



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Criminal Appeal 11 of 2012**

**BENARD MOGUSU GWARO.....APEPLLLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from original conviction and sentence in Oyugis PMCRC No.3 of 2008***

***dated and delivered on 7<sup>th</sup> August, 2008)***

**JUDGMENT**

1. The appellant, Bernard Mogusu Gwaro was accused number 3 in Nyamira Senior Principal Magistrate's Criminal Case No. 606 of 2011. He was arraigned in court with three other accused persons on a charge of burglary and stealing contrary to **section 304 (2)** and **279 (b)** of the **Penal Code**. It was alleged that on the night between 30/31 August 2011 at Gekano village in Manga District within Nyamira County he and three others broke and entered the dwelling house of NICODEMUS NYAGWAYA ABUGA.

2. The appellant was also charged with handling stolen goods contrary to **section 322 (2)** of the **Penal code**. It was alleged that on 31<sup>st</sup> day of August 2011 at Keroka Town within Nyamira County, otherwise than

in the course of stealing, dishonestly retained two blankets, knowing or having reason to believe them to be stolen goods. The appellant's co-accused faced other alternative counts.

3. The appellant pleaded guilty to the main count of burglary and stealing. The facts to which the appellant pleaded guilty were that on 30<sup>th</sup> August 2011, the complainant, a resident of Gekano village in Manga District but who works in Nandi Hills securely locked his house with a padlock and proceeded to Nandi Hills. There was nobody at home. On the 31<sup>st</sup> August 2011, the complainant received a report that his house had been broken into and the number of items enumerated in the charge sheet were stolen. The complainant travelled back to Gekano village and on arrival home he found that the padlock to his house had been damaged and all the items valued at Kshs.26370/= had been stolen.

4. After establishing the theft at his home, the complainant was accompanied by his brother to make a report at Magombo AP post. After making the report investigations started during which a person by the name Joash was interrogated. The said Joash eventually led the AP's to a house in Keroka where he was able to identify the appellant and his co-accused together with some of the stolen goods. The appellant and his co-accused admitted to having stolen the said goods. With the help of the appellant and his co-accused, the 4<sup>th</sup> accused in the court below was traced to her house and a number of the stolen items were

also recovered from her house. The complainant thereafter positively identified all his stolen items. Two blankets out of the stolen items were recovered from the appellant's house. These were also positively identified by the complainant. After the investigations and the arrests by Ap's, the appellant herein was collected from Magombo AP Post by Police Constable Raymond Kwambai, and subsequently charged with the two offences.

5. After the detailed facts were given by the prosecution, the appellant stated **"Facts are correct."** He was, alongside his co-accused, convicted on his own plea of guilty and sentenced to serve four (4) years imprisonment on the first limb and another four (4) years imprisonment on the second limb. Both sentences were to run concurrently.

6. Being aggrieved by both the conviction and the sentence, the appellant filed this appeal on grounds that he was misled into pleading guilty to the charges and that the sentence imposed upon him by the learned trial magistrate was harsh and excessive in the circumstances. The appellant prays that the appeal on sentence be allowed so that the sentence is reduced to a shorter period.

7. At the hearing of this appeal, the appellant told the court that he was appealing against sentence only. He informed the court that his family depended on him and therefore wanted the sentence reduced.

8. The appeal on sentence was opposed. Counsel for the respondent submitted that the appellant was convicted on his own plea of guilty to burglary and stealing. That the offence of burglary attracts a maximum sentence of 10 years while the appellant was sentenced only to 4 years. Counsel submitted that the sentence meted out to the appellant was very lenient indeed and as such the sentence should not be interfered with. With regard to the second limb of the offence, counsel submitted that the sentence imposed thereon was also extremely lenient and well deserved. In summary, counsel urged the court to disallow the appellant's plea for reduction of the sentence.

9. This is a first appeal. On this appeal, I am under a duty to consider whether the conclusions reached by the trial court can be supported. In this case, the appellant who pleaded guilty is only appealing against sentence. The guiding principle in determining whether this court should interfere with the sentence imposed by the trial court is this: is such a sentence manifestly harsh and excessive or is it inordinately low? This principle was restated in such cases as **Diego –vs- Republic [1985] KLR 621** and **Dismas – vs- Republic [1984]KLR 634**.

10. After carefully considering the submissions made by both parties to this appeal, and considering the fact that the plea of guilty was entered pursuant to the steps set out in the case of **Adan –vs- Republic [1973] 445** I am satisfied that the appeal on sentence has no merit. The said sentence is neither harsh nor excessive in the circumstances. Nor can it be said that the trial court applied the wrong principles in meting out the said sentence. As submitted by counsel for the respondent, I agree that the trial court was extremely lenient in sentencing the appellant. Also see **Hando s/o Akunaay –vs- R [1951] 18 EACA 307**.

11. For the above reasons, this appeal on sentence is accordingly dismissed.

12. It is so ordered.

**Dated and delivered at Kisii this 13<sup>th</sup> day of February, 2013**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Absent (on C.S.O.) for Appellant

Miss Cheruiyot for Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**