



REPUBLIC OF KENYA



**Karemeri v Republic (Criminal Appeal E001 of 2022)
[2023] KEHC 23979 (KLR) (22 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 23979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E001 OF 2022
GL NZIOKA, J
AUGUST 22, 2023**

BETWEEN

JOHN KAREMERI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No. 4402 of 2021 at the Senior Principal Magistrate's Court at Engineer delivered by Hon D. N. Sure, Senior Resident Magistrate, on 29th December, 2021)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide criminal case No. E4402 of 2021 with the offence of house breaking contrary to section 304(1)(a) of the *Penal Code* (herein "the Code). The particulars of the charge are that on 24th December 2021 at Ndunyu Njeru in Kinangop within Nyandarua County he broke and entered the building used as a dwelling house by Joseph Mwaniki Njuguna.
2. He was also charged with an alternative court of handling stolen goods contrary to section 322(1)(2) of the *Penal Code*. The particulars thereof are that, on 25th December 2021 at Ndunyu Njeru in Kinangop within Nyandarua County otherwise than in the course of stealing, dishonestly retained household goods, one mattress, two sufurias and one Sonitec radio having reason to believe to be stolen goods.
3. He pleaded guilty to the main charge and was convicted on his own plea of guilty and sentenced to serve five (5) years imprisonment.
4. The brief facts of the prosecution's case were that on 24th December 2021, the complainant left his rental house at 8:00am. He returned in the evening and found the house had been broken into. He reported the matter to Ndunyu Njeru Police Post and investigations started. On 25th December 2021,



at 1:00pm he saw that appellant's child using a sufuria which belonged to him. He alerted the Police Officers who came to the scene and found the appellant with his children. A search was conducted in the appellant's hose and two (2) sufurias, one (1) radio Soniteck, and one (1) mattress were recovered. The appellant was arrested and charged as stated herein.

5. However, he has appealed against the decision of the trial court vide grounds of appeal which states as follows:
 - a. That I pleaded guilty to the offence.
 - b. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were not conclusively proved.
 - c. That, the learned trial magistrate erred in law and fact by convicting the appellant yet failed to appreciate that there was no proper medical evidence linking the appellant to the commission of the offence.
 - d. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without putting into consideration the appellant's mitigation, thus imposing the maximum sentence which is harsh and excessive and not informed by the unique facts and circumstances of the offence.
 - e. That, I pray to be supplied with a copy of the original trial court's proceedings and its judgment.
 - f. That, further grounds shall be adduced at the hearing of this appeal.
 - g. That, I wish to be present during the hearing and determination of this appeal.
6. Be that as it were, the appeal was opposed by the respondent vide grounds of opposition dated 26th February 2023 in which the respondent stated as follows: -
 - a. That the appellant was convicted on his own plea of guilt and subsequently sentenced.
 - b. That the sentence that was meted out by the trial court was lenient having taken into account his mitigation and pre-sentence report and his record as a first time offender.
 - c. That the appellant's appeal lacks merit and should accordingly be dismissed
7. The appeal was disposed of vide filing of submissions. The appellant filed submission on 17th March 2023, wherein he sought for leniency stating that he is young, a first offender, remorseful, has learnt his lesson. That he is now reformed and has had no case of indiscipline while in Prison facility.
8. That, he has a harmonious relationship with his family and the community and is looking forward to create awareness to the youth concerning moral values and be a "Crime si Poa" ambassador. He prays that the court sets aside his sentence and set at liberty.
9. However, the respondent, in its submissions dated 20th February 2023 submitted that in the case of; *Adan vs Republic* (1973) EA 445 the Court of Appeal outlined the procedure of plea taking and stated that the essential ingredients of the offence should be explained to the accused in a language he understands, that the accused own words should be recorded if it an admission, the prosecution



should read the facts to the accused who should be given an opportunity to dispute, explain or add any relevant facts, and where there is no change of plea a conviction should be recorded.

10. That, in the present case the charge and all the elements of the offence were read out to the appellant in Kiswahili language that the appellant understood, and the appellant pleaded guilty. That, the facts were read out on the following day and the appellant still pleaded guilty. Even when given an opportunity to mitigate, the appellant never retracted his plea of guilty nor did he change his mind while awaiting for sentence that was imposed on a later date.
11. Further, that section 348 of the Criminal procedure Code provides that an appeal on conviction where an accused pleads guilty is untenable except to the extent or legality of the sentence.
12. The respondent submitted that the trial court has discretion to impose a shorter sentence than prescribed except where mandatory minimum sentences are expressly prescribed. That, section 304(1) (a) of the Code provides for a minimum sentence of seven (7) years for the offence herein while the appellant was sentenced to five (5) years imprisonment and therefore the sentence was proper.
13. Having considered the appeal in the light of material placed before the court and submissions tendered I find that the grounds of appeal can be summarised as the propriety of the ingredients of the offence not proved; availability or otherwise of medical evidence; consideration or otherwise of mitigation before sentence; and the validity of sentence imposed.
14. The grounds (a) and (b) are not applicable where the appellant pleaded guilty. The provisions of section 348 of the *Criminal Procedure Code* (Cap 75) Law of Kenya, in that regard states: -

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

Furthermore, the appellant's submissions do not impugn conviction but are more on sentence review.

15. Therefore, the appeal herein is purely on sentence. The appellant was sentenced under section 304(1) (a) of the *Penal Code* that provides for a sentence of seven (7) years imprisonment. The appellant was sentenced to five (5) years, in the circumstance the sentence was lawful.
16. However, he pleaded guilty and saved the court's time, he is a first offender, the value of the subject matter was Kshs. 10,000, and the stolen goods were recovered. The pre-sentence report filed in the court does not indicate the salient views to assist the court. Be that as it were, I have considered the same, and it is not positive as the appellant is described as a habitual offender and his release on a non-custodial sentence is opposed by all people interviewed.
17. However, five (5) years imprisonment is definitely harsh, again the subject report was written in January 2022. A current report will be helpful. I therefore order for one to be availed on or before 4th September 2023 and the file reverts for further orders.
18. Otherwise the appeal on conviction fails. It is so ordered

DATED DELIVERED AND SIGNED THIS 22ND DAY OF AUGUST 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually



Mr. Atika for the respondent

Ms Ogutu: court assistant

