



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CRIMINAL APPEAL NO.96 OF 2010**

*(Appeal from Senior Resident Magistrate Hon. R. Oigara in Kimilili Court in Cr. No.832 of 2010)*

**BENSON PHILLIP MABONGA.....APPELLANT**

~VRS~

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was “*convicted*” on own plea of guilty of housebreaking and stealing contrary to section 304 (1) and 279 (b) of the Penal Code whose particulars were that on 15/8/2010 at about 11.30 a.m at Lukhome village in Maeni location of Kimilili in Bungoma district of the Western Province he broke and entered into the dwelling house of Rose Namaemba Khaemba with intent to steal thereon and stole 10 tins of beans, 2 thermos flasks, 2 hot pots and building and roofing nails all worth ksh.2,000/= the property of Rose Namaemba Khaemba. He was sentenced to serve 4 years in jail on 1<sup>st</sup> limb and 3 years in jail on the 2<sup>nd</sup> limb. He was aggrieved by the sentence and preferred this appeal. He complained that having pleaded guilty the sentence was harsh in the circumstances. He also complained that his mitigation was not considered. The State through Mrs. Leting opposed the appeal. It was submitted that the sentence was legal and that it was neither harsh nor excessive.

I have looked at the record kept by the trial court. It is clear that plea was not properly taken. The facts were narrated to show that the Appellant was arrested with the goods that had been stolen from the complainant’s house after it was broken into on the same day. The Appellant was not asked to respond to the facts. Section 207 of the Criminal Procedure Code and the direction in **Adan v. Republic [1973] EA 445** are quite clear on how plea should be taken. After the facts are narrated the accused should be asked whether he accepts them or not. If the facts are accepted, and the court is convinced that they show that the offence charged was committed, a conviction shall be entered. No conviction was entered in this case. After the conviction, the court should ask the prosecution to indicate whether the accused has any previous antecedents. If he does not have the prosecution will indicate that he is a first offender. The

record shows that the court did not ask the prosecution about the Appellant's antecedents. It is after the prosecutor's indication that the accused is asked to mitigate. In the instant case there was mitigation before conviction and before the prosecutor's indication. In short, plea was not properly taken and the trial was a nullity.

Something about the sentence. The trial court should remember that the sentence should reflect the circumstances of the case, whether the accused was a first offender and what he has said in mitigation. The record does not show that these were considered. It should also be recalled that for a first offender who has pleaded guilty, imprisonment should not be the first option, unless the offence is particularly grave, aggravated or widespread (**Arrison v. R [1957] EA 447**). Lastly, in sentencing the value of the stolen goods and the fact that they were recovered should be considered. (**Mathai v. Republic [1983] KLR 422**). Even if plea was properly taken, the sentence imposed did not reflect the consideration of all these important principles.

The sentence was excessive in the circumstances.

In conclusion, the plea was a nullity. The "conviction" is quashed and the sentence set aside. Considering the period the Appellant has been in custody, a retrial will not be ordered. He is ordered to be set at liberty forthwith unless he is otherwise legally held.

Dated and delivered at Bungoma this 25<sup>th</sup> day of January, 2011 in the presence the Appellant and State Counsel Mrs. Leting and Lilian Gimose the court clerk.

**A. O. MUCHELULE**  
**JUDGE**