



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 79 OF 2019**

**NOBERT MUCHITI ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(from the original conviction and sentence in Kakamega Chief Magistrate's Criminal Case No. 1551 of 2019 by D. Alego, SPM, dated 26/6/2019)*

**JUDGMENT**

1. The appellant was on the 26<sup>th</sup> June, 2019 convicted on his own plea of guilty in count 1 for the offence of stealing contrary to section 275 of the Penal Code and in count 2 for the offence of stealing in a dwelling house contrary to section 279 (b) of the Penal Code. In count 1 he was sentenced to serve 3 years imprisonment and in count 2 to serve 5 years imprisonment. Sentence in the two counts was ordered to run concurrently. The appellant was aggrieved by the sentence and filed this appeal. The grounds of appeal are that the sentence imposed on him was extremely harsh, that the trial magistrate failed to consider the fact that the petitioner was a first offender, and that the court failed to consider that he pleaded guilty to the charges.
2. The grounds of appeal were expounded by the written submissions of the advocates for the appellant, **M/s Amasakha & Co. Advocates**. The advocates in their submissions reiterated the grounds of appeal stated in the memorandum of appeal. They submitted that the trial court failed to consider that the complainant in count 2 was the mother to the appellant. That the appellant is a student and was a first offender. That the custodial sentence imposed on him will affect his studies. That the trial court failed to consider the fact that the appellant was remorseful and that he pleaded guilty to the charges.
3. It was submitted that the appellant was given the maximum sentence of 3 years in count 1. That the imposition of the maximum sentence was harsh.
4. It was submitted that before the appellant was released on bail pending appeal he had served 8 months imprisonment. That most of the stolen items were recovered. That the sentence served is sufficient.
5. Counsel submitted that the charges against the other accused persons were withdrawn pursuant to reconciliation of the parties. That the appellant was not given an opportunity to equally enjoy the same right that was accorded to his co-accused.
6. The state did not make any submissions in the appeal. They instead relied on the record of the lower court.
7. The charges against the appellant in count 1 were that on the 24/6/2019 at Kefinco estate in Kakamega town he stole one mobile phone make Tecno valued at Ksh. 15,000/= and one radio valued at Ksh. 1,000/= the property of Newton Muchesia. The charge in count 2 was that on the 21/6/2019 at Madala village in Shibuye Location within Kakamega County jointly with others broke into the dwelling house of Mable Mudola Muchiti and stole one TV make Sony 32 inches, DVD machine Toshiba, radio, 3 shaving machines and accessories, Samsung tablet, one Iphone mobile phone and 2 scientific calculators all valued at Ksh. 86,000/= the property of Mable Mudola Muchiti.
8. The duty of the first appellate court is to analyze and re-evaluate afresh the evidence adduced and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – see **Okeno –Vs- Republic (1972) EA 32**.
9. I have considered the grounds of appeal and the submissions by the advocates for the appellant. The appellant pleaded guilty to the charges. He was a first offender.
10. Sentencing is a discretion of the trial court. The grounds under which an appellate court can interfere with a sentence imposed by a lower court are stated by the Court of Appeal in **Kimani Gacheru –V- Republic (2002) eKLR** where the court cited the case of **Wanjema –V- Republic (1971) EA 493** where it was held that:-

*“An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence .....*”

11. In **Francis Muthee Mwangi –Vs- Republic (2016) eKLR**, it was held that:-

*“Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.”*

12. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

1. **Retribution:** To punish the offender for his/her criminal conduct in a just manner.
2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.
4. **Restorative Justice:** To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. **Community protection:** To protect the community by incapacitating the offender.
6. **Denunciation:** To communicate the community’s condemnation of the criminal conduct.

13. The maximum sentence for stealing under section 275 of the Penal Code is 3 years imprisonment. The appellant was given the maximum sentence for stealing under S. 275 of the Penal Code. It is a general principle of sentencing that a maximum sentence should not be imposed on a first offender – See **Otieno –V- Republic (1983) KLR 295**.

14. The maximum sentence for stealing from a dwelling house under section 279 of the Penal Code is 14 years imprisonment. The appellant was sentenced to serve 5 years imprisonment for the offence of stealing from a dwelling house.

15. I have considered the principles of sentencing set out above. I have considered that the appellant was a first offender and that he pleaded guilty to the offences. I have considered that the appellant is a young man. I am of the view that the maximum sentence of 3 years imposed on him for stealing under section 275 of the Penal Code was harsh and excessive. I am also of the considered view that the sentence of 5 years for count 2 was excessive in view of the fact that the stolen property was recovered.

16. The appellant had already served 8 months imprisonment before he was released on bond pending appeal. Taking into consideration that he was a first offender I am of the view that the sentence served is sufficient for the offences committed.

17. The upshot is that the appellant is sentenced to the time already served of 8 months imprisonment. It is so ordered.

**Delivered, dated and signed at Kakamega this 30<sup>th</sup> day of September, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Miss Lubayi holding brief for Amasakha for Appellant

Mr. Mutua for State/Respondent

Appellant - Present

Court Assistant - Polycap

14 days right of appeal.