REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 130 OF 2017

JULIUS MUTUA ILELU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the sentence by Hon. A. Lorot (SPM) in Machakos Chief Magistrate's

Court Criminal Case No. 1010 of 2016 delivered on 1st November, 2017)

JUDGEMENT

1. Julius Mutua Ilelu has appealed against the sentence meted on him by the trial court. He filed this appeal on grounds that he is a first offender and is remorseful and already rehabilitated; that he is spiritually upgraded; that he is his family's sole breadwinner; that he pleaded guilty at trial and that this court should treat the entire period he has been in custody as a punishment to reduce the sentence to the period served.

2. The Respondent opposed the appeal and submitted that claims of reform and prayer for leniency are not sufficient grounds to warrant this court to interfere with the sentence of the trial court unless the sentence was excessive and harsh or the trial court failed to consider crucial factors when sentencing the appellant.

3. The appellant was charged with burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code. His plea of guilty was considered rescinded due to the fact that he, after conviction, stated that he was not the one who committed the offence. His said plea was substituted with a plea of not guilty after the initial one was considered unequivocal and was tried for the charges. The trial court later found him guilty of the offences and convicted him for the same and sentenced him to 7 years imprisonment for the first limb and 4 years for the second limb. The said sentences were to run concurrently.

4. The principles upon which an appellate Court will exercise its discretion to interfere with a sentence imposed by the trial court are now well settled. The same were discussed in **Felix Nthiwa Munyao v. Republic CA. No. 187 of 2000** and **Macharia v. Republic [2003] 2 E.A. 559.** Also in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, the Court of Appeal pronounced itself on this issue as follows:

> **"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-**
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> **sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle and must be interfered with (see also Sayeka –vs- R. (1989 KLR 306)"**

5. It follows therefore that an appellate court should not interfere with the discretion of a trial Court as to sentence except in such cases where it appears that in assessing the sentence, the court acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive.

6. I have carefully examined the record and it emerges that the appellant is not a first offender as he alleges. It was said that he had previously been convicted of robbery with violence in Criminal Case No. 113 of 2013 and was sentenced to 4 years imprisonment; that in another case he was charged for the offence of being in possession of government stores and was sentenced to 6 months imprisonment and further that he had escaped from lawful custody. All these antecedents were not rebutted by the Appellant. The appellant in his mitigation stated that he did not commit the offence. Among the factors considered by the trial court in sentencing the appellant was the fact that he was not a first offender. Particularly the trial court sentiments were that "*I consider him a repeat offender…The accused is an untamed criminal. He must be kept away from right-thinking members of society*."

7. The maximum sentence for burglary under section 304 (1) (b) of the Penal Code is 7 years imprisonment and for stealing under Section 279 (b) of the Penal Code is 14 years imprisonment. The sentences meted on him were in my view commensurate to the offence. Further, I find that the appellant is a social menace for the reason that he is not a first offender, a fact that the trial court considered while sentencing him. In the circumstances, the trial court cannot be said to have been in error. In the end, the sentences meted upon the Appellant were not excessive and I decline to interfere with the same. This appeal therefore fails and is hereby dismissed. The sentences by the trial court is

upheld.

Dated and delivered at Machakos this 29th day of October, 2018.

D. K. KEMEI

JUDGE