REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 41 OF 2016

BESHICK MOMBO MWAKE……..…....…….. APPELLANT

VERSUS

REPUBLIC..……..… RESPONDENT

(From original conviction and sentence in Criminal Case Number 507 of 2015 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon G. M. Gitonga (RM) on 11th December 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Beshick Momba Mwake, was tried and convicted by Hon G. M. Gitonga Resident Magistrate for the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code Cap 63 (Laws of Kenya). He convicted and sentenced to serve three (3) years' imprisonment. He had also been charged with an alternative charge of handling stolen property contrary to Section 322 (1) (2) of the Penal Code

2. The particulars of the main charge were as follows :-

> **"On the 22nd day of October 2015 at about 8.00 am at Laminyi Village Mwachabo Location within Taita Taveta County, stole six pieces of timber valued at Kshs 1,500/= the property of FIDILIAH CHANYA MOMBO."**
>
> **ALTERNATIVE CHARGE**
>
> **"On the 22nd day of October 2015 at about 1200 Hrs at Laminyi Village, Mwachabo Location within Taita Taveta County, otherwise than in the course of stealing, dishonestly received or retained six pieces of timber knowing or having reason to believe them to be stolen goods."**

3. Being dissatisfied with the said judgment, on 11th August 2016, the Appellant filed a Petition of Appeal. The Grounds of Appeal were as follows:-

> **1. THAT the Learned Trial Magistrate did not consider him as a 1st offender.**
>
> **2. THAT the Learned Trial Magistrate did not consider his mitigation.**

4. This court directed both parties to file their respective Written Submissions. The Appellant's Written

Submissions were filed on 5th October 2016 while those of the State were dated and filed on 8th November 2016. However, the Appellant's Written Submissions appeared to have been more of mitigation grounds seeking a reduction of the sentence which he argued was harsh and excessive in the circumstances of the case herein.

5. His Mitigation Grounds of Appeal were as follows:-

> **1. THAT he pleaded guilty without knowing the consequences and magnitude the offence carried** (sic)**.**
>
> **2. THAT he was not aware of the court procedures and this led him to plead guilty without considering the offence he had been charged with.**
>
> **3. THAT he was influenced by the police officers to change his plea of guilty without knowing that it was a trap of fixing him in the case and a way of making their work easier by not producing witnesses in the court proceedings.**
>
> **4. THAT the sentence of three (3) years was very harsh and therefore pleaded with this court to quash the sentence and set him free.**

6. When the matter came up for in court on 8th November 2016, both the Appellant and the State asked this court to deliver its Judgment based on their respective Written Submissions.

LEGAL ANALYSIS

7. As can be seen from the Appellant's Grounds of Appeal, the Appellant did not challenge the fact that the Prosecution had proved its case to the required standard. In any event, he pleaded guilty to the main Count.

8. The question that this court was being asked to consider and determine was whether or not the Appellant had advanced good reasons to persuade it to set aside the aforesaid sentence which he argued was harsh in the circumstances of the case.

9. The Appellant did not contend that there was any irregularity in the procedure that was adopted in taking the plea. The Respondent submitted that the Charges were read to the Appellant in Kiswahili, a language that he understood and that he had ample time to re-consider his plea between 23rd October 2015 when the plea was first read to him and 9th December 2015 when he asked that the Charges be read to him again.

10. The Respondent was therefore right in having argued that the Appellant could not have purported that was misled to plead guilty to the Charge without knowing the consequences of doing so or that he was not aware of the court procedures. It must be noted that ignorance is no excuse. Having admitted to the said Charge, this appellate court could only consider the appeal regarding the extent or legality of the sentence as provided in Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

11. The said Section stipulates as follows:-

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."**

12. The Appellant had argued that the Learned Trial Magistrate did not consider that he was a first offender when he sentenced him. The State submitted that the Appellant could not be considered as a first offender as he had previously been convicted of the offence of being in possession of narcotic drugs and sentenced to serve six (6) months' probation, a fact that this court confirmed from the proceedings from

the lower court. He was actually very lucky to have escaped with a non-custodial sentence considering the stiff penalty provided in Section 3(2)(a) of the Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994.

13. As he had now been charged with the offence of stealing, the Learned Trial Magistrate acted correctly in considering his past behaviour in crime and finding that the Appellant was not a first offender in the circumstances of the case. He could not also have considered the Appellant's mitigation as he said nothing. Indeed when asked to give his mitigation, he stated as follows:-

> **" The records are correct. I have no mitigation."**

14. Appreciably, a person who is convicted of stealing is liable to three (3) years imprisonment. Section 275 of the Penal Code prescribes the general penalty for the offence of theft. The same provides as follows:-

> **"Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."**

15. In respect of the meaning of "liable to life imprisonment", the Court of Appeal rendered itself in the case of **Daniel Kyalo Muema V Republic [2009] eKLR** by stating as follows:-

> **"….The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs. Uganda [1967] EA 752 where the Court said at page 754 paragraph B:**
>
> **"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".**

16. The import of the penalty is that a Trial Court cannot sentence a person convicted to the offence of stealing to imprisonment to more than three (3) years but he has the discretion of sentencing such convicted person to a lesser sentence. The three (3) year imprisonment is the maximum sentence but not the mandatory sentence.

17. While this court appreciated that an appellate court ought not to be too quick to disturb a sentence that is within the limit prescribed in the law, nonetheless, having considered the Appellant's submissions in respect of the extent of the sentence, it was its view that the Learned Trial Magistrate misconstrued the phrase **"liable to three (3) years' imprisonment"** by imposing the maximum sentence that could be meted under Section 275 of the Penal Code.

18. The Appellant had been charged with stealing six (6) pieces of timber that were valued at Kshs 1,500/=. Bearing in mind the Sentencing Policy Guidelines and the value of stolen goods, it was evident that the penalty of three (3) years that was meted upon the Appellant was not proportionate to the offence that he had committed.

19. Accordingly, having considered the Appellant's Appeal, his Written Submissions and those of the State, this court came to the firm conclusion that the sentence that was meted by the Learned Trial Magistrate was manifestly excessive, sufficient to have amounted to a great miscarriage of justice thereby warranting interference by this court.

20. Going an inch upwards from a non-custodial sentence that the Appellant had previously being given to a custodial sentence of whatever length would have been sufficient in the circumstances of this case as opposed to him being handed the maximum sentence.

21. This court hopes that the Learned Trial Magistrate will consider the said Sentencing Policy in his future decisions to avoid a miscarriage of justice.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal lodged on 11th August 2016 was partly successful. As he had pleaded guilty to the main Charge, his conviction is hereby upheld. However, this court hereby sets aside the sentence that was meted upon him by the Trial Court as the same was manifestly harsh and excessive in the circumstances of the case and replaces the same with a sentence of three (3) months imprisonment.

23. However, as the Appellant has already served his imprisonment sentence for slightly over a year, this court hereby orders that he be set free forthwith unless he be held or detained for any other lawful reason.

24. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20TH** day of **DECEMBER** 2016

J. KAMAU

JUDGE

In the presence of:-

Beshick Mombo Mwake…….. Appellant

Miss Anyumba…..……. for State

Josephat Mavu– Court Clerk