REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL REVISION NO 163 OF 2016

EDWARD MAGHANGA…….APPLICANT

VERSUS

REPUBLIC ……...… RESPONDENT

RULING

INTRODUCTION

1. By a letter dated 16th November 2016 filed on 17th November 2016, the Applicant moved the court for a revision of the sentence that was meted upon him on 3rd November 2016 by the Trial Magistrate, Hon N.N. Njagi, Senior Principal Magistrate in **Cr Case No 58 of 2016 Republic vs Edward Maghanga** at Wundanyi Law Courts.

2. The Applicant had been charged with the offence of breaking into a building with intent to commit a felony contrary to Section 307 of the Penal Code Cap 63 (Laws of Kenya). He was fined Kshs 100,000/= or in default to serve twelve (12) months imprisonment. He had also been charged with the alternative charge of handling stolen goods contrary to Section 322(1)(2) of the Penal Code.

3. The particulars of the main Charge were as follows:-

> **"On the 30th day of January 2016 at around 9.00 pm at Wundanyi Township Wundanyi Location within Taita Taveta County broke and entered into a kiosk of Edward Maina Mwanjau with intent to commit a felony therein namely stealing."**
>
> **ALTERNATIVE CHARGE**
>
> **"On the 30th day of January 2016 at around 9.00 pm at Wundanyi Township Wundanyi Location within Taita Taveta County, otherwise than in the course of stealing, dishonestly received or retained assorted new clothes, shoes and cosmetics knowing or having reason to believe them to be stolen goods."**

4. Being aggrieved by the sentence, the Applicant sought a Revision of the following grounds:-

> **1. THAT the learned trial magistrate relied on the evidence of the watchman (PW II) who was the key witness.**
>
> **2. THAT the watchman claimed that he saw the light inside the building and noticed somebody had broken into the building and waited outside for the person who was inside to**

come out without raising any alarm to call people for assistance (sic)**.**

3. THAT the watchman who was the key witness (PW II) said that he waited until when the person who was inside the building came out and he struggled with him, a person who was armed with a knife(sic)**.**

He claimed that the suspect overcame him and left his coat and knife. The suspect never raised any alarm during the struggle to call people for assistance. The suspect never left anything as exhibit stolen from the building(sic)**.**

4. THAT the time the watchman (PW II) noticed the building was broken into was at 9.00 pm very early in the night, people were still moving along the town, but PW II never bothered to call any person; which showed this was a plan to fix him in the case(sic)**.**

5. THAT the watchman (PW II) informed the complainant PW I who was the owner of the building after the event. (sic) **While he was able to notice the breaking into the building very early and waited for all that, without informing him or the neighbours; which showed that it was a planned deal to fix him** (sic).

6. THAT the coat produced in court as exhibit was never fitted to him (sic) **to ascertain if it was his size.**

5. The said grounds appeared to have been more of submissions than grounds of revision. On 1st December 2016, this court gave the Applicant an opportunity to lodge an appeal instead of proceeding with the Revision after it explained to him in detail the differences between a Revision and an Appeal. However, he was adamant that he wished to proceed with the Revision application as drafted. Since it was his application, the court acceded to his request.

6. In answer to the Applicant's application, the State filed its Response dated 7th February 2017 on 8th February 2017. It opposed the Applicant's application on the ground that the penalty that had been meted upon him was well within the limit that the Learned Trial Magistrate would have imposed on him. It pointed out that Section 307 of the Penal Code did not provide for option of a fine but that the Learned Trial Magistrate was well within his discretion when he meted to the Applicant a default imprisonment of one (1) year.

7. The said Section 307 of the Penal Code provides as follows:-

"Any person who is guilty of the felony termed housebreaking is liable to imprisonment for seven years."

8. It further submitted that the grounds the Applicant had raised were more of evidentiary facts and did not establish any legal ground that would affect the legality of the sentence that was meted upon him. It was its contention that the sentence that was meted upon the Applicant was commensurate with the offence he had been charged with and therefore urged this court to dismiss the present application.

LEGAL ANAYSIS

9. Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

"The High Court may call and examine any record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded, and as to the regularity of any proceedings of any such court."

