



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 196 OF 2014

SAMSON KIOKOAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court, Criminal Case No. 1684 of 2014 by Hon. G.M. Mutiso Ag Principal Magistrate on 6th October, 2014)

J U D G M E N T

The appellant herein was charged (*in the lower court*) with the offence of Burglary contrary to **Section 304 (2)** and Stealing contrary to **Section 279(b)** of the **Penal Code**.

The particulars of the charge as set out in the charge sheet are that on the night of the **20th September, 2014**, at **Mtito Andei market** in Kibwezi Sub-County within Makueni County broke and entered the dwelling house of **JAPHETH MUSYOKI** with intent to steal therein and did steal from therein the mobile phones TECNO P-3 and TECNO P-5 respectively the property of **JAPHETH MUSYOKI**, the said mobile phones being of the value of Kshs. 23,000/=.

The appellant also faces an alternative count of handling stolen goods contrary to **Section 322(1) (2)** of the **Penal Code**. The particulars of which are that on the 5th day of October, 2014 at Mtito Andei police station in Mtito Andei township within Makueni County, otherwise than in the course of stealing, dishonestly retained one mobile phone TECNO P-5 knowing or having reasons to believe to be stolen property.

The appellant pleaded guilty to the main charge and a plea of guilty was entered and consequently he was convicted on his own plea of guilty and sentenced to serve five (5) years imprisonment. The facts as read out by the prosecution were that on the 30th September, 2014 at 3.30a.m the complainant was asleep in his rental house at Mtito Andei when he was woken up by footsteps inside his room. He switched on the lights and saw the appellant who run away. The complainant noticed that his two mobile phones TECNO -3 and TECNO -5 were missing.

The appellant has appealed to this court and has listed four (4) grounds of appeal. The appeal came up for hearing on the 9th day of July, 2015 when he proceeded to argue his appeal by way of oral submissions. He told the court that though he pleaded guilty to the charge before the lower court, he was a form three student at Kiwuan High School and for that reason he pleaded with the court to reduce the sentence so that he could go back to school and complete his education so that he can help his family, community and the nation at large.

He further told the court that though he had three (3) other previous convictions, the charges were instigated by the complainant in the case before the lower court who is his relative.

Mr. Machagu for the state opposed the appeal and in his submission relied on **Section 348** of the **Criminal Procedure Code**. The said Section provides and I quote;

“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 to the extent or legality of the sentence”

My understanding of that Section is that an accused person who pleads guilty to a charge in the lower court can only appeal to the High Court on the ground that the sentence is excessive or if the same is illegal. The appellant in his ground 3 of appeal has challenged the sentence on the basis that it is too harsh and extensively excessive, and on that ground alone the appellant is rightly before the court. As to whether he succeeds in his appeal or not, that is a different case.

Mr. Machagu argued that the sentence of imposed on the appellant of five(5) years imprisonment is lenient bearing in mind that the maximum sentence provided for by law for the offence he was charged with is fourteen(14) years. Mr. Machagu further argued that in sentencing the appellant the court put into consideration that the appellant was not a first offender and that he had been convicted in three other charges. It was also Mr. Machagu’s submission that the fact that the appellant is a student is not reason enough to interfere with the sentence. He urged the court to dismiss the appeal.

The court has carefully considered the submissions made by the appellant and the state in support of and in opposition to the appeal respectively. **Section 279(b)** of the **Penal Code** under which the appellant was charged provides for a maximum penalty of fourteen (14) years, the offence having been committed at night. One of the mobile phones being TECNO P-5 was recovered from the appellant.

He pleaded guilty to the charge and he was convicted of his own plea of guilty. The court also notes that the appellant is not a first offender having been convicted before in criminal case number 1594 of 2014, criminal case number 1359 of 2013 and criminal case number 1017 of 2012.

The court is not persuaded that it should interfere with the sentence as there was nothing illegal about it and the same is not excessive.

In the circumstances, I find no merit in this appeal on both conviction and the sentence and the same is dismissed. The sentence by the lower court is upheld. It is so ordered.

Dated and Delivered at Machakos this 22nd day of July, 2015

LUCY NJUGUNA

JUDGE