



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**Criminal Appeal 36 of 2006**

*[From the original conviction and sentence in Criminal Case No.168 of 2005 Chief Magistrate's Court, NAKURU – A. B. MONGARE (R.M)]*

**IMEJELI LEMARKAT ..... 1<sup>ST</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant *Imejeli Lemarkat* was the second accused person before the lower court where he was charged with another with the offence of shop breaking and committing a felony contrary to Section 306 (a) of the Penal Code.

The particulars of the offence stated that on the night of 12<sup>th</sup> and 13<sup>th</sup> January 2005 at Nakuru township in Nakuru District of the Rift Valley Province broke and entered a building namely a shop of **John Mwangi Kimani** and committed therein a felony namely theft assorted clothing and beddings as per attached list all valued at Kshs.150,000/-.

The appellant also faced an alternative charge of **handling stolen goods** contrary to **Section 322 (2) of the Penal Code**.

The particulars of the offence stated that on the 13<sup>th</sup> day of January 2005 at Bahati in Nakuru District of the Rift Valley Province dishonestly received or retain assorted goods as per the attached list the property of **John Mwangi Kimani** knowing or having reasons to believe them to be stolen goods.

After a full trial, the appellant was acquitted of the main count but he was found guilty of the alternative count and he was sentenced to five (5) years imprisonment with hard labour. Being dissatisfied with the sentence, the appellant who was unrepresented appealed against the sentence and during the hearing of this appeal, he submitted a further supplementary grounds of appeal in which he has pleaded for leniency. He urged this court to consider that he is a first offender and that he has reformed since he was incarcerated about two years ago, within which period he has reformed and wishes to be given another opportunity to reunite with the society and lead a meaningful life.

This appeal was opposed by the State, the learned Senior State Counsel **Mr, Koech** supported both the conviction and sentence which he said was supported by overwhelming evidence. The appellant was arrested with items that were stolen from a shop which was guarded at the material time by the 1<sup>st</sup> accused as a watchman. The items were positively identified by the complainant, they were recovered in the possession of the appellant within a few hours of the breakage and the appellant did not offer any

explanation as to how the goods were found in his possession. He therefore urged the court to dismiss the appeal and confirm the conviction.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own determination of whether to uphold the conviction while bearing in mind that this court never saw or heard the witnesses and give due allowance for that.

See the case of **Njoroge –Vs – Republic [1987] page 19.**

Although this appeal turns on the sentence, alone, in order to appreciate the entire circumstances of the case, it is important to briefly look at the evidence before the trial court.

The evidence before the trial court was adduced by four prosecution witnesses who included the complainant the owner of the business premises which was broken into on 12<sup>th</sup>/13<sup>th</sup> January 2005. **John Mwangi Kimani, PW 1** told the court that he closed his shop securely on 12<sup>th</sup> January 2005 and left his premises which was guarded by **Stephen Lekisati** who was the first accused before the trial court. The following day they arrived at the premises and found his premises had been broken into and several items as per the list attached to the charged sheet had been stolen and they were valued at kshs.150,000/-. A few days later this witness was called at the Bahati Police Station and he was able to identify his stolen goods as well as the 1<sup>st</sup> accused who was his watchman at the time.

**Police Constable Nukuthi, PW 2** received the report about the theft and visited the scene where he took the record of lost items. After two days, the appellants together with the 1<sup>st</sup> accused were arrested with some of the items which were produced as exhibits.

**Corporal Timothy, PW 3** arrested the appellant with another who were found with stolen properties. He was preparing to charge them with the offence of conveying stolen properties when he received a report of shop breaking and after the items that were found in possession of the appellant were positively identified by the complainant he charged them with the offences.

**Eliud Mirigo Ndungu, PW 4** was employed as the salesman by PW 1 and he confirmed the way their business premises were broken into and the list of the properties that were found missing together with the 1<sup>st</sup> accused who was the watchman and was supposed to be guarding the premises.

Put on his defence, the appellant nearly denied any involvement with the alleged theft, and claimed that he was arrested when he was innocently walking towards Bahati. He told the court that the police searched him and took away Kshs.9,900/- together with his identity card.

It is on the basis of the above evidence that the trial court found the appellant guilty as charge with the alternative charge of handling stolen property. As stated earlier, this appeal turns only on the issue of sentence. It is clear from the evidence before the trial court that the appellant's conviction was based on sound evidence and the conviction therefore is safe.

The principles to be considered by the court while exercising its jurisdiction to review or alter a sentence imposed by the trial court were settled in the case of **Ogalo son of Owuor [1954] E.A.C.A at page 270** where the Court of Appeal held as follows: -

***“The court does not utter a sentence on a mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge acted upon some wrong principle or overlooked some material facts if the sentence is manifestly excessive in view of the circumstances of the case.”***

Taking the totality of the evidence before the trial court and in particular the sentence that is prescribed by the law, am inclined not to interfere with the sentence imposed by the trial court. The appellant was

convicted of the alternative count of handling stolen property and the sentence prescribed by the law is fourteen (14) years with hard labour. I therefore find the sentence of five (5) years lenient and the same is hereby confirmed.

For the above reasons, the appeal is dismissed, the conviction and sentence is hereby confirmed.

**Judgment read and signed on 2<sup>nd</sup> day of March 2007.**

**MARTHA KOOME**

**JUDGE**