



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.39 OF 2013**

**BERNARD MWANGI MBURU.....APPELLANT**

**VERSUS**

**REPUBLIC OF KENYA.....RESPONDENT**

**[An Appeal from original conviction and sentence in Nyahururu C.M.CR.C.NO.194 of 2013 by  
Hon. P. O. Muholi Resident Magistrate, dated 20th February, 2013**

**JUDGMENT**

**INTRODUCTION**

1. The appellant was charged with the offence of stealing from a person contrary to Section 279(a) of the Penal Code.
2. The particulars of the offence are that on 3rd February, 2013, the appellant jointly with others not before the court convinced the complainant to remove all his belonging so that they could pray for him.
3. The complainant removed his Voda phone, his chemistry text book, a sweater and a trouser all valued at Kshs.11,500/= and handed this property to the appellant and his accomplices.
4. The complainant was then told to proceed to the secretariat office at Karoka for prayers.
5. When he later went back to the crime scene, the complainant found that the appellant had disappeared with all the complaint's property.
6. The appellant was later arrested, charged and convicted on his own plea of guilty and sentenced to four (4) years imprisonment.
7. Being aggrieved with the decision of Hon. V. K. Kiptoon, Ag. Senior Resident Magistrate, delivered on the 8<sup>th</sup> August, 2011 the appellant filed this appeal and listed five (5) grounds of appeal *inter alia*:

i) That he was a first offender and his family desperately needed him

ii) that he lost his parents through HIV and was left with a blind grandmother who has nothing to provide

iii) That he pleaded guilty to the offence as he was mentally confused

iv) That the police officer who escorted him to the court misled him that if he accepted the

charge before the court of law he was to be set free

v) That the honourable court may consider the above grounds and strike off that excessive sentence.

8. At the hearing of the appeal, the appellant and the prosecuting counsel for the State both made oral submissions.
9. The appellants submitted that on the date of taking of pleas, he was mentally confused and the police coerced him into entering the plea of guilty.
10. The appellant further submitted that he did not fully exhaust his mitigation before sentence was passed.
11. The appellant urged the court to reduce his sentence as he was married and had two children and that one of the children was sickly and in need of an operation.
12. The appellant submitted that his sentence was also harsh and excessive and urged the court to allow his appeal on sentence.
13. The Appeal was opposed by counsel for the State who submitted that the appellant was not misled by the police to enter a plea of guilty.
14. Counsel submitted that on the first day the Appellant entered a plea of “*not guilty*.”
15. After five (5) days when his case came up, the Appellant changed his plea to that of guilty.
16. Even after fifteen (15) days, when his case was mentioned the appellant maintained his plea of “*guilty*” and counsel submitted that for that period of 15 days, the appellant was not in the custody of the police.
17. It was submitted that the plea was properly taken in a language that the appellant understood.
18. The facts were narrated to him in a language he understood and he admitted to the correctness of the facts.
19. Before sentence, counsel submitted that the appellant was allowed to mitigate and counsel stated that the mitigation made before this appellate court was exactly the same as the mitigation made by the appellant before the trial court.
20. Counsel urged the court to uphold the conviction and sentence as the trial court had looked at the manner in which the offence had been committed, which was planned and deliberate.
21. This court was urged to dismiss the appeal.

#### **ISSUES FOR DETERMINATION:**

22. After due consideration of the submissions made by the respective parties, this court finds the following issue for determination:

- i. **Unequivocal plea**
- ii. **Whether the sentence was harsh and excessive?**

#### **ANALYSIS**

23. This being the first appellate court, this court is duty bound to re-assess the evidence on record and arrive at its own independent conclusion. Refer to the case of **Okeno V. Republic** (1972) EA 32.
24. On the issue of the plea taken, this court has had occasion to peruse the Record of Appeal and notes as follows:
25. The appellant was arraigned in court and his plea was taken on the 5<sup>th</sup> February, 2013. He entered a plea of “Not guilty.”
26. The case came up for mention on the 15<sup>th</sup> February, 2013 and the charge was read to him in Kiswahili and he changed his plea to that of “Guilty.”
27. The trial magistrate ordered that the appellant be remanded in custody till the next mention date set for the 20<sup>th</sup> February, 2013 so that the facts may be read to the appellant.
28. On the 20<sup>th</sup> February, 2013 the facts were read to the appellant in Kiswahili a language he understood and the appellant maintained his plea of guilty and the trial magistrate entered a plea of “guilty”

29. Nowhere on the court record does it indicate that from the 5<sup>th</sup> February, 2013 to the 20<sup>th</sup> February, 2013 that an order was made that the appellant be remanded in police custody.
30. It therefore follows that if the appellant was not in the custody of the police no opportunity arose for the police to mislead the appellant or coerce him into pleading guilty.
31. This court finds that the pleas were properly taken by the appellant in a language (Kiswahili) that he understood and this court finds that the court record does not support any evidence of coercion.
32. The court finds no merit on this ground of appeal and the same is disallowed.
33. The next issue relates to mitigation and sentence.
34. The appellant contends that the trial magistrate did not accord him the opportunity to fully exhaust his mitigation.
35. The provisions of **Section 216** of the **Criminal Procedure Code** provides for mitigation before sentence and read as follows:

**“Section 216: The court may, before passing sentence or making an order against an accused person under Section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made”**

36. A court of law usually accepts mitigation as to determine the sentence to be passed. The operative word is “may” which therefore means this is a discretion exercisable by the court.
37. Upon perusal again of the court record this court finds that the appellant was afforded an opportunity to mitigate
38. This court notes that the same facts were adduced by the appellant in mitigation before the trial court and before this appellate court. No additional facts were added on appeal.
39. The court record does not reveal any evidence of interruptions or interjections by the trial court when the appellant was mitigating.
40. The court finds that from the particulars of the offence provided by the prosecution, the trial magistrate noted the prevalence of the type of offence and from the facts adduced in mitigation, the trial court made an informed decision as to the nature of the penalty to be meted out to the appellant.
41. This court finds no reason that warrants interference of the sentence passed.

## **FINDINGS**

42. For the reasons stated above this court finds:

- i. that the plea taken is found to have been properly taken and is also found to be unequivocal;
- ii. that the trial magistrate took into consideration the appellant’s mitigation and made a proper and informed decision before passing sentence;
- iii. The sentence is found to be proper and not harsh and excessive in the circumstances.

## **CONCLUSION:**

43. The appeal is found lacking in merit in its entirety and is hereby dismissed.
44. The conviction and sentence are upheld.

It is so ordered.

**Dated, Signed and Delivered at Nakuru this 14<sup>th</sup> day of November, 2013.**

**A. MSHILA**

**JUDGE**

