REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Criminal Appeal 43 of 2009

EMMANUEL WAFULA SIMIYU .....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal from WBY SRM CR. CASE NO.561 OF 2009)

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JUDGMENT

The Appellant Emmanuel Wafula Simiyu was charged with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code on 8/06/2009. The property allegedly stolen was a weighing machine valued at Ksh.5,000/=. There was an alternative charge of handling stolen goods (which was the same weighing machine as in the main charge) contrary to 322 (2) of the Penal Code. The Appellant admitted the offence during plea. The facts were read and he admitted them as true. He was convicted and sentenced to three years imprisonment.

In his petition of appeal, the Appellant takes issue with both conviction and sentence. He states that the magistrate failed to consider his mitigation. He was a first offender. Further that his pleading guilty was due to harassment by the police.

The state opposed the appeal against conviction arguing that section 348 of the Criminal Procedure Code is a bar to appeal where the accused has pleaded guilty to the offence.

I proceed to examine the provisions of section 348 of Criminal Procedure Code. It provides:

> ***"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the legality and extent of sentence."***

The provisions are very clear that the Appellant is not allowed to appeal after pleading guilty. The Court of Appeal has held that section 348 is not a complete bar. Where the plea was unequivocal for some reason, the Appellant may be heard. In the case before me, the accused alleges that he pleaded guilty due to harassment by police. When he was given a chance in court to explain the grounds of appeal, he did not explain how he was harassed. The accused ought to tender some proof of harassment in police custody and the state of his health at the date of plea. In the absence of this proof, he can not convince the court that the plea of guilty was not voluntary. When the plea was taken in court I believe that the police officers who allegedly harassed him were not there. The Appellant does not say that he was coerced in court to plead guilty. The Appellant made no report of harassment or torture to the court before or after the plea was taken. I note that he does not complain of torture but of harassment. I find no merit in this ground. I therefore uphold conviction.

On sentence, the Appellant was a first offender as shown by the record, He said the complainant was his employer and that he stole because he wanted to pay himself his dues.

The maximum sentence under section 306 (a) is seven (7) years imprisonment. Being a first offender and considering the negligible value of the property stolen, the Appellant deserved a more lenient sentence if not a non-custodial sentence. He has now served one (1) year in prison. It is my considered opinion that the sentence was too punitive in the circumstances. I set aside the three (3) year imprisonment sentence and substitute it with one (1) year. The Appellant having fully served one (1) year sentence by now, is hereby set at liberty unless otherwise lawfully held.

Judgment dated and delivered on the 16th day of June, 2010

F. N. MUCHEMI
JUDGE

in the presence of the Appellant and the State Counsel Mrs. Leting.

F. N. MUCHEMI
JUDGE