



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 102 OF 2017

DANSON MUSE ANZIKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the sentence by Hon. L. Kassan (SPM) in Mavoko SPMC Criminal Case No. 6 of 2017 delivered on 10th January, 2017)

JUDGEMENT

1. The appellant was convicted on his own plea of guilty for the offence of breaking into a building and committing a felony contrary to Section 306 (a) as read with Section 306(b) of the Penal Code. He was subsequently sentenced to 5 years imprisonment.
2. He lodged this appeal seeking that the entire period that he has been in custody since 10th January, 2017 be put into consideration and that the sentence be reduced to non-custodial sentence. That this would give him a chance to provide for his children. He expressed that he is remorseful and regrets his actions.
3. The Respondent submitted that sentencing is discretionary and the appellate court would only interfere where it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice. The Respondent relied on the cases of **Fredrick Nzioki Wambua v. R (2015) eKLR** in which the Court of Appeal decision in **Shadrack Kipchoge Kogo v. Republic, Eldoret Criminal Appeal No. 253 of 2003** was quoted. It was further submitted that while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of proportionality analysis, mitigation and aggravating factors should also be considered. It was submitted that the Appellant's plea of guilty and his mitigation having been considered, the sentence of 5 years was lenient in the circumstances.
4. I have given due consideration to this appeal. The principles that an appellate Court will act upon in exercising its discretion to interfere with a sentence imposed by the trial court are now well settled. The Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka -vs- R. (1989 KLR 306)"

5. The Appellant was charged with the offence of breaking into a building and committing a felony contrary to Section 306(a) as read with Section 306(b) of the Penal Code. He pleaded guilty to the said offence and was convicted. His mitigation was that he is remorseful and that he is a first offender. From the facts presented, a TV, DVD player, Laptop and small speaker charger were recovered from the appellant. These were items that had been stolen from a school.
6. Section 306(a) and 306(b) of the Penal Code provides as follows:

"A person who -

(a) Breaks and enters a school house, shop, warehouse, store, office, counting house, garage, pavillion, club, factory or workshop or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating

liquor or a building which is adjacent to a dwelling house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or

(b) Breaks out of the same having committed any felony therein; is guilty of a felony and is liable to imprisonment for seven years”.

7. Bearing in mind the circumstances fore mentioned that is that the items were recovered, that the appellant is a first offender and that he is remorseful of his actions, I find that a sentence of three (3) years is reasonable. Accordingly, the trial court’s sentence is hereby set aside and replaced with imprisonment for three (3) years to run from 10th January, 2017.

Orders accordingly.

Dated and delivered at Machakos this 29th day of April, 2019.

D. K. KEMEI

JUDGE