**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 7 OF 2018**

**WESLEY ROTICH.....APPELLANT**

**VERSUS**

**REPUBLIC.....DEFENDANT**

(Being an appeal from the sentence passed in Eldoret Chief Magistrate's Criminal Case No. 1754 of 2010 by Hon. N. Wairium, PM, dated 7 February 2018)

**JUDGMENT**

**[1]** This appeal arises from the sentence imposed on the Appellant herein, **Wesley Rotich**, by **Hon. Wairimu, PM**, in **Eldoret Chief Magistrate's Criminal Case no. 6133 of 2016: Republic vs. Wesley Rotich.** The Appellant had been charged before the lower court with two counts. In Count I, he was charged with the offence of vandalism of electrical apparatus contrary to **Section 64(4)(b)** of the **Energy Act, No. 12 of 2006** (now repealed). The particulars thereof were that on the night of 6th and 7th April 2016 at Uhuru-Plateau area within Uasin Gishu County, jointly with others not before the court, he vandalized a 200 KVA transformer Serial No. 28296, valued at **Kshs. 2.5 million**, the property of Kenya Power.

**[2]** In Count II, the Appellant was charged with sabotage contrary to **Section 343** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. The particulars were that on the night of 6th and 7th April 2016 at Uhuru-Plateau area within Uasin Gishu County, jointly with others not before court, he willfully and unlawfully severed electricity power taplings from a transformer with intent to impair its efficiency in transmitting electric power to Uhuru-Plateau residents.

**[3]** The Appellant was arraigned before court on **25 October 2016** and he admitted both counts. The matter was then deferred enable the Prosecution present the facts of the case and to have the age of the Appellant ascertained. When the facts were ultimately read on **10 November 2016**, the Appellant expressly admitted them. However, in mitigation, he asserted that he was looking for work and therefore prevaricated in his plea. Accordingly, his plea was converted to a plea of not guilty. Thereafter, while the matter was pending hearing, the Appellant, of his own volition, informed the lower court on **18 January 2018,** that he wished to change plea. Hence, the charges were again read over and explained to him in Kiswahili language and he admitted them. The facts were then re-stated and he admitted the same. Upon being convicted on his own guilty plea, the Appellant was sentenced to pay a fine of **Kshs.5 million**, in default to serve 10 years imprisonment in respect of Count I; and to imprisonment for 5 years in respect of Count II. The terms of imprisonment were to run concurrently.

**[4]** Being aggrieved by the sentence imposed on him, the Appellant preferred this appeal on **19 February 2018,** contending that:

**[a]** He is remorseful and has changed for good; and that he was prompted by poverty to commit the crime;

**[b]** That he is an orphan and he regrets the offence;

**[c]** That he is asthmatic and the prison environment is not favourable for his condition;

**[d]** That he is the sole breadwinner for his young family and that he has learnt his lesson and, added that, having reformed and converted into Christianity, never again will he indulge into such an act.

**[5]** With the leave of the Court, the Appellant filed what he referred to as Amended Grounds, but which are, in essence, similar Grounds of Mitigation as the initial grounds of appeal. He relied entirely on those Amended Grounds. On behalf of the State, **Ms. Mumu** opposed the

appeal contending that the sentence passed against the Appellant is a legal sentence. She accordingly urged for the dismissal of the appeal.

**[6]** The Appellant having pleaded guilty, **Section 348** of the **Criminal Procedure Code, Chapter 75** of **the Laws of Kenya** is explicit that:

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence."**

**[7]** Accordingly, the duty of the Court in this appeal is limited to ascertaining that the Appellant's plea was otherwise unequivocal; and that the sentence imposed on him was not only legal but also merited. To this end, **Section 207** of the **Criminal Procedure Code** provides that:

> **(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**
>
> **(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**
>
> **Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**
>
> **(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.**
>
> **(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.**

**[8]** A reiteration of the aforestated provision is to be found in ***Adan vs. Republic* [1973] EA 446** wherein **Spry, V.P**. explained that:

> **"*When a person is charged, the charge and the* particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."**

**[9]** The record shows that the Appellant's plea was unequivocal and that the procedure set out in **Section 207** of the **Criminal Procedure Code** and **Adan vs. Republic** (supra) was strictly complied with. Indeed, while urging his appeal before this Court, the Appellant reiterated the fact that he admitted the charges and that his plea is for reduction of the sentence. He further reiterated his assertion that he is an orphan with a young family and that he has learnt his lesson and will henceforth be a good citizen if released.

**[10]** It is trite law that an appellate court does not alter sentence unless certain factors, some of which were aptly spelt out in the case of ***Ogalo s/o Owuora vs. Republic [1954] 21 EACA 270,*** exist. In the stated case the court held:

> **"The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v Republic [1950] 18 EACA 147*, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case."**

[11] And in the Judiciary Sentencing Policy Guidelines it is proposed that in sentencing, a three-step approach be employed, firstly, to determine the sentencing options provided by the specific statute creating the offence; and secondly, to determine whether a non-custodial or a custodial order would be the most appropriate order in the circumstances and, thirdly, if custodial sentence is the most appropriate option, to determine the duration of the custodial sentence taking into account the mitigating and aggravating circumstances, examples of which are set out in the Guidelines. In addition, one of the cardinal principles underpinning sentencing process is the principle of proportionality. Hence, in Paragraph 3.1 of the Sentencing Policy Guidelines, it is stated thus:

> **"The sentence meted out must be proportionate to the offending behavior. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behavior is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender."**

**[12] With the foregoing in mind, I have looked at the relevant provisions pertaining to the appeal and note that under Section 64(4) (b) of the repealed Energy Act, it is provided that:**

> **"A person who willfully or with intent to interfere with the management or operation of the apparatus of a licensee … (b) vandalizes or damages any works of or under the control of a licensee … commits an offence, and shall be liable, on conviction, to a fine of not less than five million shillings or to imprisonment for a term of not less than ten years, or both."**

**[13]** It is manifest therefore that, in respect of Count I, the lower court had no option but to mete out the minimum penalty as by law prescribed. Similarly, in respect of Count II, the penalty provided for under **Section 343** of the **Penal Code** is imprisonment of up to five years. The lower court passed the maximum, which may, on the face of it appear harsh. However, granted the seriousness of the matter, granted the minimum penalty set out for Count I and the order by the lower court that the sentences would run concurrently, it cannot be said that the sentence meted for Count II is excessive in the circumstances. I note, too, that the lower court called for a Pre-sentence Report and that she did take into account the expressions of the Appellant in mitigation as well as all the pertinent circumstances of the case before reaching her decision.

**[14]** Thus, upon a reconsideration of the proceedings of the lower court, it cannot be said that the Trial Magistrate **acted upon some wrong principle or overlooked some material factor in sentencing the Appellant. I therefore find no merit in the appeal and would accordingly dismiss the same.**

**Orders accordingly.**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF AUGUST 2019**

**OLGA SEWE**

**JUDGE**