



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 218 OF 2010**

***(From original conviction and sentence in Criminal Case No. 6127 of 2009 of the Chief Magistrate's Court at Nakuru - B. Atiang, SRM)***

**ALBERT NYAMATA MAKARA.....**

**APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was charged, with the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code, (*Cap 63 Laws of Kenya*). He was also charged with the alternative offence of handling stolen goods contrary to section 322(2) of the Penal Code.

The appellant was acquitted of the charge of breaking into a building for lack of evidence. The appellant was on the evidence however found guilty of the alternative charge of handling stolen goods, and was sentenced to nine years imprisonment. Aggrieved with his conviction the appellant has in his Petition of Appeal filed on 14<sup>th</sup> July 2010 set out eight grounds of appeal.

These are -

- (1) *that the appellant was denied fair hearing during the entire hearing of the proceedings and he was denied his rights and justice.*
- (2) *that having sensed that the trial magistrate was leaning towards a certain direction, the appellant frantically made effort in seeking application to be moved to another court for retrial without success.*
- (3) *that by blatant ignoring the appellant application for a retrial from another court, the trial magistrate showed bias and had already pre-judged me and found guilty of the said offence.*
- (4) *that the trial magistrate erred in law and fact by convicting me with the offence of handling whereas no independent witness testified in court to proof that the house which the stolen goods were recovered from was my house and not anybody else.*
- (5) *that the trial magistrate erred in law and fact for failing to consider that the stolen goods were recovered from two different houses, and the owners of those two houses were not availed in court to shed more light on the same.*

(6) *that the appellant prays that the conviction and sentence be put aside and the appellant be awarded bond pending the hearing of this appeal.*

(7) *that the appellant prays that he be present during the application of this pending appeal.*

And for these reasons, the appellant prayed that his conviction be quashed, and set sentence aside, and he be freed. However at the hearing of the appeal on 22<sup>nd</sup> November 2010, the appellant submitted written submissions in which the appellant set out six grounds in mitigation, and prayed that his sentence be reduced. The mitigation grounds were -

**(1) *that the sentence awarded is highly excessive and punitive.***

**(2) *that I'm remorseful of the offence committed and have since been rehabilitated by the harsh conditions in both remand and prison environment.***

**(3) *that I do suffer from erotic duodenum peptic ulcers a condition that is seriously complicated and aggravated by the harsh conditions within the prison environment. Your Lordship I used traditional medicinal herbs a facility that is not available in prison.***

**(4) *that I'm, the first born in a family of nine and my mother is epileptic and is not able to play an active role in up bringing and fending of the siblings a task that was squarely on my shoulders with my confinement in prison, the family is likely to (suffer)?.***

**(5) *that I earnestly pray that the sentence awarded therein be reviewed and a lesser sentence be considered.***

**(6) *that in consideration of my ailment and that of my mother, I be awarded a suspended sentence so that I may amend my broken life.***

Mr. Nyakundi, learned State Counsel submitted that the appellant had conceded to the question of conviction, the only issue is one of sentence. The appellant was convicted of the offence of handling stolen goods and sentenced to nine years. There was no record of previous conviction, and the sentence of nine years could therefore be excessive.

I have considered the appellants grounds of mitigation as well as submissions by Mr. Nyakundi. The maximum punishment for the offence of handling stolen goods contrary to Section 322(a) of the Penal Code is fifteen years. The appellant was a first offender, the stolen goods were recovered. These are factors the learned magistrate ought to have taken into account in sentencing the appellant. The appellant had in his mitigation before the trial court merely prayed for leniency. He did not say he had any medical condition that required special treatment. He did not say he had a mother who entirely depended on him on account of her suffering from epilepsy. These are all matters that ought to have been put before the trial court for further investigation to ascertain their veracity.

However taking into account the two factors, State Counsel referred to, that the appellant was a first offender and had no previous record, and taking into account, that the stolen goods were all recovered, and further taking into account the appellant's apparent remorse, I think the sentence of nine years was harsh and excessive.

In exercise therefore of the discretion conferred upon this court by Section 354(3)(b) of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*) the appellant's sentence of nine years is reduced to four years to run from the date of his conviction.

There shall be orders accordingly.

**Dated, delivered and signed in Nakuru this 11<sup>th</sup> day of March 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**