



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CRIMINAL APPEAL 90 OF 2017**

**ISAYA OTIENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the sentence of Hon. E. Mutunga (SRM) in Criminal [Case No. 774 of 2017](#), delivered on 19<sup>th</sup> May 2017 at the Chief Magistrate's Court at Mombasa)**

**JUDGMENT**

1. The Appellant was charged with, and convicted of four counts of stealing contrary to section 268(1) of the Penal Code as read with section 275 of the Penal Code, on his own plea of guilty. The particulars were that on 8<sup>th</sup> May 2017 in Likoni Sub County within Mombasa County, he stole the following items : firstly, one mobile phone make Techno valued at Kshs 1800/=, a jacket valued at Ksh 1500/= and cash of Kshs 600/=, all valued at Kshs 3,900/= and the property of Musa Musyoka.

2. Secondly, a mobile phone make Samsung valued at Kshs 12,000/=, the property of Geoffrey Ekinig; thirdly, a mobile phone make Techno valued at Kshs 2,000/= the property of Isaac Okomera; and lastly, a mobile phone make Techno valued at Kshs 1500/=, the property of Caroline Anyango. He was sentenced to serve one (1) year imprisonment for each count.

3. The Appellant subsequently preferred this appeal against the sentence only. During the hearing of the appeal held on 13<sup>th</sup> December 2018, the Appellant orally submitted that he was seeking a reduction of his sentence or that he be set free, and relied on Amended Grounds of Mitigation and submissions he availed to the Court on 22<sup>nd</sup> November 2018. The Appellant states therein that he has been incarcerated for 18 months, has learnt his lesson and is remorseful. Further, that he readily pleaded guilty and did not waste the Court's time and resources, and is a first offender. Lastly, that he is a widower with three children and the sole breadwinner, and he requested for a non-custodial sentence to be able to provide for his children.

4. Mr. Masila, the learned Prosecution counsel, relied on written submissions dated 23<sup>rd</sup> November 2018 that he filed in Court, and submitted that the mitigation by the Appellant was also given in, and considered by the trial Court, and that the sentence meted out on the Appellant was not excessive. Further, he cited section 348 of the Criminal Procedure Code that an appeal will be allowed in the case of a plea of guilty only to the extent of legality of the sentence. Reliance was also placed on the decision in **Benard Kimani Gacheru vs Republic (2002) e KLR**, for the position that an appellate Court will not normally interfere with a sentence, unless it is manifestly excessive, or the trial Court overlooked some material factor.

5. I have considered the Appellant's mitigation and the submissions by the Prosecution. The issues for determination by this court are whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive, and whether the said sentence is amenable to reduction and /or variation.

6. Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-

**“ In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence”.**

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated 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)."**

7. In the instant appeal, the Appellant was charged with, and convicted of the offence of stealing contrary to section 268(1) of the Penal

Code as read together with section 275 of the Penal Code. Section 268(1) of the Penal Code provides as follows in this regard:

**“1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property..”**

8. The penalty is provided for in section 275 which provides that any person who steals anything capable of being stolen is guilty of the felony termed theft, and is liable to imprisonment for three years. The sentence of one (1) year imprisonment for each count meted on the Appellant was therefore lawful, to the extent that it is provided for by the said provisions of the Penal Code.

9. This finding notwithstanding, after reading the facts that were presented to the trial Court by the Prosecution after the Appellant pleaded guilty, I note that the theft by the Appellant occurred on the same day on 8<sup>th</sup> May 2017, from four different houses and persons, between the hours of 7.40 am and 10.30 am in the morning. In **Ondiek vs R (1981) KLR 430**, it was held that the practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances, the sentences imposed ought to run concurrently. Likewise in **Nganga vs R, (1981) KLR 530**, the High Court held that concurrent sentences should be awarded for offences committed in one criminal transaction.

10. In the present appeal, the four counts the Appellant was charged with occurred on the same date, and even though in separate houses, they were essentially part of a similar transaction as they occurred over a span of only 2 hours, and the Appellant employed the same method in each offence. Concurrent sentences should therefore have been given in the circumstances, and the trial magistrate erred by failing to specify this aspect of the sentences.

11. Arising from the foregoing reasons, the Appellant’s conviction for the four counts of stealing contrary to section 268(1) of the Penal Code as read with section 275 of the Penal Code is upheld, since he is not challenging the conviction. However, the sentence of one (1) year imprisonment for each count is set aside, and substituted with a sentence of one (1) year imprisonment for each count to run concurrently. Given that the Appellant has already served a sentence of 18 months imprisonment since his sentencing on 19<sup>th</sup> May 2017, I consequently order that he be, and is hereby set at liberty forthwith unless otherwise lawfully held.

12. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 19<sup>TH</sup> DAY OF DECEMBER 2018.**

**P. NYAMWEYA**

**JUDGE**