REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.143 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.256 of 2017 by: Hon. V. A. Ochanda – R.M.)

JEREMIAH GATHOGO……..……..APPELLANT

- V E R S U S –

REPUBLIC……...……...…….RESPONDENT

J U D G M E N T

Jeremiah Gathogo (the appellant), with 2 others, were charged with the offence of theft of farm produce contrary to section 8(1) of the stock and farm produce Act Cap 355 LoK as read with Section 275 of the Penal Code.

It was alleged that on 12/2/2017 at Gatimu Village, within Nyandarua County, stole two sacks of potatoes worth Kshs.7,000/= the property of **Christopher Ndungu Mbugua**.

In the alternative, they faced a charge of handling stolen property contrary to section 322(1) as read with Section 322(2) of the Penal Code.

Particulars of the charge are that on 12/2/2017 at Gatimu village, Nyandarua County otherwise than in the course of stealing, jointly dishonestly retained two sacks of potatoes all worth of Kshs.7,000/=.

The appellant pleaded guilty to the alternative charge, was convicted and sentenced to serve 2 years imprisonment.

No finding was made on the main charge.

Being dissatisfied with the sentence, he filed this appeal seeking a review of the sentence on grounds that; he pleaded guilty to the offence, he is a first offender, a father of three and the sole bread winner; that he has a mother who is mentally sick and not able to take care of the children and lastly that the sentence is too harsh and requests for an option of fine.

Mr. Waichungo who has conduct of the appeal filed written submissions arguing that sentencing is the discretion of the trial court which must be exercised judiciously guided by evidence and sound legal principles. He invoked provisions of section 354 of Criminal Procedure Code where the court has the discretion to interfere with the sentence. He also urged the court to take into account the sentencing policy guidelines developed by the committee appointed by **C.J. Mutunga** at paragraph 7 – 19; that the court should take into account the gravity of the offence, criminal history of the offender, children in

conflict with the law, character of the offender etc. Counsel also submitted that the court was not informed of any aggravating circumstances that called for a custodial sentence; that the stolen goods were returned to the owner; that the court should have called for a pre-sentence report. Counsel relied on the decision in ***Republic v Ibrahim Rashid Omar CRA.432/2010*** where the court considered the role of the criminal justice system when it said:

> ***"The essence of the criminal justice system and criminal law in particular is not only to correct and punish criminal action but also to rehabilitate criminal offenders for re-absorption to society. It is not only penal but transformative"***.

Ms. Rugut, learned counsel for the State submitted that the sentence of 2 years is lenient because under section 322(2) of the Penal Code the appellant was liable to 14 years imprisonment upon conviction. She urged the court not to interfere with the sentence.

I do agree with the defence counsel that upon conviction, the court should have taken into account the previous criminal records of the appellant, his antecedents, the gravity of the offence and whether he could benefit from non custodial sentence.

After the appellant gave his mitigation, the court went straight ahead to sentence him. The trial magistrate did not record that she ever considered his mitigation or that he was a first offender and that he pleaded guilty and therefore did not waste the court's precious time.

Under Section 322(2) Penal Code one found guilty under the said section is liable to be sentenced to a term not exceeding 14 years imprisonment. However, before handing the appellant such sentence, the court should have considered the gravity of the offence; the fact that the two bags of potatoes that had been stolen were recovered; that the appellant never wasted the court's time by the case going to full hearing; that the appellant was said to be a first offender. The court should have asked for a social enquiry report to determine whether or not the appellant would benefit from non custodial sentence. Since the court was considering a sentence of only two years, it should have called for the pre sentence report to guide it. The court should not be too hasty to throw convicts to prison for such short sentences but instead consider other optional sentences available to avoid unnecessary congestion in the prisons. I think that the sentence was harsh in the circumstances.

The appellant has been in prison since 13/2/2017, a period of 7 months now. I am satisfied that the period already served is sufficient punishment. I will therefore allow the appeal, sentence the appellant to the period already served to date. I set aside the balance of the sentence and order that he be released from prison forthwith.

Dated, Signed and **Delivered** at ***NYAHURURU*** this **22nd** day of ***September,*** 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

Tirian - Court Assistant

Appellant - present

Mr. Waichungo - for appellant