



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 36 OF 2016**

**JACKTON MAKENZI..... APPELLANT**

**VERSUS**

**REPUBLIC..... REPUBLIC**

*(From the original conviction and sentence in Criminal case No.250 of 2016 of the Chief Magistrate's Court at Busia by Hon. J.N Maragia- Resident Magistrate)*

**JUDGMENT**

**JACKTON MAKENZI**, the appellant herein, was convicted on own plea of guilty for the offence of handling stolen property contrary to section 322 (2) of the Penal Code.

The particulars of the offence were that on 4<sup>th</sup> February 2016 at **AKOBWAIT** village, **AMUKURA** Division in **BUSIA** County, otherwise than in the course of stealing dishonestly retained two pieces of timber, knowing or having reasons to believe them to be stolen property or unlawfully obtained.

He was sentenced to serve three years imprisonment. He has appealed against the sentence which he says was very harsh.

The appellant was in person. He raised two grounds of appeal that as follows:

1. That the learned trial magistrate erred in law and in fact by failing to consider his mitigation.
2. That the learned trial magistrate erred in law and in fact by meting out a harsh sentence in view of his deteriorating health.

**The state opposed the appeal through Mr. Owiti, learned counsel.**

The facts of the prosecution case were briefly as follows:

After the house of the complainant was burgled and some 15 pieces of timber were stolen from therein, the following morning at about 11a.m the appellant was spotted carrying two pieces of timber. When he was asked the origin of the timber, he ran away. Later, he claimed the timber belonged to a workshop. When they went to the workshop, the owner denied knowledge of the timber.

The appellant pleaded guilty to the offence and was sentenced.

Section 322(2) of the Penal Code provides as follows:

***A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.***

Though the appellant contended that the trial court did not consider his mitigation, this is not so. In his mitigation the appellant told the court the following:

***I am home alone. I am a family breadwinner. I ask for leniency.***

He never raised an issue of his health at the time of sentence. He only raised it during his appeal and he never supported this claim with any documents. Certainly the learned trial magistrate factored his mitigation before she passed the sentence. This is what she said:

*I have carefully noted the mitigation. I have also noted that the accused is a first offender.*

Before an appellate court can interfere with the sentence of the trial court there must exist sufficient circumstances.

In the case of **OGALO S/O OWUORA VS REPUBLIC (1954) 21 EACA 270** as follows:

*The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsky (1912) C.CA 28 T.L.R 364.*

The sentence in this case cannot be said to be harsh. I have no reasons to interfere with the order of the learned trial magistrate. The net result is that the appeal must fail. The same is dismissed.

**DELIVERED and SIGNED at BUSIA this 31<sup>st</sup> day of July, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**