



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCRA NO. 140 OF 2019**

**WAMBUA KIOKO *alias* MAFFIN MAKAU.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. Mwaniki J. (S.P.M)***

***in Makueni Senior Principal Magistrate's Court Criminal Case No. 311 of 2019***

***delivered on 19<sup>th</sup> August 2019).***

**JUDGMENT**

1. **Wambua Kioko *alias* Maffin Makau** the Appellant was charged with the offence of burglary contrary to section 304(2) and stealing contrary to section 279(b) of the Penal code. The particulars were that the Appellant on the night of 17/08/2019 at unknown time at AIC kwa Mutisya Kaiti in Wote location in Makueni county broke and entered into the dwelling house of **Reverend Jonathan Mutuku Manthi** with intent to steal and did steal from therein one 14" television, one Sony DVD, one meko gas cylinder, two pairs of trousers, two shirts, one adaptor and two remote gadgets all valued at Kshs.27,100/= the property of the said **Reverend Jonathan Mutuku Manthi**.

2. He faced an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars being that the Appellant on the 18<sup>th</sup> day of August 2019 at Wote township in Wote location within Makueni sub-county of Makueni county otherwise than in the course of stealing handled one 14" Led television, one Sony DVD, one meko gas cylinder, two pairs of trousers, two shirts, one television adaptor and remote gadgets all valued at Ksh.27,100/= the property of **Reverend Jonathan Mutuku Manthi** knowing them to be stolen goods.

3. The charges were read to him on 19<sup>th</sup> august 2019 when he first appeared for plea and he pleaded guilty. Upon conviction he was sentenced to seven (7) years imprisonment on each limb with sentences running concurrently.

4. He filed this appeal raising the following grounds:

- a) **That**, the learned trial Magistrate erred in law and facts by not considering that there was a grudge between him the Appellant and the family of the complainant.
- b) **That**, the trial Magistrate erred in law and facts by not considering that the tendered evidence was hearsay.
- c) **That**, the trial Magistrate erred in law and facts by not considering his defence which was brief and cogent.
- d) **That**, the trial Magistrate erred in law and facts by not considering the contradictions and inconsistencies which were in want of merit.

5. The appeal was canvassed by way of written submissions.

6. In his submissions he raises only mitigating grounds which have nothing to do with the above grounds of appeal. He submits that he was a first offender and he asks for leniency. He claims to have been rehabilitated through integrated services and spiritual programs at the prison. He prays for reduction of his sentence to enable him go and take care of his motherless children.

7. The appeal was opposed by the Respondent through learned counsel Mrs. Ann Penny Gakumu. She submits that the Appellant's right to a fair trial under Article 50 of the Constitution of Kenya was not violated. That the plea was unequivocal, and his mitigation was considered.

8. Counsel has further submitted that the sentence provided for under the section the Appellant was charged is ten years. The sentence of seven years is therefore lenient, and she urges the court not to interfere with it.

#### **Analysis and determination**

9. This is a first appeal and this court has a duty to scrutinize and re-evaluate the evidence on record and arrive at its own conclusion. See **Okeno –vs- Republic (1972) E.A 32 Simiyu & Another –vs- Republic (2005) I KLR 192; David Wairimu Njuguna –vs- Republic (2010) eKLR.**

10. I have considered the evidence on record, grounds of appeal and the submissions by both parties.

11. As already stated at paragraph 3 of this judgment the Appellant was convicted on his own plea of guilty. Therefore the many grounds he raised in this appeal do not apply here as they are irrelevant.

12. The issues I find falling for determination are:

**i. Whether the plea was unequivocal.**

**ii. Whether the sentence was harsh and excessive.**

#### **Issue no.(i) Whether the plea was unequivocal.**

13. The record shows that the charge was read to the Appellant in Kiswahili language which he understands. After pleading guilty the facts were presented to the court. The Appellant told the court that the facts were correct. He was thereafter convicted. Having perused the record and found what I have stated above I find that the plea was properly taken. It's therefore unequivocal. See **Adan –vs- Republic 1972 E.A 445.**

#### **Issue no.(ii) Whether the sentence was harsh and excessive.**

14. The sentence provided for under section 304(2) of the Penal code is ten years imprisonment while that under section 279(b) is fourteen years imprisonment.

15. The prosecution told the court that the Appellant had been convicted in Makueni Criminal Case No. 56 of 2019 for the offence of church breaking. He was discharged on condition that he does not commit another offence for one year. This was on 5<sup>th</sup> July 2019. The present offence was committed on the night of 17<sup>th</sup> and 18<sup>th</sup> August 2019. It means he committed another offence within six weeks of his conditional discharge by the court.

16. There was an order for him to be presented to court No. 2 on 11<sup>th</sup> September 2019 for re-sentencing in the said case. It's not clear whether it was Criminal Case No. 56 of 2019 or no. 57 of 2019. The Appellant admitted the previous conviction.

17. In his mitigation he asked the court for leniency saying he had small children who depended on him. He nowhere said he is a widower as he is now saying in his submissions. For sure, this is not anything that would have escaped his mind.

18. I have considered the circumstances of the case, the value of the stolen items and the fact that all the stolen items were recovered. I have also taken into account that the Appellant is a repeat offender.

19. I find the sentence of seven (7) years to be abit harsh. I set it aside and substitute it with a sentence of four (4) years imprisonment on each limb from date of conviction. The sentences will run concurrently.

20. The appeal succeeds on sentence ONLY as stated above.

Orders accordingly.

***Delivered, signed & dated this 12<sup>th</sup> day of November 2020, in open court at Makueni.***

.....

***H. I. Ong'udi***

***Judge***