



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL APPEAL NO. 160 OF 2015**

**BERNARD AJWANG OGILA alias ODM ..... APPELLANT**

*versus*

**REPUBLIC ..... RESPONDENT**

*Consolidated With*

**CRIMINAL APPEAL NO. 22 OF 2016**

**JOSHUA KOOME LEMUGE alias**

**ANTONY MWENDA ..... APPELLANT**

*versus*

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in*

*Nanyuki Chief Magistrate’s Court Criminal Case No. 83 of 2015*

*by Hon. T. MATHEKA – Chief Magistrate on 10<sup>th</sup> November 2012)*

**JUDGMENT**

1. **BERNARD AJWANG OGILA** alias **ODM** hereinafter referred to as **Bernard** and **JOSHUA KOOME LEMUGE** alias **ANTONY MWENDA** herein after referred to as Joshua were charged before the Chief Magistrates Court at Nanyuki with the **offence of breaking into a building and committing a felony contrary to section 306(a)(b) of the Penal Code**. They were also charged with an alternative **offence of handling stolen goods contrary to section 322 (1) (2) of the penal code**. After trial they were convicted on the main charge. The trial court sentenced Bernard to serve 3 years imprisonment and similarly sentenced Joshua to serve a similar period of sentence. Both of them were aggrieved by that sentence and have presented their appeals against sentence.

2. Bernard in his oral submissions stated that he had cumulatively been sentenced to 13 years imprisonment for various offences committed around the same time and requested the court to reconsider those sentences and reduce them. He stated that he had reformed and that he had a family that depended on him but that his wife and children had moved away from Nanyuki town to Nairobi when he was convicted and sentenced. In addition to his oral submissions Bernard relied on his written submissions

when he stated that his sentence in this matter was excessive. He prayed that this court would reduce the said sentence.

3. Joshua only relied on written submissions where he stated that he was 25 years old, a family man and that he was remorseful. He also submitted that he had been trained in Agriculture business while serving his sentence.

4. Mr. Tanui the Principal Prosecution Counsel opposed the appeal against sentence. He submitted that Bernard when he was convicted in this matter had a previous record. That Joshua on his part had no previous record. He submitted that the sentence prescribed under **section 306 (a)** of the Penal Code was 7 years but that the sentence as per the trial court against both appellants was only 3 years. In his view learned counsel submitted that sentence was lenient in the circumstances.

5. Although Bernard and Joshua are not appealing against conviction, in order to consider their appeal against sentence it is important to consider the prosecution's evidence presented against them during the trial. The evidence of the complainant was that he closed his business on 28<sup>th</sup> January 2015 in Nanyuki town where he was selling Del gas and G-gas. On reopening his business the following day he found 8 of his Del gas cylinders missing and 10 cylinders of G-gas missing. Subsequently he was informed by the police investigating the matter that some gas cylinders had been recovered and he was requested to identify them. He was able to identify them by a special mark he had put on the cylinders. However only 3 gas cylinder were recovered.

6. Although Bernard by his submission requested the court to accumulatively consider all the files under which he was convicted where he is now serving 13 years imprisonment that cannot be done by this court. The matter before this court, in particular this appeal and another matter namely **Nanyuki High Court Criminal Appeal No. 105 of 2016** were not of the same transaction. In this matter the offence was committed on 29<sup>th</sup> January 2015. In **Nanyuki Criminal Appeal No. 105 of 2016** the offence was committed on 26<sup>th</sup> and 27<sup>th</sup> February 2014. The offences were also committed at two different locations. In that regard therefore the court cannot consider all the sentences cumulatively. Each appeal will be considered on its own merit.

7. As correctly submitted by Mr. Tanui the maximum prescribed sentence for the offence that the appellants were convicted is 7 years. The trial court in this matter even though Bernard had previous conviction sentenced both him and Joshua to 3 years imprisonment. In my view that sentence does not attract interference by this court. Also considering that in sentencing the trial court is required to ensure that the offender is punished and to ensure that in sentencing, the offender is deterred from re-offending and also to ensure that the community is protected from such an offender, I find that the imprisonment by the trial court of the appellants for 3 years cannot attract interference by this court.

8. Accordingly the appellants' appeal is hereby dismissed and the trial court sentence is hereby confirmed.

**DATED and DELIVERED at NANYUKI this 31<sup>ST</sup> DAY of OCTOBER 2017**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellants: Bernard Ajwang Ogila alias ODM .....

Joshua Koome Lemuge Alias Antony Mwenda .....

For the State: .....

Language: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**