REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 354 of 2005

NAFTALY MUKUNDI WAWERU……...……..APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 108 of 2004 of the Senior Principal Magistrate's Court at Kikuyu (Mrs. Murage - SRM)

JUDGMENT

The appellant NAFTALY MUKUNDI WAWERU was charged before the subordinate court with three counts. The first count was for house breaking and theft contrary to section 304(1) and Section 279(b) of the Penal Code. The second count was for creating a disturbance likely to cause a breach of the peace contrary to Section 95(1) of the Penal Code. The third count was for house breaking and theft contrary to section 304(1) and section 279(b) of the Penal Code.

The appellant pleaded guilty to count one and count three. The second count which was for creating a disturbance in a manner likely to cause a breach of the peace was withdrawn by the prosecution under Section 87(a) of the Criminal Procedure Code. Of the two counts on which he pleaded guilty, the appellant was sentenced to consecutive 3 years imprisonment on each of the two limbs in the first count and consecutive 3 years imprisonment on each of the two limbs of the third count. The sentences on the two counts were ordered to run concurrently, which meant that he would serve a total of 6 years imprisonment.

The appellant has appealed to this court on sentence claiming that his background was not adverse, he is the sole breadwinner of his family with two children, that he is remorseful, that his sentence is harsh and excessive, that he wants to be given a chance to reform, and that he is ready to abide by regulations and the law.

At the hearing of the appeal the appellant submitted that he had pleaded guilty to the two counts and that he was asking for the sentences in the two counts to be made concurrent, as the consecutive sentences were excessive.

Learned State Counsel, Mrs. Gakobo, opposed the appeal on sentence. Counsel submitted that the sentences were lenient considering the maximum sentences for the offences committed. Counsel contended that the court had discretion under Section 14 of the Criminal Procedure Code to order that sentences run one after another. Counsel contended that the sentences meted were handed down after the

subordinate court considered the Probation Officer's report which showed that previous attempts to reform the appellant were not successful. Counsel urged this court not to interfere with the sentences.

In response the appellant stated he had suffered a lot in prison, and that he had served more than 3 years imprisonment.

It is a well settled principle of law that sentencing is the discretion of a sentencing court. An appellate court will be slow to interfere with the exercise of that discretion unless it is shown that the sentencing court took into account an irrelevant factor or failed to take into account a relevant factor or that it applied a wrong principle or that short of these the sentence is so harsh and excessive that an error in principle must be inferred – see **SHADRACK KIPKOECH KOGO – vs – REPUBLIC, Criminal Appeal No. 253 of 2003 Eldoret** (*unreported*).

In our present case the appellant was convicted on two counts of burglary and theft. The offence of housebreaking contrary to Section 304(1) carries a maximum sentence of 7 years imprisonment. On the other hand the offence of theft contrary to Section 279(b) of the Penal Code carries a maximum sentence of 14 years imprisonment. Before sentencing the appellant, the prosecutor informed the court that there were no previous records for the appellant. A Probation Officer's report was produced in court before sentencing. That report showed that the appellant had lived a criminal life from 1990 when he was a pupil in standard 6. He committed a number of offences and even at one time escaped from custody. Attempts by his father, who was the complainant, in the present case, to rehabilitate him by giving him a three acre farm with a three roomed house did not help.

The learned trial Magistrate therefore stated thus in her notes before sentence –

"I have considered the Probation Officer's report. Accused is a jail bird and even a previous attempt to rehabilitate him under probation have failed. The offence he committed is serious and calls for custodial sentence".

The learned Trial Magistrate proceeded to sentence the appellant to 3 years imprisonment on each limb of the two counts, which were concurrent in each count but consecutive between the two counts on which he was convicted, making a total of 6 years imprisonment.

Having considered that circumstances of the offence in which the appellant broke twice into the house of his father and stole therefrom even after his father had earlier tried to rehabilitate him in vain, his antecedents per the Probation Officer's report, and the maximum sentences for the offences, it is my finding that the Learned Trial Magistrate exercised her discretion properly. I find nothing to indicate that the Learned Trial Magistrate erred or applied a wrong principle in sentencing. I therefore find no basis for interfering with the Learned trial Magistrate's discretion in sentencing. The sentence is neither harsh nor excessive.

For the above reasons, I find no merits in the appeal against sentence. I dismiss the appeal and uphold the sentence of the learned trial Magistrate.

Dated and delivered at Nairobi this 25th day of June, 2007.

George Dulu

Judge

In the presence of –

Appellant

Mrs. Gakobo for State - absent

Eric – Court Clerk