



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 159 OF 2013

Appeal from the original conviction and sentence by the Acting Senior Resident Magistrate (V. A. Otieno) in Mwingi Principal Magistrate's Criminal Case No. 560 of 2013

JAMES MUSYOKA.....1ST APPELLANT

OMAR KYALO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Both appellants were charged in the lower court at Mwingi with kiosk breaking with intent to commit a felony contrary to section 307 of the Penal Code. It was alleged that on 13th October 2013 at 22.45pm in Mwingi Central District of the Kitui County broke and entered a kiosk belonging to John Gitau with intent to steal from therein.

Each appellant pleaded guilty to the charges and each was convicted on own admission and sentenced to three (3) years imprisonment. The appellants are dissatisfied and have come to this court on appeal. The 1st appellant filed Criminal Appeal No. 159 of 2013 on 30th October 2013. He is asking this court to review the proceedings of the trial court and acquit him or reduce the sentence because he was a first offender and that he was forced by the police to admit the offence.

The 2nd appellant filed Criminal Appeal No. 160 of 2013. He advanced similar grounds of appeal and added that the trial was unfair.

The appeals were consolidated into Criminal Appeal No. 159 of 2013. Each appellant made brief oral submissions. The 1st appellant claimed that he had been beaten by police and forced to admit the offence and 2nd appellant asked this court to consider his written mitigation and allow the appeal. The written mitigation by the 2nd appellant is the same as his grounds of appeal.

The respondent opposed the appeals. Learned state counsel submitted that both appellants are barred by section 348 Criminal Procedure Code from filing an appeal against their own plea of guilty; that it is an afterthought to claim that police had beaten them to force them to admit the offence; that the trial court considered their respective mitigations before sentence and that a sentence of three (3) years is not excessive.

I have carefully read the record of the lower court. The appellants were charged together with breaking

into a kiosk with intent to steal from therein. Each pleaded guilty to the charge. The facts were presented showing that that they were found inside the kiosk by the owner Mr. John Gitau who called police. They were arrested inside the kiosk. Each appellant admitted these facts as correct. The 1st appellant mitigated by telling the court that he was remorseful and would not repeat. The 2nd appellant did not mitigate.

The record of the lower court however shows that the trial magistrate did not convict the appellants. This is how the record looks like after facts were presented:

Accuse 1 – Its true (*sic*)

Accused 2 – Its true (*sic*)

Court – Plea of Guilty entered

Mitigation

1st Accused – I am sorry, I wont repeat (*sic*).

2nd Accused – Nil

Court – Each accused ordered to serve 3 years imprisonment each (*sic*).

Clearly there is no conviction and therefore the sentence of three (3) years is not based on any conviction and is illegal.

This error escaped the appellants and also the learned state counsel. Despite this error, this court finds that the facts showed that the appellants were found inside the kiosk and obviously the intention was to commit a felony.

This court will therefore correct the errors of the trial magistrate by setting aside the sentence of three (3) years imprisonment against each appellant, which I hereby do. I will proceed to enter conviction against each appellant on plea of guilty for the offence of breaking into a kiosk with intent to commit a felony. Each appellant is sentenced to serve community service for six months under the Community Service Orders Act. Each appellant will remain in custody pending identification of a work station by the probation officer. Service of the sentence will commence on the day the court makes its final orders on community service after the probation officer files a report of the work station. It is so ordered.

Dated, signed and delivered this 31st July 2014.

S. N. MUTUKU

JUDGE