**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NYERI**

**Criminal Appeal 273 of 2007**

**DEDAN WAMAE MACHENE ..... APPELANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from original Conviction and Sentence in Senior Resident Magistrate's Court at Karatina in Criminal Case No. 747 of 2006 dated 20th September 2007 by Kimemia B. M. – R.M.)***

**J U D G M E N T**

**Dedan Wamae Machine** hereinafter referred to as "the appellant" was charged with the offence of housebreaking contrary to section 304 of the Penal Code and stealing contrary to section 279 (b) of the Penal Code. It was alleged that on diverse dates between 25th and 26th July 2006 at Karindundu village in Nyeri District of Central Province he broke and entered the dwelling house of James Machine with intent to steal and did steal therefrom assorted items listed in charge sheet all valued at Kshs.5330/=.

The appellant, it would appear is the son of the complainant (PW1). The prosecution case was that PW1 went home and found the ceiling of his house fallen and there were items missing from the house and he suspected his son, the appellant herein. Subsequently thereto he saw the appellant sleeping in his employees' house whilst wearing his shoes, one of the items stolen from the house. He thereafter organised for the arrest of the appellant whom he handed over to Karatina police station. PWII the mother of the appellant testified more less along the same lines as PW1 but emphasised that it was not the 1st time that the appellant had stolen from them. In fact he had stolen a gas cylinder the previous year. PWIII testified as to how he had repaired the damaged iron sheets which the appellant used to access the house. PWIV was the arresting officer. He testified as to how he had re-arrested the appellant at Karatina police station and had him charged with the instant offence.

In defence, appellant stated in unsworn statement of defence that he had gone for a funeral meeting the night before and went to sleep at the workers house a 6.30 a.m. the following day. That his father came and woke him up and said he had stolen items from his house and took him to Karatina police station. That he was shocked that his own father would accuse him for having stolen from him.

The learned magistrate having carefully evaluated and analysed the evidence tendered eventually found for the prosecution, convicted the appellant and sentenced him to four years imprisonment. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal. However at the hearing of the appeal, the appellant abandoned the appeal on conviction and elected to prosecute the appeal on sentence only.

In support of the appeal on sentence, the appellant submitted that the sentence imposed was harsh and excessive. He stated further that the issue arose as a result of a domestic misunderstanding. That he had reformed and has sufficiently been punished.

As a first appellate court, I have the necessary jurisdiction to interfere with a sentence passed by the trial court once I am satisfied that in imposing the sentence the trial court did not take into account a relevant factor, or that it took into account an irrelevant factor that resulted in it imposing a manifestly harsh and excessive sentence and or that the sentence imposed was illegal. In doing so I must pay regard to the fact

that in a sentencing an accused person, the trial court is exercising some discretion. The appellate court should therefore be slow to interfere with the exercise of such discretion more so if it is exercised judicially and not capriciously. See generally **Wanjema v/s Republic (1971) E.A. 494**.

Applying the foregoing to the circumstances of this case, I have no doubt that the sentence that should have commended itself to the trial magistrate should have been probation and or community service orders as correctly pointed out by the learned senior Principal State Counsel. To that extent therefore the sentence of four years imprisonment would appear to be manifestly excessive and harsh. After all the complainant was the father of the appellant. The appellant too was a first offender which should count for something.

I also note that the appellant was charged under two limbs though in one count. The first limb was housebreaking which should have attracted separate punishment. The second limb was stealing which too should have attracted separate punishment. Much as I would have preferred for the appellant to be jailed on probationary terms, I think that the time he has so far served in jail is sufficient punishment. Accordingly I would commute his jail term to the term so far served with the consequence that he should forthwith be set free unless otherwise held for lawful purpose.

***Dated and delivered at Nyeri this 29th day of January 2009***

**M. S. A. MAKHANDIA**

**JUDGE**