10. This court was persuaded by the Respondent's submissions that the issues raised by the Applicant were not issues for Revision but rather, they were issues for appeal. They went into the heart of the

question as to whether the Prosecution had proven its case to the required standard. The Applicant ought to have appealed but he did not.

11. Be that as it may, the court had due regard to the case of **Charles Gitau vs Republic [2008] eKLR** where Ojwang J (as he then was) referred to the case of **R. v. Ajit Singh s/o Vir Singh [1957] E.A. 822.** He stated and observed as follows:-

> **"In that case the Court clarified the situation in which the revision jurisdiction might be exercised even when the matter arising was one in which appeal lay (p.824 – Rudd, Ag. C.J.):**
>
> **"We are of opinion that sub-s.(5) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s.361 and s.363 (1). To hold that sub-s. (5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect…merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can in its discretion, act suo motu** (sic)**even where the matter has been brought to its notice by an aggrieved party who had a right of appeal.""**

12. What this court understood to have been the purport of the said holding was that a court could act *suo moto* and exercise powers conferred on it by Section 361 and 361(3) of the Criminal Procedure Code to disturb a finding, sentence or order where the issue had been presented as a revision instead of an appeal especially where an applicant was a layman as was contemplated in the case of **Republic vs Ajit Singh s/o Vir Singh**(Supra).

13. This court also took into consideration the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to technicalities and proceeded to determine the Application herein as if it were an appeal as he was a layman.

14. A perusal of the evidence shows that on 30th January 2016, Peter Mwalimu Mbogho (hereinafter referred to as "PW 2") was guarding the shop belonging to Edwin Maina Wanjau (hereinafter referred to as "PW 1") when the Applicant broke into the kiosk and attempted to steal certain items which were tendered in evidence as Exhibits.

15. PW 2 then engaged the Applicant in a scuffle in an area that was well lit. He was therefore emphatic that he identified the Applicant who ran towards the Stadium. After he blew the whistle, members of the public and PW 1 gave chase and found the Applicant seated in Tsavo Bar.

16. Although there was a break in the chain of events in pursuit of the Applicant after the alleged offence, this court was satisfied that PW 2 was not mistaken as to the identification of the Applicant as he struggled with him at PW 1's shop in a well-lit area and further identified him at the Tsavo Bar where he had gone to hide.

17. His argument that the jacket that was found at the scene was not fitted was neither here nor there as PW 2 was certain that he was the person who had been at PW 1's kiosk.This court was thus convinced beyond any doubt that the Appellant was positively identified as the offender on the material date and time.

20. Accordingly, this court agreed with the Learned Trial Magistrate's conclusion that there was overwhelming evidence against the Applicant in respect of the offence of breaking into a building with intent to commit a felony and that the conviction was warranted. He acted correctly when he discharged the Applicant of the alternative charge.

21. As has been seen hereinabove, a person who is found convicted of the offence of breaking into a

building with intent to commit a felony is liable to seven (7) years imprisonment. The penalty prescribed therein is a maximum. It is not a minimum or mandatory. As was held by the Court of Appeal in the case of **Daniel Kyalo Muema vs Republic [2009] eKLR**, the sentence prescribed unless a contrary intention is shown, is the maximum penalty and not the mandatory penalty.

22. Consequently, as the Applicant did not succeed in stealing PW 1's property, this court found and held that the Trial Magistrate acted correctly and within the law when he exercised his discretion and fined the Applicant Kshs 100,000/= and/or in default to serve twelve (12) months imprisonment for the reason that the same was proportionate to the offence the Applicant had been charged with.

23. Having found that the sentence that was meted upon the Applicant by the Learned Trial Magistrate was just, legal, correct and proper, the court found itself in agreement with the Respondent's submissions that it ought not to disturb the same.

DISPOSITION

24. In the circumstances foregoing, the court found the Applicant's application for Revision dated 16th November 2016 and filed on 17th November 2016 not to have been merited and the same is hereby dismissed. Instead, the court affirms the sentence that was meted upon him as the same was just, legal and proper.

25. It is so ordered.

DATED and **DELIVERED** at **VOI** this **23rd** day of **March** 2017

J. KAMAU

JUDGE

In the presence of:-

Edward Maghanga….....Applicant

Miss Anyumba…….....…. for Respondent

Josephat Mavu…….....… Court Clerk