REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

Criminal Appeal 494 of 2005

PATRICK MANUTHU MACHABA…….....….……..APPEALANT

VERSUS

REPUBLIC ……..….RESPONDENT

(*From the original conviction and sentence in Criminal Case No. 3210 of 2005 of the Senior Principal Magistrate's Court at Kiambu*)

JUDGMENT

PATRICK KANUTHU MACHABA the appellant was charged before the subordinate count with the offence of burglary and stealing contrary to section 304(2) and 279(b) of the Penal Code. The particulars of the charge were that –

"**On 8th day of October 2005 at Ndumberi trading centre in Kiambu District within Central Province, broke and entered the dwelling house of GEOGREY KIMANI WATHIAI with intent to steal and did steal weighing machine, one radio make National, one camera make olympia, one tin of 5 litres paint, one long trouser and cash 10,000/= all valued at Kshs. 25,000/=**

The appellant was also charged with an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. He pleaded guilty and was convicted on the main count of burglary and stealing. He was jailed for 2 years for the burglary element and 3 years for the stealing element of the charge. Sentences to run concurrently. He has now filed an appeal, claiming that the sentence is harsh and excessive.

At the hearing of the appeal, the appellant submitted that he was a first offender and that he had not done a similar thing before. He also submitted that he had a wife and two children to take care of. He further stated that he had changed his way while in prison and had even learnt carpentry and was going to be a useful and productive citizen. He submitted that he had admitted the charge in the subordinate court.

Learned State Counsel, Mr. Makura, opposed the appeal. He submitted that the maximum sentence for burglary was 10 years imprisonment, while the maximum sentence for the theft was 14 years imprisonment. The sentence imposed was therefore not excessive. He contended that the magistrate took into account the mitigating factors and did not take into account any extraneous matter.

This is an appeal against the sentence imposed by a trial magistrate. In **SHANDRACK KIPKOECH KOGO –vs- REPUBLIC** – ELDORET Criminal appeal No. 253 of 2003 the Court of Appeal held –

"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere, it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or failed to take into account a relevant factor or that a wrong principle was applied or that short of those the sentence itself is so harsh and excessive that an error in principle must be inferred."

The appellant says that the sentence is execessive. Indeed, he pleaded guilty to the charge. He did not waste the court's time. He was a first offender. The first limb of the charge which relates to burglary carries a maximum of 14 years, while the second limb of theft from a dwelling house carries a maximum sentence of 10 years. The magistrate took into account the mitigating factors. There is no allegation that

he took into account intraveneous or irrelevant matters in the sentencing. The magistrate could only have taken into account facts that were before him.

Now the appellant talks about having a wife and two children to care for which he did not inform the magistrate. He also says that he has changed his ways in prison, which was also not a fact that was before the magistrate. I do not find the sentence imposed as either harsh or execessive. I find no justifiable reason to interfere with the exercise of discretion of the sentencing court. The concurrent sentence means that the appellant will only serve upto 3 years.

Consequently, I find no merit in the appeal and dismiss the same.

Dated and delivered at Nairobi this 9th May 2007.

GEORGE DULU

JUDGE

In the presence of –