



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 258 of 2007

PETER KUBAI GITHINJI.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the sentence imposed by Ag. Senior Principal Magistrate Mrs. M. Murage on 9th November, 2006 in Criminal Case No. 1053 of 2006 at Kikuyu Law Courts)

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JUDGEMENT

The appellant was in the company of two others, when the three were charged with the offence of breaking into a building and committing a felony therein, contrary to s.306(a) of the Penal Code. The particulars were that the three, on 30th August, 2006 at Gikuni in Kiambu District, within Central Province, jointly with others not before the Court, broke and entered the shop of **Amos Wangera Njoroge**, and therein, stole one paper-punch, one calculator, one stapler, and cash, in the sum of Kshs.35,000/= all valued at Kshs.36,000/= – the property of the said **Amos Wangera Njoroge**.

When the charges were read out to the accused persons, before Ag. Senior Principal Magistrate, **Mrs. Murage**, on 19th October, 2006, the appellant herein pleaded guilty, whereas the other accused persons pleaded not guilty. The facts of the commission of the offence were then read out; and the appellant herein acknowledged the same to be “correct”. The Court of first instance treated the appellant as a first offender, and took into account his statement in mitigation. Sentence was deferred for the Probation Officer’s report to be placed before the Court. On 9th November, 2006 the learned Senior Principal Magistrate, after considering the representations of the Probation Officer, sentenced the appellant to a four-year term of imprisonment.

In his petition of appeal, the appellant states that he had committed the crime in question after being misled by his accomplices, and that he is deeply remorseful. He states that the four-year prison term is “harsh and excessive” and he prays for reduction of the same. It is these very points that the appellant took up, when he urged his appeal in Court.

Learned State Counsel **Ms. Gateru** submitted that the sentence appealed against was lawful, and not harsh or excessive; but she noted that the appellant’s co-accused who pleaded not guilty, proceeded with the

hearing, and was in the end convicted, was sentenced to the much reduced prison term of *three months*, by a different Acting Senior Principal Magistrate. The effect, learned counsel urged, was that there was a serious *disparity* in the sentencing of persons accused of committing the same offence. Counsel noted that the appellant might sense a failure of justice in the circumstances, since he had saved the Court's time by readily pleading guilty – something which his accomplices did not do.

In the foregoing circumstances, counsel urged, the sentence imposed against the appellant would appear harsh. Should the Court find such to be the case, it was urged, then a discretion may be exercised, to impose a more suitable sentence against the appellant.

It is clear to me that, had the learned Senior Principal Magistrate who sentenced the 1st accused, on 29th March, 2007, read the record on file as she had a duty to do, she could not have failed to notice that barely six months earlier, the 2nd accused (the appellant herein), who had greatly saved the Court's time by pleading guilty, had been sentenced to a term of imprisonment, by another learned Magistrate, roughly *five times* the term of imprisonment which was now being dispensed. The principle of justice in sentencing, requires that like case be treated, so far as possible, *alike*. There can be no question that the learned Magistrate who sentenced the first accused after he had been proved guilty by the process of trial, improperly failed to give effect to the principle of *equality* for two accused persons placed in more-or-less the same situation.

For this Court in its appellate capacity, it is most regrettable that its scope for proper judgment is now being limited by a trial-Court sentence that failed to be mindful of elementary considerations in sentencing.

However, for an appearance of fairness in the dispensation of sentence, in respect of the appellant herein, I will exercise a discretion to reduce the four-year term of imprisonment, to a two-year term.

The appeal on sentence is allowed, and the sentence is reduced to a two-year term of imprisonment.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 13th day of October, 2008

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Ms. Gateru

Appellant in person