



NO. 319

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CRIMINAL APPEAL NO. 42 OF 2010**

**PATRICK BUDARA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**(Appeal from the original judgment and conviction in the Resident magistrate's court at Kehancha in Criminal case No. 671 by J.R.Ndururi-RM)**

**Patrick Maina Budara**, the appellant herein, was convicted on his own plea of guilty on one count of breaking into a building and committing a felony contrary to section 306(a) of the **Penal Code** and one count of being unlawfully present in Kenya contrary to section 4(1) of the **Immigration Act**. Upon conviction he was sentenced to five (5) years and three (3) months imprisonment respectively. That conviction and sentence triggered this appeal that was limited to sentence only.

In support of his appeal on sentence, the appellant submitted that the sentence imposed was harsh and manifestly excessive.

**Mr. Mutuku**, learned Senior Principal State counsel conceded to the appeal on sentence. Counsel

submitted that although the sentence imposed was within the law, the same was nonetheless harsh and excessive bearing in mind that the appellant was a first offender. Counsel further alluded to the fact that the stolen goods were recovered. Counsel therefore invited me to review the sentence downwards.

The sentence imposed on the appellant pursuant to his conviction was of course legal. However considering that the same was the maximum in respect of the first count, the goods were recovered and that the appellant was a first offender, the sentence imposed may appear too harsh and excessive in the circumstances. It has been constantly reiterated that the appropriate sentence to be imposed is a matter for the discretion of the trial court. This being the case the trial court must act judicially and not to award sentences capriciously. The trial court must be guided by evidence and sound legal principals. It must take into account all relevant factors and eschew all extraneous or irrelevant factors.

The appellate court will only however interfere with the sentence imposed if it is shown to be unlawful and illegal or if it is manifestly harsh and excessive as to amount to a miscarriage of justice. See **Ogola s/o Owuora vs Republic (1954) 19 EACA 270, Nilson vs Republic (1970) EA 599 and Wanjema vs Republic (1971) EA 493.**

Considering the circumstances, of this case and though the sentence was legal, it was nonetheless manifestly harsh and excessive as to amount to a miscarriage of justice.

**Mr. Mutuku** was therefore right in conceding to the appeal on sentence. The sentence imposed being manifestly harsh and excessive as to amount to a miscarriage of justice calls for my intervention. Bearing all this in mind, I think that the appellant has been sufficiently punished. For the ends of justice to be met, I would commute the appellant's sentence to the term so far served with the consequence that he shall forthwith be set at liberty unless otherwise lawfully held.

**Judgment dated, signed and delivered** at Kisii this 17<sup>th</sup> day of January, 2011.

**ASIKE-MAKHANDIA**

**JUDGE**