



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 19 OF 2015

(Formerly Nakuru HC.CR.A. No. 145 of 2014)

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 3459 of 2012 of the Chief Magistrate’s Court at Naivasha – S. Muchungi, RM)

ROBERT SANILA KIHIMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein was the 2nd Accused in the lower court case. He was charged jointly with another with the offence of Stealing goods in transit, contrary to Section 279 (c) of the Penal Code. In that on the 6th day of November 2012 at Maai Mahiu Town, Maai Mahiu location in Nakuru County, jointly with others not before court, they stole 1570 twenty litre jerricans of Pomo Palm oil valued at 3.9 million the property of **Transfer Kenya Limited** from a motor vehicle registration number KBQ 688R Trailer transit from Mombasa to Kampala.
2. Following a full trial, he was convicted and sentenced to serve seven years imprisonment. His co-accused in the trial was acquitted.
3. In his amended grounds of appeal, the Appellant only attacks the sentence and citing his personal circumstances and especially his previous clean record, he describes the sentence as **“harsh and lengthy.”**
4. Mr. Koima, representing the Director of Public Prosecution opposed the appeal. Highlighting the substantial loss occasioned to the complainant as a result of the offence and the Appellant’s conduct demonstrated by the evidence at the trial, Mr. Koima submitted that the sentence was not excessive.
5. I have considered the rival submissions and the evidence on record. The circumstances in which an appellate court may interfere with the sentence meted out by the trial court are governed by settled principles, and not based on the whims of the appellate court.
6. In the case of **Ogalo s/o Owuora –Vs- Republic [1954] 19 EACA 270**, it was stated:-

“(1). The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the Appellant, he might have passed a somewhat different sentence, and it would not ordinarily interfere with the discretion exercised by the trial Magistrate

unless it is evident that the Magistrate acted upon some wrong principles or overlooked some material factors. (See also JAMES VS REPUBLIC (1950) 10 EACA 147)

(2). The test criterion is that if the sentence is manifestly excessive in view of the circumstances of the case, the sentence will be disturbed. The Appellate Court should not interfere with the sentence of a lower Court unless it is satisfied that the same was so severe as to amount to a miscarriage of justice. (SEE NILSON VS REPUBLIC (1970) EA 599)."

7. And further in **Wanjema -Vs- Republic (1971) EA 493**, the court stated:-

"[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

8. The Appellant was treated as a first offender. In his mitigation he laid before the court his personal circumstances, also repeated here, dwelling on his responsibilities towards his dependents. These matters were considered by the court as reflected in the notes before sentence, as well as the fact, that the stolen goods which had a high value, were never recovered.

9. In my view these were all relevant considerations. The offence for which the Appellant was convicted carries a maximum of fourteen years imprisonment. Although the Appellant was a key architect of the theft of his employer's goods, he could not have acted alone, as the charge sheet indicates. Indeed the police believed the driver of the vehicle was also an accomplice.

10. The age of the Appellant was not indicated to the court. Whatever the case, the sentence meted out does not seem to recognize the fact, or give sufficient weight to the Appellant's antecedents. In the circumstances, this court would interfere with the sentence meted out by reducing it to a five years imprisonment from the date of sentencing, that is, 19th June 2014.

Delivered and signed at Naivasha, this **28th** day of **April, 2017**.

In the presence of:-

Mr. Mutinda for the DPP

Appellant – present

C/C – Quinter Ogutu

C. MEOLI

JUDGE