REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 73 OF 2014

LAZARUS MUNYOKI NDILIKU…….....…..…… ACCUSED

VERSUS

REPUBLIC……..…….…….....RESPONDENT

(*From the conviction and sentence in Kyuso Principal Magistrates Criminal Case No. 346 of 2014 dated 30/07/2014 B. M. Mararo PM*)

JUDGMENT

The appellant was charged before the subordinate court with house breaking contrary to section 304 (1) (6) and stealing contrary to section 279 (b) of the Penal Code. The particulars of the offence were that on 22nd July 2014 at Itanzou Sub Location Itanzou Location in Kyuso Sub County within Kitui County broke and entered the dwelling house of SILAS MWANGO KILONZO and stole therein five trousers, two bed sheets and one lesso all valued at Kshs. 4,000/= the property of the said SILAS MWANGO KILONZO. In the alternative, he was charged with handling stolen goods contrary to section 322 (1) (2) of the Penal Code. The particulars of the offence were that on the same day and place otherwise than in the course of stealing dishonestly received or retained one bed sheet and one lesso having reason to believe them to be stolen or unlawfully obtained goods.

He was recorded as having pleaded guilty to the main count. He was thus convicted and sentenced to serve four (4) years imprisonment on the first limb, and two (2) years imprisonment on the second limb of the charge. The sentences were ordered to run concurrently.

Dissatisfied with the decision of the trial court, he has now appealed to this court against conviction and sentence. His grounds of appeal are as follows:-

1. The learned trial magistrate erred both in law and fact when convicting and sentencing him very severely without considering that he never gave the court a hard time in hearing his case as he just pleaded guilty.
2. The learned magistrate erred in law and fact when convicting and sentencing him very severely without considering that he was a first offender.
3. The learned trial magistrate erred both in law and fact when convicting and sentencing him very severely without considering that he had only one parent (mother) who was very aged and relied on him for her daily basic needs.
4. The learned trial erred both in law and fact when convicting him very severely without considering that he was the daily bread giver of his family and was a mere peasant farmer.
5. The learned trial magistrate erred both in law and fact by handing down a heavy load of four (4) years imprisonment without showing leniency.

During the hearing of the appeal, the appellant only submitted on severity of sentence. He stated that he was remorseful as he was aware that he had committed a wrong. He submitted that he had a family with a wife, children and mother to take care of. He submitted that he was the breadwinner and educator of his children and that his mother was old. He stated that he would not repeat any similar offence.

Learned Prosecuting Counsel Mr. Orwa opposed the appeal and supported both conviction and sentence. Counsel submitted that the plea of guilty was unequivocal and that the conviction was proper.

Counsel also submitted that the sentence was lawful and proper and that the learned magistrate considered the mitigation before the trial court and the fact that the appellant was a first offender. Counsel faulted the appellant for raising on appeal mitigation that was not before the trial magistrate.

This being a first appeal, and though the appellant submitted merely on sentence, I am duty bound to consider the entire record to be satisfied whether the plea of guilty was proper. Having considered the record, I am of the view that the plea of guilty of the appellant was unequivocal - **See the case of Adan Vs. Republic**. He understood the charge as read to him and made his unequivocal admission. As such the conviction was proper.

On sentence, it is the discretion of a trial court. An appellate court will not interfere with the same unless the trial court failed to consider relevant matters.

At the trial, before sentence, the prosecutor did not indicate whether the appellant was a first offender. The appellant stated in mitigation that he had two (2) children who relied on him. He also stated that his siblings depended on him.

Though the learned magistrate did not state specifically that she took into account the mitigation of the appellant, the fact that the sentences were made to run concurrently in my view, meant that the magistrate took into account the mitigation. The appellant is thus mistaken in saying that the court did not take into account the mitigation. I do not agree that the sentence is harsh and excessive.

I find no merits in the appeal. I dismiss the appeal and uphold both conviction and sentence.

Dated and delivered at Garissa this 23rd day of April, 2015

GEORGE DULU

JUDGE