



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 138 OF 2018

BETWEEN

BRIAN INDIMULI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. S. Telewa, RM

dated 1st August 2018 at the Magistrates Court at Eldoret

in Criminal Case No. 3061 of 2018)

JUDGMENT

1. The appellant, **BRIAN INDIMULI**, was charged and convicted on his own plea of guilty of the offence of house breaking and stealing contrary to **section 279 (b)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 22nd July 2008 at Kimumu Estate, Moiben Sub-County within Uasin Gishu County, he broke and entered into the dwelling house of **DOUGLAS OMULAMA** with intent to steal and did steal therein a woofler with four speakers, bed sheets, blankets, thermos flask, five enamel plates and three enamel cups and cash Kshs. 5,000/- all valued at Kshs. 15,000/- the property of the said **DOUGLAS OMULAMA**.

2. The appellant was sentenced to 3 years' imprisonment and now appeals against the sentence only.

3. The general principles upon which the appellate may interfere with a sentence imposed by the trial court are well settled. It has jurisdiction to interfere with a sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see *Wanjema v Republic [1971] EA 493*).

4. As a matter of law, the general principle is that where the law provides for both imprisonment and a fine as sentences available to a person convicted of an offence, the court must first consider the fine. In *Jackson Konde Chalo v Republic MSA HC Cr. Rev. No. 351 of 2018 [2018] eKLR*, the court held that-

The law and policy in sentencing is that where the law provides for a fine or imprisonment or both then unless the court for good reasons decides to give both, the accused person has a right to be given an option of a fine.

5. This principle finds expression in the *Judiciary Sentencing Policy Guidelines* which states as follows:

7.18 Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence.

6. It is thus clear that the trial court failed to exercise its discretion properly exercised when it failed to consider the possibility of imposing a fine instead of a custodial sentence. Further, it failed to explain or record reasons why a fine or other non-custodial sentence was not appropriate. It is only when the reasons are set out in the sentencing notes that the court can decide whether sentencing discretion has been exercised in accordance with established principles. In *Riyadh Abdul Hafedh v Republic NBI HCCRA No. 453 of 2006 [2006] eKLR* the

court observed that:

While exercising its discretion in sentence, it is advisable that reasons be given on record to show the trial court considered to determine the kind of sentence awarded.

7. Having considered the record, it is apparent that this is a proper case to intervene in the sentence for the reasons I have set out. This court, as part of its appellate jurisdiction, has power to vary the sentence particularly where the material before the court is sufficient for the court to make an informed decision without referring the matter back to the trial. I now turn to consider the appropriate sentence.

8. The **Judiciary Sentencing Guidelines** provide at para. 7.19, that in considering whether to impose a custodial or a non-custodial sentence, the court should take into account the gravity of the offence and the criminal history of the offender.

9. I have considered the sentencing notes of the trial magistrate and I observe that no consideration was given to the fact that the appellant was a 1st offender, that he had pleaded guilty and that there was no possibility of an alternative sentence. In the circumstance, I find that the trial magistrate exercised his sentencing discretion wrongly. Considering the factors, I have cited and that the appellant has been in prison for 8 months, I allow the appeal, quash the sentence and I substitute it with a sentence of term served. The appellant shall be released unless lawfully held on a separate warrant.

DATED and DELIVERED at ELDORET this 24th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Mokuu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.