



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 134 OF 2015**

**DENNIS MUGIRA KIBERE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*Being an Appeal from the conviction and sentence of Hon. L. N. Mugambi (Senior Principal Magistrate) in Kangundo Principal Magistrate's Court Criminal Case number 619 of 2014 delivered on 13<sup>th</sup> February, 2015*

**JUDGEMENT**

1. The Appellant herein DENNIS MUGIRA KIBERE had been charged before the Kangundo Senior Principal Magistrate's Court vide **Criminal Case number 619 of 2014** whereby he with two others faced three main counts with one alternative charge.

On the first count he faced a charge of shop breaking contrary to Section 306(1) (a) as read with Section 306 (b) of the Penal Code. The particulars were that on the 22<sup>nd</sup> day of September, 2014 at night at Malaa market of Matungulu Sub-County in Machakos County he together with two others jointly broke and entered the shop of one Benard Wallow with intent to commit a felony namely theft.

On the second count he faced a charge of stealing contrary to Section 275 of the Penal Code. The particulars were that on the 22<sup>nd</sup> day of September 2014 at night at Malaa market in Matungulu Sub-County, he together with two others jointly stole the following items: (1) **GLD TV 14"**, (2) **Sony DVD**, (3) **Solar Panel**, (4) **6 bundles of Sportsman cigarettes**, (5) **8 bundles of super match cigarettes**, (6) **3 packets of rooster cigarettes**, (7) **1½ bundles of SM cigarettes**, (8) **36 packets of daima milk**, (9) **8 mobile phones**, (10) **12 batteries of mobile phones**, (11) **3 Extensions**, (12) **2 knives**, (13) **Safaricom, Airtel, YU and Orange credit cards** all valued at Kshs.80,000/= and cash of Kshs.128,000/= all amounting to Kshs.300,000/- being the property of one **Benard Wallow**.

On the third count, he faced a charge of housebreaking and stealing contrary to Section 304(1) and 279(b) of the penal Code. The particulars were that on the 18<sup>th</sup> day of September, 2014 at Malaa village in Matungulu Sub-county within Machakos County jointly with two others broke and entered into the dwelling house of Maurice Waime with intent to steal therein and did steal the following items (1) **14" Aucma TV** (2) **6 kg gas cylinder** among other things all valued at Kshs.50,000/= being the property of the said Maurice Waime.

On the alternative charge, he faced a charge of handling stolen goods contrary to Section 322 (2) of the Penal code. The particulars were that on the 26<sup>th</sup> day of September, 2014 at around 2330 hours at Malaa trading centre in Matungulu Sub-County within Machakos County otherwise than in the course of stealing, dishonestly retained the following items (1) **GLD TV 14"**, (2) **Sony DVD**, (3) **Solar Panel**, (4) **18½ packets of cigarettes** (5) **2 mobile phones** (6) **3 extensions** (7) **2 knives** (8) **14" Aucma TV** (9) **Yu credit** of 180/= having reasons to believe them to be stolen.

2. The Appellant denied the charges and the matter proceeded to trial at the end of which he was found guilty of the three main counts and convicted accordingly. On **Count one** the Appellant was sentenced to **five years** imprisonment. He was also sentenced to **two years** imprisonment on **Count Two** while on **Count Three** he was sentenced to **two years** on the limb of housebreaking and one year imprisonment on the other limb of stealing. All the sentences were ordered to run concurrently.

3. The Appellant was aggrieved about the said sentences and he filed a mitigation appeal on the 6/7/2015 and supported the same on the following grounds namely:-

*(i) That he is a first offender and very remorseful.*

*(ii) That he is an orphan and a father to three children who solely depend on him.*

*(iii) That he has undergone a lot of rehabilitation in prison and acquired skills that he will use for living.*

*(iv) That the sentence of 5 years is too harsh and he prays for leniency for the sentence to be reduced to a more tolerable one.*

4. Parties herein agreed to canvass the appeal by way of written submissions.

5. The Appellant reiterated his grounds in support of the mitigation.

6. Mr. Machogu Learned Counsel for the Respondent opposed the Appeal. He submitted that the purpose of sentencing is to punish and at the same time reform or rehabilitate the offender. It was also submitted that sentencing is at the discretion of the trial court and thus the Appellate court should be slow in interfering with the discretion of the trial court regarding the issue of sentence.

It was also submitted for the Respondent that the grounds of appeal raised are merely mitigation and do not qualify to be treated as grounds of appeal. The mitigation should have been put to the trial court. It was submitted that the trial court had considered those mitigations before sentencing and should not be interfered with. Reliance was placed in the case of **WANJEMA =VS= REPUBLIC [1971] EA 493**. It was finally submitted that the appeal be dismissed.

7. I have considered the Appellant's appeal on mitigation and the Respondent's submissions. I have also noted from the record of the lower court that the Appellant was given the minimum sentences. Indeed the sentences meted out are not that excessive when one considers the fact that the sentences imposed under the relevant Sections of the Penal Code ranged from a minimum of seven years to a maximum of fourteen years imprisonment. For instance the first count attracts a maximum sentence of 7 years while the second count attracts a sentence of 3 years whereas the third count attracts 7 years on the first limb while the second limb attracts a maximum sentence of 14 years. Looking at the sentences meted out upon the Appellant by the trial court, I find the same are not excessive at all and further note that the Appellant's mitigation had been properly received by the trial court.

8. The Appellant has urged this court to interfere with the sentence on the ground that the same is excessive. As noted above, the sentences are reasonable since the trial court considered the Appellant's mitigation. It is also noted that the trial court considered a pre-sentence report on the Appellant. All these shows that his circumstances were properly considered. Again it is trite that an appellate court should not interfere with the discretion of a trial court as regards sentence unless it is shown that it overlooked some material factor or took into consideration irrelevant factors or acted on some wrong principle or that the sentence is manifestly excessive in the circumstance for the case (see **WANJEMA =VS= REPUBLIC [1971] EA 493**). I have looked at the record of the trial court and find that the Appellant's mitigation was duly considered and the sentences imposed are not in any way excessive.

9. Finally the Appellant has pointed out to this court that life in prison is too harsh and stressful as none of his family members has ever visited him with some goodies. Despite the Appellant's circumstances and obligations, I must point out the fact that the Appellant had been taken through a criminal trial where he was able to defend himself adequately and was subsequently found guilty, convicted and sentenced. The sentence meted out was lawful in all respects. The Appellant's family circumstances are matters which are inevitable due to the operation of the law in that the Appellant had committed an offence and was taken through a full trial and sentenced in accordance with the law.

10. In the result, I find the Appellant's appeal lacks merit. The same is dismissed. The sentence of the lower court is upheld, and that the Appellants is ordered to continue serving the sentence passed by the trial court.

Orders accordingly.

Dated and Delivered at **MACHAKOS** this **14<sup>th</sup>** day of **June, 2018**.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Dennis Mugira Kibere - the Appellant

Machogu - for the Respondent

Josephine - Court Assistant