



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL NO. 33 OF 2019**

**KELVIN MUKHWANA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal against the original sentence in Criminal Case No. 230 of 2019 at the Chief Magistrates Court Bungoma by Hon. C.L. Adisa – RM on 3<sup>rd</sup> March 2019)

**JUDGMENT**

1. **Kelvin Mukhwana**, the Appellant, was arraigned in court for committing the offence of burglary contrary to **Section 304 (2)** of the Penal Code and Stealing contrary to **Section 279 (b)** of the Penal Code. Particulars being that on the 27<sup>th</sup> February 2019, at Village Inn area in Khalaba location within Bungoma County, broke and entered the dwelling house of **Sylvia Nasombi Longino** with intent to steal therein and did steal one grey porch, ID card, TSC Medical Card, NHIF Card, Naivas Card, Khetia Smart Card plus cash Kshs.1250/- the property of the said Sylvia Nasombi Longino.

2. In the alternative he faced the charge of handling stolen goods contrary to **Section 322 (1) (2)** of the Penal Code. Particulars being that on the 27<sup>th</sup> day of February 2019, at Village Inn area at Khalaba Location within Bungoma County, otherwise than in the course of stealing, dishonestly retained one grey porch, one ID card, NHIF card, TSC Medical Card, Naivas Card, and Khetias Smart Card knowing or having reason to believe them to be stolen goods

3. Upon the charges being read to the appellant, he pleaded guilty at the outset.

4. Facts presented were that **Sylvia Nasombi Longino**, the complainant, woke up at 5:00 am, on the 27<sup>th</sup> day of February, 2019, to milk her cow. She returned to the house to find the appellant inside her bedroom holding her hand bag. She held him and took him to his mother, her neighbour. Her bedroom was searched and a Porch, Identity Card, NHIF Card, TSC Medical Card, Naivas and Khetias Smart Cards were recovered. The police were called, they arrested the appellant and subsequently charged him.

5. Having admitted facts as presented by the prosecution, he was convicted. It turned out that he was not a first offender as he had committed another offence and was placed under probation supervision for a period of three years but prior to the period lapsing he committed the subsequent offence. Therefore, he was sentenced to serve ten (10) years imprisonment.

6. Aggrieved, he appeals against the sentence. In mitigation, he prays for leniency and seeks review of sentence. He urges that he is a son of a single parent; his mother is in bad health and he has realized that his life can be ruined; during his stay in prison he has learnt and acquired academic knowledge and skills. That he has undergone vocational training and he will be a law-abiding citizen.

7. In response, the State/Respondent urges that the Appellant was not a first offender and the criminal record that he had is what guided the court to impose a sentence of ten (10) years imprisonment. It called upon the court to uphold the sentence imposed.

8. This being a first appellate court, it is duty bound to reanalyze and assess the evidence and facts of the case and come up with independent conclusions.

9. This court has been called upon to interfere with the sentence meted out. It is trite that an appellate court cannot intervene and alter a sentence of the lower court unless it is premised on wrong principles or if the court overlooked some material factors and/or if the sentence is harsh and excessive in the circumstances. In the case of **Macharia -vs- Republic (2003) KRL 115 the court held that:**

**“The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant they might have passed a some what different sentence. The court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James vs. Republic (1950) EA 147*, it is evident that the Judge has acted upon some wrong principle or overlooked material factors.”**

10. The appellant was convicted of two (2) limbs of the charge.

Section 304 (2) of the Penal Code provides as follows:

**If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.**

Section 279 (b) of the Penal Code provides thus:

**If the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling house.**

11. In meting out the sentence, the trial court considered the fact of the appellant having been a repeat offender. In the case of ***Republic -Vs- Malakwen Arap Kogo (1933) 15 KLR 115***, the court was of the view that at least in cases of theft, when it comes to sentencing the court should consider: -

- (a) Intrinsic value of the subject matter;
- (b) Antecedents of the accused;
- (c) Youth of the accused
- (d) Conduct of the accused during trial, in particular whether he pleaded guilty or not guilty
- (e) Prevalence of the crime in the neighbourhood

The main purpose of sentence is to punish the offender.

The appellant was given the maximum sentence for the offence of burglary. In the opinion of the court the offender needed to be deterred from committing any other offence. He had committed the offence of stock theft for which he was placed on probation. But, looking at what was stolen and the fact that the appellant pleaded guilty and saved court’s time, the sentence meted out was harsh and excessive.

13. Therefore, the appeal succeeds to the extent that I set aside the sentence of ten (10) years imprisonment meted out and substitute it with a sentence of three (3) years imprisonment on each limb of the charge. Since the offences were committed in the same transaction, the sentence which will be effective from the time of the appellant’s arrest will run concurrently.

14. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 29<sup>TH</sup> DAY OF OCTOBER, 2021**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

*Appellant*

*Mr. Ayekha for ODPP*

*Court*

*Assistant*

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*Immaculate*