



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NANYUKI**

**CRIMINAL APPEAL NO.73 OF 2017**

**JAMES MBURU ITOTIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from original Sentence dated 19/06/2017 in Nanyuki CM Criminal Case No 126 of 2016 – W J Gichimu, PM)***

**J U D G M E N T**

1. The Appellant herein, **JAMES MBURU ITOTIA**, was convicted after trial of ***stealing a motor vehicle*** contrary to **section 278A** of the **Penal Code**. On 19/06/2017 he was sentenced to serve three-and-a-half (3½) years imprisonment. He has appealed only against that sentence. The Appellant's main complaint is that the trial court did not give him credit for the 16 months he had been in custody during his trial.
2. Learned prosecution counsel for the Respondent opposed the appeal. He pointed out that the sentence was not only lawful, but also only half of the maximum seven (7) years imprisonment provided for the offence by the law. Learned Counsel also stated that indeed the trial court had taken into account the time the Appellant had been in custody during his trial, as well as his other mitigation.
3. I have perused the trial court's notes on sentencing. In mitigation the Appellant stated –

***“I am a single parent. My wife died in 2008 of cancer. I have 2 children who rely on me. My daughter lives with me and has been admitted to university. My 2<sup>nd</sup> born is studying ICT at Strathmore University. He is at home due to fees.”***

The Trial court then stated –

***“Accused's mitigation noted. Although he is a first offender the offence is serious. The complainant lost his motor vehicle which has never been recovered. I have taken into account the fact that he has been in custody since 04/02/2016.”***

4. The Appellant's main complaint in regard to the sentence is not borne out by the record. Even without his prompting, the trial court indeed took into account the rather long period he had been in custody during his trial.
5. The Appellant's personal circumstances at the time of his sentencing would no doubt elicit some sympathy; however, those circumstances could never be an excuse for taking and permanently depriving the complainant of his motor vehicle. In any case, the fact that I would probably have awarded a slightly shorter custodial sentence is not a lawful reason to interfere with the trial court's sentencing discretion.
6. I find no merit in this appeal against sentence. The same is hereby dismissed. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 24<sup>TH</sup> DAY OF APRIL 2019**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 25<sup>TH</sup> DAY OF APRIL 2019**