REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRA NO.172 OF 2011

(Appeal arising from SRM Sirisia No.430 of 2011)

DAVID SIMIYU MISIKO ……APPELLANT

Versus

REPUBLIC ……..RESPONDENT

JUDGMENT

The charge

[1] The Appellant was charged with another person namely Mark Karani Oteba of the offences of Burglary and Stealing contrary to section 304 (2) and 279 (b) of the Penal Code. The particulars of the offence were that:

> **David Simiyu Misiko, Mark Karani Oteba: On the nights of 22nd and 23rd day of July 2011 at Kapkoto village in Sasuri location within Bungoma County, broke and entered into a dwelling house of Hezbon Omoit Orone with intent to steal therein and did steal therein one table, two sofa single seater, one table chair and two table clothes the property of the said Hezron Omoit Orone the said two sofa single seater, one table, one table chair and two table clothes being of the value of Ksh.5,000/=.**

Own plea of guilty

[2] The Appellant pleaded guilty to the charge. Facts of the case were read over to the Appellant who confirmed them to have been true. The facts were that:

> **On 22/7/2011, the complainant securely locked his house and went to sleep. On waking up the following day he found the door locked and upon opening the said door he found two sofa single seater, one table chair and two table clothes all valued at Ksh.5,000/= missing. He reported the matter to the police. On 23/7/2011 police officers received a call that they had arrested the two accused at Masaba village while carrying sofa sets, a table chair and two table clothes. Police rushed there and found the two accused had been arrested by Administration Police Officers from Namwela Administration Police Camp. The officers interrogated them and confirmed that the accused had broken into the complainant's house and stole the items therein. The accused were later charged. I wish to produce the two sofa single seater as exhibits.**

[3] The Appellant was then convicted on his own plea of guilty and the magistrate passed the following sentence.

"I sentence each of the accused to serve imprisonment for a period of three (3) years in each limb of the offence. The sentence in both limbs for each accused shall run concurrently."

[4] The alternative charge of handling stolen property contrary to section 322 (1) (2) of the Penal Code was withdrawn under section 87 (a) of the Criminal Procedure Code hereafter CPC).

The Appeal

[5] The Appellant was aggrieved by the judgment of the trial court and filed this appeal. The significant grounds of the appeal are:

a) That the trial magistrate ignored my mitigation.

b) That I pray to be pardoned and be treated as a first offender.

c) That I am a young adult at school going age.

d) That I pray for mercy.

Prosecution opposed the appeal

[6] The Prosecution stated that on 22/7/2011 the complainant securely locked his house and went to sleep. On waking up the following day, he found two single-seater, one table chair and two table clothes all valued at Ksh.5000/= missing. The accused confirmed that they had been broken into the complainant's house and stole the items from therein. The Appellant and the other accused person were arrested at Masaba village by administration police. At the time of arrest, the Appellant and the other accused person were carrying sofa sets, a table and two table clothes.

[7] These facts were confirmed to be true and correct by the Appellant and the other accused person. The facts supported the charge and are perfectly in order. According to the Prosecution, the conviction was, therefore, proper.

[8] The magistrate considered the mitigation offered by the Appellant. In mitigation the Appellant said that:

"I have been having problems since I was young. I am 19 years."

[9] The offence of burglary and stealing under section 229 (1) (b) carry a penalty of seven years and fourteen years respectively. Looking at the sentence imposed- three (3) years on each limb of the charges, it is clear the magistrate considered the mitigation by the Appellant and imposed very lenient sentences although the magistrate had observed that the case called for a deterrent sentence.

[10] Mr Kamau further submitted that the accused pleaded guilty to a charge and he can only question the extent or legality of the sentence. For those reasons, he asked the court to dismiss the appeal.

Court's analysis and decision

[11 As a general rule, where an accused has pleaded guilty to a charge he can only question the extent or legality of the sentence. That rule has been expressed in section 348 of the Criminal Procedure Code (CPC). However, there exceptions to that rule; equivocal plea can be a basis for an appeal or revision so also are instances where plea was to charges that were unknown to law or infringe the principle of legality or offend the rule against double jeopardy. Those exceptions

accordingly limit section 348 of the CPC.

[12] I do not, however, find any of the exceptions to exist in this case. There is not even a claim or evidence on record showing that the plea was not unequivocal. There are no grounds that impel me to disturb the sentence imposed by the trial magistrate. The appeal is dismissed. Thereby, the conviction and sentence imposed by the trial magistrate is upheld.

Dated, signed and delivered in open court at Bungoma this 22nd day of July, 2013.

F. GIKONYO

JUDGE

In the presence of:

Mr. Kamau for the State

Appellant in person present

COURT: Judgment read in open court.

F. GIKONYO

JUDGE