

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 229 of 2006

(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in Criminal Case No. 208 of 2006 H. M. Nyaberi [P.M].

JACOB NDERITU MUTURI..... ..APPELLANT

VERSUS

REPUBLIC..... ..RESPONDENT

JUDGMENT

The appellant, Jacob Nderitu Muturi was charged with two counts. The 1st count was Breaking into a building and committing a felony contrary to Section 306 as read with Section 279(b) of the Penal Code. The particulars of the offence were that on diverse dates between the 21st and 23rd November 2005 at Kasuku village in Nyandarua District, the appellant broke into a dwelling house of Hannah Wanjiku and committed therein a felony namely, stealing, by stealing a solar panel valued at Ksh.3,500/= and cash Ksh.3000/= the property of the said Hannah Wanjiku. The appellant was also charged with the offence of **Assault causing actual bodily harm contrary to Section 251 of the Penal Code**. The particulars of the offence were that on the 3rd January 2006 at Kasuku village in Nyandarua District, the appellant unlawfully assaulted Hannah Wanjiku thereby occasioning her actual bodily harm. The appellant pleaded not guilty to the charge when he was arraigned before the trial magistrate's court. After full trial, the appellant was convicted as charged and sentenced to serve five years imprisonment on the 1st count and two years imprisonment on the 2nd count. The sentences were ordered to run consecutively. The appellant was aggrieved by the sentence and has appealed to this court.

In his petition of appeal, the appellant stated that the trial magistrate had failed to consider his mitigation before he sentenced him to serve the custodial sentence and which was ordered to run concurrently instead of consecutively. During the hearing of the appeal, the appellant pleaded with the court to order the consolidation of the two sentences. He pleaded with the court to exercise leniency on him because he had suffered while in prison. He told the court that he was asthmatic and could not get proper treatment while in prison. He urged the court to consider his plea and reduce the sentence. Mr. Mugambi for the State left the issue of sentence to the discretion of the court.

I have considered the plea by the appellant for reduction of sentence. Mr. Mugambi for the State left the issue of reduction of sentence pleaded by the appellant at the discretion of the court. The Court of Appeal in **Samuel Githua Njoroge vs Republic CA Criminal Appeal No.53 of 2006 (Nakuru) (Unreported)** held at page 2 as follows;

“The principles upon which an appellate court can interfere with the discretion of a trial [Magistrate] as regards sentence are well settled. The appellate court can only interfere where the trial [Magistrate] in assessing the sentence has acted on wrong principles or imposed a sentence which is manifestly inadequate or manifestly excessive. (See Diego vs Republic [1985] KLR 621).”

In the present appeal, the appellant was convicted of two counts of house breaking and burglary and that of assault. The appellant was sentenced to serve two custodial sentences consecutively. He has pleaded with the court to consolidate the said sentences. He has submitted that he was an asthmatic who has

suffered in prison due to the unavailability of drugs. He told the court he was remorseful and urged the court to exercise leniency on him. I have considered the plea of leniency by the appellant. From the record of the subordinate court, the appellant is not a first offender. He was previously convicted in **Nyahururu SRMC Criminal Case No.248 of 2001** for a similar offence of breaking and stealing. After the appellant was released from prison, he went back and committed the same offence. It is evident that the appellant cannot reform. His place appears to be in prison where he cannot commit another such crime.

Having considered his plea for reduction of sentence, in light of his past record, this court is not inclined to interfere with the sentence of the trial magistrate. The appellant appears to be a person who will not reform. He shall serve his sentence as ordered by the trial magistrate. His appeal against sentence is hereby dismissed and the conviction and sentence of the trial magistrate confirmed.

DATED at NAKURU this 15th day of November 2007

L. KIMARU

JUDGE