

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 245 of 2005

ANTHONY KARIUKI MAINA APPELLANT

Versus

REPUBLICRESPONDENT

(From original Conviction and Sentence of the Senior Resident magistrate's Court at Karatina in Criminal Case No.766 of 2005 dated 12th September 2005 by Mrs. R. Oyaro Mecha S.R.M.)

J U D G M E N T

Anthony Kariuki Maina hereinafter referred to as the appellant was charged with the offence of house breaking and stealing contrary to *section 304 (1)* and *section 279 (b)* of the penal code. He also faced an alternative count of handling stolen goods contrary to *section 322 (2)* of the penal code. The appellant pleaded guilty to the main count whereupon he was convicted and sentenced to 4 and 2 years imprisonment respectively on his own plea of guilty.

The appellant was aggrieved by the conviction and sentence. Hence he preferred this appeal.

At the hearing of the appeal, the appellant elected to drop his appeal on conviction. Instead he opted to pursue the appeal on sentence only. In support thereof, the appellant submitted that the sentence imposed was manifestly harsh and excessive.

Mr. Orinda learned principal state counsel did not oppose the appeal on behalf of the state. In his view the sentence imposed was manifestly harsh and excessive considering that the offences attracted a maximum jail term of 7 and 14 years respectively.

As it has been constantly stated sentencing is a matter for the discretion of the sentencing court. That discretion however must, be exercised judicially and not capriciously. The sentencing court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. It has been said severally that an appellate court can only interfere with the sentence imposed by a subordinate court if it is shown to be unlawful and illegal or if is manifestly harsh and excessive as to amount to a miscarriage of justice. See generally OGOLA S/O OWUORA VS REPUBLIC (1954) 19 EACA 270, JAMES VS REPUBLIC (1950) 10 EACA 147, NILSON VS REPUBLIC (1970) EA 599 and WANJEMA VS REPUBLIC (1971) EA 493.

The offence for which the appellant was convicted carries a maximum sentence of 7 and 14 years imprisonment respectively. The appellant was sentenced to 4 and 2 years imprisonment respectively. To that extent the sentence though legal nonetheless appears to be manifestly harsh and excessive. **Mr. Orinda** was right in not opposing the appeal therefor. The items which were stolen were recovered intact from the appellant. The appellant was also a first offender. The appellant in fact pleaded guilty to the charge and accordingly saved the court its valuable judicial time. This should have counted for something.

I note that the appellant has been serving his sentence since September, 2005. I think that the appellant has been sufficiently punished. I would therefore interfere with the sentence to the extent that I would commute the same to the term so far served by the appellant with the consequence that the appellant shall forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 25th day of January, 2008.

M.S.A. MAKHANDIA

JUDGE