**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 11 OF 2016**

**PETER NJOROGE MUNGAI ……..…… APPELLANT**

**VERSUS**

**REPUBLIC ……..……..……. RESPONDENT**

***(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 1042 of 2014 by Hon. E. BETT Senior Resident Magistrate on 27th January 2014).***

**JUDGMENT**

**1. PETER NJOROGE MUNGAI**, the appellant, has appealed against sentence by the trial court at Chief Magistrate's Court Nanyuki. He was convicted on three counts on his own plea of guilt. On the 1st and 2nd count he was charged with the offence of stealing contrary to section 275 of the Penal Code Cap 63. On the 3rd Count he was charged with the offence of unlawfully being in possession of narcotic drug contrary to section 3(1)(a) of the Narcotic drug and Psychotropic Substances (control) Act, (Narcotic Act).

2. The facts of the case, read out by the prosecution after admission of guilt by the appellant, were that the appellant stole 4 wooden doors from complainant's building under construction and also stole 13 iron sheet from the same construction site. The theft of the doors related to the 1st count while the theft of iron sheets related to the 2nd count.

3. I will begin by separately considering the 1st and 2nd counts in respect to this appeal, because those two counts call upon very different considerations to the considerations in the 3rd count.

4. The appellant before the trial court mitigated on his sentencing by stating that he stole the items of complainant because he was unemployed. That he sold some while other were recovered during his arrest. Before this court he sought the leniency of this court. He submitted that he had no prior conviction before being charged with the offence the subject of this appeal.

5. The appeal was opposed by Senior Principal Prosecuting Counsel Mr. Tanui. In his view since the appellant was convicted on his own plea of guilt the sentence meted out by the trial court were lenient when one considers the value of the goods the appellant stole.

6. In respect to 1st and 2nd count and the appeal by the appellant against the sentence of 2 years on each of those counts, this court will be guided by the principle that the appellant court should not interfere with the discretion of trial court on sentencing unless that sentence was against legal principles. The court in

the case **REPUBLIC –V- JAGANI & ANOTHER (2001) KLR 590** the court discussed that principle thus:-

> ***"A court on appeal will only interfere with the discretion of a trial court in sentencing where the sentence was imposed against legal principles, or when relevant factors were not considered or irrelevant and or extraneous matters considered or normally where the sentence is manifestly excessive in view of the circumstances of any case."***

7. My consideration of what informed the trial court in sentencing the appellant on 1st and 2nd count reveals that the trial court did not transcend the legal principles nor did that court fail to consider relevant factors. It is for that reason that the appellant's appeal on sentence in respect to 1st and 2nd count will fail.

8. On the 3rd count the prosecution's facts of the case were that when the police went to the appellant's home, and arrested him, on carrying out a search of his house they recovered 20 grams of Cannabis Sativa. Appellant confirmed those facts and was convicted on his plea of guilt. In this court's view that plea was not unequivocal because section 74A of the Narcotic Act was not complied with. This is the section that sets out the procedure that has to be followed on seizure of narcotic drug. That section provides that on seizure of a narcotic drug the police, and a medical services person in the presence of the person to be charged and his advocate, if any, weigh the seized narcotic drug and take one or more samples for the purpose of analysing and identifying the same. On carrying out analysis an analysis certificate shall be issued. The production before the trial court of the samples of the drug and analyst certificate **"shall be conclusive proof as to the nature and quantity of the narcotic drug"** substance concerned.

9. Although the prosecution produced before the trial court 10 grams of plant "bhang" there was no certificate produced by the prosecution as required under **Section 74 A.** Such a certificate would have proved that the substance recovered from the appellant was a narcotic drug. It is for that reason that the conviction and sentence on the 3rd count will be quashed and set aside respectively.

10. The Court of Appeal in the case **MOSES BANDA DANIEL V REPUBLIC (2016) eKLR** in discussing the need to comply with the strict procedure of seizure of narcotic drug under section 74 A stated:-

> ***"…….. regarding the application of section 74 A …….. it is of utmost importance that procedure contained in the substantive provisions of the law be observed and followed with extreme diligence and scrupulous care. Although complex as we have noted, the procedure laid down in section 74 A must be strictly followed ……***
>
> ***After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs."***

That was not done in respect to the appellant's case. It follows that the appellant's plea of guilt to the 3rd count was not unequivocal. That plea will be quashed.

11. In the end the judgment of this court is as follows:-

**(a) The appeal against sentence in respect to 1st and 2nd count is dismissed.**

**(b) The conviction on the 3rd count is quashed and the sentence on that count is set aside.**

12. It is ordered.

**DATED AND DELIVERED THIS 19TH DAY OF DECEMBER 2016.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant ……..

Appellants: Peter Njoroge Mungai …….

For the State: ….....

COURT

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**