REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 52 OF 2017

ALI JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(**From original conviction and sentence in Criminal Case Number 150 of 2017 in the Principal Magistrate's Court at Taveta delivered by Hon G. K. Kimanga (RM) on 25th May 2017)**

JUDGMENT

1. The Appellant herein, Ali Juma was charged with the offence of stealing from a dwelling house contrary to Section 279 (b) of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the 14th day of May 2017 at around 2300 hours **(sic)** Machungwani area within Taita Taveta County, he stole King Max Water pump valued at Kshs 16,400/= the property of Boniface Mbele (hereinafter referred to as "the Complainant") from his dwelling house.

2. The Learned Trial Magistrate, Hon G.K. Kimanga, Resident Magistrate convicted him and sentenced him to three and a half (3½) years imprisonment.

3. Being dissatisfied with the said judgment, on 5th July 2017, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time, which application was allowed and his Petition of Appeal deemed to have been duly filed and served. He relied on six (6) mitigation Grounds of Appeal. One (1) Ground of Appeal related to the sentence only. His Written Submissions were filed on 7th November 2017. The State's Written Submissions were dated 15th January 2017 and filed on 17thJanuary 2017.

4. When the matter came up on 18th January 2018, both he and the State asked this court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the said written submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."**

6. As can be seen hereinabove, the jurisdiction of an appellate superior court is limited to analysing the evidence that has been adduced in a trial court afresh with a view to establishing whether or not such trial court erred on fact or law or both. However, where an accused person has pleaded guilty to an offence, its jurisdiction is limited to considering the legality and extent of a sentence.

7. This is in line with the provisions of Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that stipulates as follows:-

> **"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 or legality of the sentence."**

8. In this case, this court noted that the Appellant pleaded not guilty to the offence when he was first arraigned in court. Subsequently, he requested that the Charge be read afresh and he pleaded guilty to the offence. His admission of the offence was reflective of his guilt. No value then would be added in analysing the evidence that was adduced during trial as this court is limited to looking at the extent and legality

of the sentence that he was given only.

9. However, whereas this court appreciated that its jurisdiction was limited to interrogating the extent and legality of the sentence herein, it took cognisance of the fact that this was a *pro se* trial. The Appellant represented himself during the trial in the Trial Court and was not expected to know all the finer details of the law.

10. It appeared that the Appellant's Grounds of Appeal were merely mitigation grounds that should have been addressed to the Trial Court. He did, however, raise a substantive issue relating to the extent of the sentence that was meted upon him.

11. This court therefore deemed it fair to address itself to his assertions relating to his admission of the Charge and the legality, propriety and correctness of the sentence. Indeed, a court of law has inherent powers to make such orders are as necessary for the ends of justice and to prevent the abuse the process of court. This court therefore dealt with the issues that had been raised herein under the following heads.

I. ADMISSION OF CHARGE

12. The Appellant herein contended that he was persuaded by the Complainant to plead guilty to the offence as he would only be given a fine which he subsequently established was not the case when he was sentenced to prison as it became evident that he was avoiding a full trial.

13. On its part, the State submitted that the Appellant's plea was unequivocal and that the procedure for taking plea was properly followed as the Charges and facts were read to him in Kiswahili, a language that he understood as he had not informed this court that he did not understand Kiswahili. It pointed out that there was no factual proof that the Appellant was coerced into pleading guilty as he had averred.

14. It was evident from the proceedings from the lower court that on pleading guilty, the facts that were read to him were clear that he had been charged with stealing from the Complainant's dwelling house. There was no ambiguity in the manner he pleaded to the charge and in the manner the facts were read to him as the Charge and facts were read to him in a language that he understood.

15. This was in line with the holding in the case of **Kariuki vs Republic[1954] KLR 809**that Wendoh J referred to in the case of **Fredrick Musyoka Nyange vs Republic[2012]eKLR** wherein it was held as follows:-

> **""2. The manner in which a plea of guilty should be recorded is:**
>
> **(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;**
>
> **(b) he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;**
>
> **(c) the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
>
> **(d if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan v Republic [1973] EA 445"**

16. This court was not therefore persuaded that there was any merit in the Appellant's assertions that he was coerced to plead guilty to the Charge by the Complainant. If he was indeed coerced as he stated, then he did not demonstrate the same.

II. SENTENCE

17. Grounds of Appeal Nos (5) and (6) were dealt with under this head.

18. The Appellant averred that the sentence was too excessive in the circumstances of the case. He stated that he was a first offender and the Learned Trial Magistrate ought to have given him the option of a fine.

19. On its part, the State referred this court to the case of ***Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No 253 of 2003*** **(quoted in *Arthur Muya Muriuki vs Republic* (2015) eKLR)** where the Court of Appeal stated the following on principles of sentencing:-

> ***"Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred."***

20. However, it was its submission that whereas the maximum penalty for stealing from a dwelling house was fourteen (14) years imprisonment, Section 26 (3) of the Penal Code provided that a court could impose a fine where there was no minimum sentence.

21. It also added that as the Appellant was a first offender, a period of one and a half (1½) years imprisonment was sufficient. It placed reliance on the case of **Reuben Nyakango Mose vs Republic [2013] eKLR** where the appellate court therein upheld a sentence of three (3) years imprisonment.

22. This court concurred with both the Appellant and the State that bearing in mind the sentences this very court had upheld, the penalty of three and a half (3 ½) years for stealing property worth Kshs 16,400/= was harsh, severe and excessive in the circumstances of the case herein.

23. In the case of **Beshick Mombo Mwake vs Republic [2016] eKLR,** this very court the sentence of three (3) years imprisonment where the appellant therein had stolen three (3) pieces of timber valued at Kshs 1,500/= and replaced the same with three (3) months imprisonment.

24. In the case of **Oliver Mwakilenge Kalevs Republic [2018] eKLR**, this very court also reduced a sentence of eleven (11) years where the appellant therein had broken into a house and stole goods worth Kshs 6,000/= to four (4) months imprisonment.

25. In the case of **James Kilema Mbogholi vs Republic [2018] eKLR**, this court also reduced a sentence of thirteen (13) years where the appellant therein had been convicted of having stolen goods valued at Kshs 11,250/= to six (6) months imprisonment.

26. In the case of **Elijah Sowene Ngesiani alias Tatu vs Republic [2017] eKLR**, this very court upheld a sentence of two (2) years where the appellant therein had been convicted for having stolen a motorcycle worth Kshs 67,000/=.

27. Doing the best that it could, this court came to the firm conclusion that although a sentence of one and a half (1 ½) years imprisonment as had been proposed by the State was still fair, a sentence of seven (7) months imprisonment was sufficient in the circumstances of the case. Indeed, penalty ought not to be so excessive as to defeat the objective of reforming a convicted person.

DISPOSITION

28. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 5th July 2017 was partially successful to the extent of the sentence only. Accordingly, the conviction is hereby upheld as the same was lawful and fitting.

29. However, this court hereby sets aside and/or vacates the sentence of three and a half (3½) years imprisonment and replaces the same with a sentence of seven(7) months imprisonment. In view of the fact that the Appellant has since served eleven (11) months in prison, this court hereby orders that he be set free forthwith unless held or detained for any other lawful reason.

30. It is so ordered.

DATED and DELIVERED at VOI this 20th day of April 2018

J. KAMAU

JUDGE

In the presence of:-

Ali Juma-Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk