



REPUBLIC OF KENYA



**Kibet v Republic (Criminal Appeal E017 of 2023)
[2023] KEHC 27238 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E017 OF 2023**

DK KEMEL, J

DECEMBER 19, 2023

BETWEEN

DAVID KIBET APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the original conviction and sentence of the Senior
Principal Magistrate's Court at Webuye, Hon. M. Munyekenye, SPM
in the Criminal Case No. E196 of 2022 issued on 17th March 2023)*

JUDGMENT

1. David Kibet was charged before Webuye Senior Principal Magistrate's Court with two counts. Count one was the main charge of stealing contrary to section 268 (1) as read with section 275 of the [Penal Code](#) and an alternative charge of handling stolen goods contrary to section 322(1)(2) of the Penal Code. Under count two, he was charged with the offence of having or conveying suspected stolen property, contrary to section 323 of the [Penal Code](#) (PC).
2. Upon the charges being read and explained to him by the trial Court, he pleaded guilty on both counts. When Prosecution gave the facts of the case, the Appellant confirmed the facts on count one were correct. He was convicted on his own plea of guilt therefor.
3. On 13th June 2022, the trial Court on count one sentenced Appellant him to two (2) years' imprisonment. The trial Magistrate proceeded to set the hearing date on count two for 27th September 2022 and directed that due to the sentence under count one, the Appellant's bond terms were not to be set until further notice.



4. It follows from the provisions of section 348 of Criminal Procedure Code that the Appellant's appeal can only be against his sentence, unless his conviction was unsafe. This is what was stated in the case of *Samuel Kanyiri Wanjiru Vs. Republic* (2020) eKLR thus:-

“No appeal on plea of guilty, nor in petty cases. 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.

In Kisumu Criminal Appeal No.581 of 2010, *Alexander Likoye Malika Versus Republic* (2015) eKLR the Court of Appeal made reference to this section and stated as follows:-

“May we by way of commentary only remind that there is ordinarily no appeal against conviction resulting from a plea of guilty-see section 348 of the *Criminal Procedure Code* which only permits an appeal regarding legality of sentence. A court may only interfere with a situation where an accused has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused to which he has pleaded disclosed no offence known to law. Also where upon admitted facts the appellant could not in law have been convicted of the offence charged...”

5. During the hearing on count two, the Prosecution established vide its witness and exhibits before the trial Court that on 8th June 2022, the Appellant was apprehended by members of the public in Lufindiri area of Nzoia as he had gained access to the house of one Wilson Mwanzia and stole the complainant's phone. The Investigating Officer arrived at the scene and found the Appellant in possession of the suspected mobile phone make ITEL valued at Kshs. 4, 250/=and on asking the owner of the house he established that the Complainant was charging his phone at the house of Wilson Mwanzia, his brother, when the Appellant gained access to the house and made away with the phone. On searching the Appellant, they found another mobile phone make NEON RAY PRO in his socks which was valued at Kshs. 5,000/=. On inquiring about the ownership of the discovered phone, the Appellant told the investigating officer that it belonged to his late wife but he was not able to prove the same. The Appellant was apprehended and charged. The investigating officer testified that on further investigations, he was able to establish that the Appellant did not have a deceased wife as alleged. On cross examination, the Prosecution witness told the Court that they went to the mortuary to investigate further on the name that Appellant had given them but no such person existed there and on being queried about the receipt of the phone, the Appellant failed to avail the same. Vide a ruling issued on 31st January 2023, the trial Court held that the Prosecution had established a prima facie case and the Appellant was thus placed on his defence.
6. During the defence hearing, the Appellant issued a sworn testimony. He told the trial Court that that he was a KDF officer and that he denied the charge against him. He testified that he had visited his sick relative at the hospital with his mother and while there his sick relative asked him to call her sister and while she was handing him the phone, it fell on the floor and that his sick relative died. He called the number he was given but nobody picked it up. He told the Court that they later deposited the body of his sick relative at the mortuary. He further stated that he later went to claim his money from someone who had taken a DVD but they disagreed and that was the same person that had him arrested. On cross examination, he stated that he works at Moi Barracks and that his work number is 763xxxx and that he works at the signal office as a KDF officer.



7. At the close of the defence hearing, the trial Court proceeded to issue its judgement holding that the Prosecution did prove its case against the Appellant beyond reasonable doubt and that the Appellant was convicted accordingly in count two of the offence. After taking the Appellant's mitigation, the trial Court sentenced him to two (2) years' imprisonment.
8. Aggrieved by the sentence of the trial Court under count two, the Appellant filed an appeal raising several grounds mainly on mitigation.
9. Section 323 of the Penal Code under which he was convicted provides:-

“Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained and who does not give an account to the satisfaction of the court of how he came by same is guilty of a misdemeanor.”
10. Sentence for misdemeanor is provided under section 36 of the Penal Code. The sentence under that section should not exceed two years' imprisonment or fine or both.
11. Before the trial Court sentenced the Appellant, it took his mitigation where the Appellant prayed for forgiveness and told the Court that his wife had died.
12. In the case Lawrence Gitau Karanu Vs. Republic (2020) eKLR the court discussed when an Appellate Court would interfere with trial Court's sentence thus:-

“I am guided by what was stated in the case of Josiah Mutua Mutunga And Another -v- Republic (2019) eKLR when the court considered an appeal on sentence. In that case the court stated:-

“The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in *S Vs. Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:-

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate””
13. In my view, there is no need to interfere with Appellant's sentence for two reasons. Firstly, because the Appellant's sentence is within the dints of section 36 of the Penal Code and which is not excessive in the circumstances. Secondly, it is noted that the trial Court duly considered his mitigation.
14. Looking at the evidence as a whole, iam satisfied that the prosecution proved its case against the appellatant on count two beyond any reasonable doubt. The appellatant's defence was properly rejected by the trial court as it was a mere sham and it did not shake the evidence of the prosecution in nay way. The finding on conviction was sound. Similarly, the sentence imposed was within the law. I see no reason to interfere with the same.



15. In the result, it is my finding that the appeal lacks merit. The same is dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DECEMBER, 2023 DAY OF 2023

D. KEMEI

JUDGE

In the presence of:

David Kibet Appellant

Mwaniki for Respondent

Kizito Court Assistant

