

REPUBLIC OF KENYA

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

Criminal Appeal 278 of 2006

GEORGE WANG'OMBE WAMARITEAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From conviction and sentence in criminal case No. 636 of 2006 of the Principal Magistrate's Court at Kikuyu – Mrs. Murage PM)

JUDGMENT

GEORGE WANG'OMBE WAMARITE, the appellant, was charged in the subordinate court with breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. The particulars of the offence were that on the night of 16th/17th May 2006, at Ondiri village, in Kiambu District within Central Province broke and entered a building namely a store and therein did steal a water pump, water pump gear and two mortars all of a total value of Kshs. 370,000/= the property of OLIVER KIMANI KARANJA. When the charge was read to him, the appellant was recorded as having pleaded guilty. He was convicted and sentenced to serve five (5) years imprisonment. Being aggrieved, he has appealed to this court against the sentence imposed. At the hearing of the appeal, the appellant relied on his grounds of appeal.

Learned State Counsel, Mr. Makura, opposed the appeal. Counsel submitted that the appellant was sentence to 5 years imprisonment, while the maximum sentence for the offence was life imprisonment. In counsel's contention, the magistrate exercised her discretion in sentencing properly as the items stolen had a value of more than Kshs.300,000/=.

This is an appeal on sentence. Sentencing is essentially the discretion of the 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 that it failed to take into account an irrelevant factor, or it applied a wrong principle or short of these the sentence is so harsh and excessive that an error of principle must be inferred – see **SHADRACK KIPROTICH KOGO –vs- REPUBLIC** – Criminal Appeal No. 253 of 2003 (CA).

Indeed, the maximum sentence for the offence is seven (7) years imprisonment. The learned magistrate sentenced the appellant to serve 5 years imprisonment. The sentence is legal. However, the learned magistrate did not record that she took into account any mitigating factors in sentencing. The magistrate did not record that she took into account the fact that the appellant pleaded guilty to the charge and did not waste the courts time. She also did not take into account what the appellant said in his plea in mitigation. Though the appellant was not a first offender, the previous offence was for possession of bhang, and had nothing to do with housebreaking or theft. In my view, had the learned magistrate taken into account the above relevant factors, she would have passed a more lenient sentence than the sentence of 5 years imprisonment. On that account, I will interfere with the sentence imposed.

Consequently, I allow the appeal on sentence. I set aside the sentence imposed by the learned magistrate. In its place, I order that the appellant will serve three (3) years imprisonment from the date when he was sentenced by the subordinate court.

It is so ordered.

Dated and delivered at Nairobi this 29th day of October 2007.

George Dulu

Judge

In the presence of –

Appellant in person

Mr. Makura for State - absent

Eric - court clerk