REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 61 OF 2016

JOHN KIMANI NJAGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction and sentence in Criminal Case No. 243 of 2016 at Kangema by D. M. Kivuti, Senior Resident Magistrate, dated 5th July 2016]

JUDGMENT

1. The appellant pleaded guilty to *preparation to commit a felony* contrary to section 308 (3) (b) of the **Penal Code**. He was sentenced to *seven years imprisonment.*

2. The particulars were as follows-

> *"On 3rd July 2016 at Kanyenyaini trading centre, Kangema Sub-County within Murang'a County, he was found in a building namely, Chemist Shop, at night with intent to commit a felony to wit shop breaking".*

3. The petition of appeal challenges *both* the conviction and sentence. The appellant submitted that he was *misled* by police officers to plead guilty on the understanding that he would be let off easily on a *fine*.

4. The appellant also pleaded for *leniency*. He said that he is a first offender; and, that the sentence was too harsh in the circumstances.

5. Learned Prosecution Counsel *opposed* the appeal.

6. This is a *first appeal* to the High Court. I have re-evaluated the evidence on record and drawn *my* conclusions. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] EA 32.

7. The charge was read and explained to the appellant in *Kiswahili*, a language in which he was conversant. He answered: *"It is true"*.

8. The *facts* were fairly straightforward: He was found at 3:00 a.m. with an *iron bar*; and, had already *broken* the *padlock* to the shop (exhibits 1 and 2). When those facts were read to him in *Kiswahili*, he answered in the *affirmative*.

9. I thus find that his plea of guilt was *unequivocal*. The fresh allegation that he was misled by the police; or, that he was promised a non-custodial sentence is untenable. The upshot is that the appellant was properly convicted of the offence.

10. I will now turn to the appeal on *sentence*. Section 354 (3) of **Criminal Procedure Code** empowers the High Court to *"maintain the sentence, or with or without altering the finding reduce or increase the sentence"*.

11. In ***Macharia v Republic*** [2003] 2 E.A. 559 the Court of Appeal had this to say on sentencing-

> *"The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors."*

12. The learned trial magistrate considered that the appellant had *no* previous criminal record. The appellant said in *mitigation* that he was ailing and could not procure employment. But the trial court correctly found that the explanation was flippant. The appellant did not express

remorse for his actions.

13. The minimum sentence provided for the offence was *seven years*.

14. I cannot then say that the learned trial magistrate *failed to look at the facts and circumstances of the case in their entirety before settling for the sentence.*

15. The appeal is devoid of merit. It is *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 21st day of February 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant (in person)

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.