REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 40 of 2014

JADIEL MWENDA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant **Jadiel Mwenda** was charged with cutting down of cultivated produce contrary to **Section 344 (a) of the Penal Code.**

The particulars of the offence were that on the 28th day of August 2013, at Kithoka area in Imenti North District within Meru County, he willfully and unlawfully cut down crop of cultivated produce, namely avocado trees to wit 13 valued at Kshs 31,000 the property of **John Ndegwa**.

The Appellant was convicted on his own plea of guilty and sentenced to 4 years imprisonment during which period he was to undergo counseling in anger management. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal setting out the following grounds of appeal (in the appellant's own words):

1. **THAT I pleaded guilty;**

2. **THAT the learned trial magistrate failed to consider my defence;**

3. **THAT the learned trial magistrate did not consider the fact that I have spinal cord problem. Moreover I am a father to three children who earnestly depend on me as their sole breadwinner;**

4. **THAT the learned trial magistrate erred in law and fact in convicting.**

When the appeal came up for hearing on 9th November 2015, the appellant intimated to court that indeed he admitted committing the offence and urged the court to consider the sentence and that he had been in prison for 2 years. He further contended that he had a report from prison showing that he had trained in masonry and carpentry and that the father who was the complainant in this case had since died. The appellant therefore, abandoned the appeal on the conviction.

Mr. Mungai for the State submitted that the appellant admitted having admitted the offence, cannot appeal on conviction; that the appellant was sentenced to 4 years whereas the maximum sentence for this offence was 14 years. He urged the court to consider the circumstances of the offence and stated that he was leaving it to court.

In essence the appellant was not challenging the conviction. His plea is that the court reconsiders the sentence meted on him. **Section 348 of the Criminal Procedure Code CAP 75 of the Laws of Kenya** provides 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."***

Situations where an appellate court would interfere with the discretion of a trial court on the issue of sentence have in the past been clearly defined by the Court of Appeal in the case of ***Ogalo Son of Owuora vs. Republic (1954) 21 EACA 270*** as follows:

> "***The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364."***

The complainant in this case was the appellant's own father. The two appeared to have very sour relations and it was evident that they could not coexist peacefully together.

After the appellant pleaded guilty, the court called for a POR which reveal the sour relationship between accused and the father that had been subsisting for long and the accused had 5 cases before the court with the father at the time. The appellant admitted that complainant in the cases was the father. The court has no idea what has happened in these cases, whether he was convicted or not. It was important that the court be told what has transpired. The Probation Officer's Report (POR) also disclosed that the appellant had been placed on probation for stealing at one time but he breached the said order. These are the facts that the trial court must have taken into account before the sentence; guided by ***Ogalo's case*** and my observations above**.**

The appellant was sentenced to 4 years imprisonment whereas the maximum sentence for this offence is 14 years. There is no evidence that the trial magistrate acted upon some wrong principle or that she overlooked some material factor nor is the sentence handed upon the appellant cannot be said to be manifestly excessive or unlawful and illegal.

The appellant has produced in court a letter from the in-charge, Meru Prison commending him for the change in character; attitude; that he has attained a grade in masonry and has undergone counseling and is of good behavior. Taking all the above into consideration, the court will call for another Probation Officer's Report to find out if he can benefit from Community Service Order (CSO) for the remainder of his sentence. Mention on 30/12/2015 for Probation Officer's report.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF DECEMBER, 2015.

R.P.V. WENDOH

JUDGE

10/12/2015

PRESENT

Mr. Mulochi for State

No appearance for Applicant

Ibrahim/Peninah, Court Assistants

Present, Appellant