

No.2974
THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MACHAKOS

CRIMINAL APPEAL NO.96 OF 2010

MWANZA NGANDAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant jointly with **Mutunga Mbithe** were charged before the Senior Resident Magistrate's court at Tawa with the offence of shop breaking and committing a felony contrary to section 306 (a) of the Penal Code. It was claimed in the particulars of the charge sheet that during the night of 21st and 22nd December, 2009 at Thuilani Market in Mbooni West District within the Eastern Province, jointly with others not before the court they broke and entered into the shop of one, **Michael Muloki** with intent to steal therein and did steal six cans of ½ cowboy, ¾ of Malo Cooking fat, seven pairs of Eveready blue, six pairs of Eveready red, five pairs of Eveready black, 30 kgs of sugar, 2 packets of wheat flour, all valued at KShs.26,150 the property of **Michael Muloki**. In the alternative, the appellant was charged with handling stolen goods contrary to section 322 (2) of the Penal Code; particulars being that on the same date and place, otherwise than in the cause of stealing, the appellant jointly dishonestly handled the afore said items.

The appellant pleaded guilty to the charge, was convicted on his own plea of guilty and sentenced to five years imprisonment. Against this sentence he now appeals on the grounds that he was a first offender, he had pleaded guilty to the charge, he was young and remorseful, he was ailing and that the sentence imposed was harsh and excessive.

When the appeal came up for hearing, the appellant maintained that the sentence imposed was harsh and excessive and that the trial Magistrate did not consider the fact that he was a first offender.

Mr. Mukofu, learned State counsel opposed the appeal and submitted that the sentence imposed was lawful. It was even lenient for he should have been sentenced to seven years. The offence was prevalent, hence the sentence imposed.

Essentially, this appeal is limited to sentence only. A sentence must in the end, however, depend upon the facts of its own particular case. An Appellate Court cannot interfere with the discretion which the trial court exercised in sentencing the accused unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on wrong principle or that the sentence is manifestly excessive in the circumstances of the case. I do not think that the instant sentence merits this court's interference on any of the above grounds.

The offence charged attracts a maximum sentence of seven years. The appellant was sentenced to five years imprisonment. The sentence was therefore lawful. The learned Magistrate took into account the fact that the offence was serious and common. He did not consider matters extraneous matters when sentencing the appellant. The sentence in my view was not manifestly excessive in all the circumstances. It was merited and well deserved. Accordingly, this appeal on sentence is dismissed.

Dated and delivered at Machakos this 15th day of November, 2011.

ASIKE-MAKHANDIA
JUDGE