person be explained to him at the close of the prosecution case and when he is being put on his defence. These rights are:

"(a) The right of remaining silent and saying nothing at all.

(b) The right to make an unsworn statement from the dock in which event the accused is not liable to cross examination by prosecution.

(c) The right to give sworn evidence from the witness box in which event the accused becomes liable to cross examination by the prosecution if the prosecution wishes.

(d) The right to call witnesses if accused so wishes."

These are fundamental rights of the accused person in a trial. They are meant to ensure fair trial. When they have been explained to him, he responds by electing to proceed as he wishes. His response must be taken down and must appear on the Court record. After that, he is then called upon to proceed in whichever manner or way he has elected. The record before us reads as we have already indicated. It does not show that the appellant's response was taken down. Nevertheless, he gave unsworn evidence and called no witnesses and we assume that it is how he elected to proceed. Failure to record his response in the particular circumstances of this case, did not therefore, in our judgment, occasion injustice.

This appeal, as we indicated earlier, was dismissed summarily by the High Court. Section 352(2) of the Criminal Procedure Code cap 75 Laws of Kenya is quite clear and has been quoted by us verbatim repeatedly in several appeals that come before us. We do not find it necessary to do so here. Suffice it to say that the section applies only in instances where the Court is satisfied on first appeal to the High Court, that the appeal is brought solely on sufficiency or otherwise of evidence and where the

Court is further satisfied that the conviction against the appellant was based on full and sufficient evidence. If there is a point of law raised or otherwise apparent on record to warrant consideration, the appeal ought

to be admitted to hearing and should not be rejected summarily under section 352(2) of the Criminal Procedure Code.

In this appeal, we have commented on two legal issues that arose. The first one was the issue of the witness and the second one was the issue of due compliance with section 211(1) of the Criminal Procedure Code.

There is however, a third legal issue that arose in our opinion in this appeal. This was on sentence which, as we indicated earlier, the trial magistrate ordered to run consecutively. Section 304(2) of Penal Code

cap 63 was the main section under which the appellant was charged. The section does however create two offences rather than one offence. The first offence it creates is burglary and the second offence it creates is stealing from the house. Both offences, however, are usually committed in the course of one transaction and they carry one *means rea*. They are, also, usually laid as one offence in one count. The charge is then said to carry two limbs namely one for burglary and one for stealing from the house.

The question which arises, in the circumstances, is whether, on conviction, the sentences on both limbs of the offence should be concurrent or consecutive.

In law it lies in the discretion of the Court to order whether sentences should run concurrently or consecutively. Nevertheless, it is an established principle of law that where offences are committed in one transaction, the sentences ought to run concurrently even when laid in separate counts. In the present case, the magistrate entered conviction on both limbs of the charge for breaking as well as for stealing. From the evidence on record, these two offences were committed in one transaction. That being so, we are satisfied that the magistrate ought not to have ordered the sentences on the two limbs of the charge to run consecutively. Mr Oluoch, before us, submitted that severity of sentence on second appeal does not lie to this Court. That is true under section 361(1) of the Criminal Procedure Code. However, where there is a point of law arising on sentence, a second appeal would lie on sentence to this Court, because, then, it would not be an appeal on severity of sentence only.

We are satisfied that there was a point of law involved on sentence in this appeal when the magistrate ordered the sentences on the two limbs of the charge to run consecutively because they were committed in one transaction and should, therefore, have run concurrently. For this reason, we are satisfied, that an appeal would lie before us on sentence on second appeal.

In the final analysis, we conclude that for the reasons we have given, the appeal to the High Court, ought not to have been rejected summarily under section 352(2) Criminal Procedure Code.

The last question for us to consider is how to dispose of the appeal. In this, we have two options. The first is to send the appeal back to the High Court to deal with it as required by law in the areas we have indicated.

The second option, is to deal with the appeal ourselves under the powers given to us by section 3(2) of the Appellate Jurisdiction Act cap 9 Laws of Kenya.

As we said in another judgment recently, we would be reluctant to exercise our powers under the aforementioned section where issues of fact and evidence are involved. That is for the obvious reason that the trial court and the High Court as the first appellate court, are the Courts to assess and make findings of facts on evidence. Here however, the issues of law we have identified do not involve facts or evidence. They are issues that we can properly deal with on second appeal, in exercising our jurisdiction under the Appellate Jurisdiction Act as we have indicated.

Taking into account everything therefore, we order this appeal dismissed on conviction. However, we find considerable merit on the appeal on sentence and it succeeds partially to the extent that we set aside the order by the trial magistrate in which the sentences in the two limbs of the charge were to run consecutively and we substitute therefore an order that the custodial sentences in the two limbs will run concurrently. The appeal succeeds to this limited extent only, otherwise it is dismissed on conviction. Orders accordingly.

Dated and delivered at Nyeri this 24th day of October, 2001

B. CHUNGA

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CHIEF JUSTICE

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR