REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Criminal Appeal 263 of 2003

(Appeal against both conviction and sentence of the Senior Resident Magistrate's court at Vihiga in Criminal Case No.1880 of 2003 (F. M. KINYANJUI ESQ, SRM)

ISAYA KEFA MWINAMU …….. APPELLANT

V E R S U S

REPUBLIC …….. RESPONDENT

J U D G E M E N T

ISAIAH KEFA MWINAMU, the appellant, was sentenced to 4 years imprisonment on the first limp and 6 years imprisonment on the second limp of the offence of housebreaking contrary to section 304(1) and stealing contrary to Section 279 (b) of the Penal Code to which he pleaded guilty and was convicted on 2.12.03 in Criminal Case No.1880/03 before the Senior Resident Magistrate, F. M. Kinyanjui Esq., at Vihiga.

In his Petition of Appeal, the Appellant merely put forward mitigation and submitted that the sentence was manifestly harsh and excessive.

Mrs. Kithaka, Principal State Counsel, expressed the view that the sentence was excessive considering that the appellant was a first offender who had stolen only foodstuffs which were recovered and returned to the complainant.

The appellant had broken and entered the dwelling house of Benjamin Kiriga, the complainant, with intent to steal and did steal the items enumerated in the charge sheet all valued at Shs.2,793/=, the property of the said Benjamin Kiriga. When he was told to mitigate after his conviction, he sought leniency. I have given due consideration to the Petition of Appeal and the submission of the Respondent through the Principal State Counsel, Mrs. Kithaka.

The trial court took into account the fact that the appellant had pleaded guilty and was a first offender. The court observed that the offence was rampant and hence a severe sentence was called for.

For me to interfere with the discretion exercised by the trial court in sentencing, there must be a legal basis. If the sentence appears manifestly excessive having regard to the offence and the circumstances attendant to it, or if the court acted on the wrong principle in sentencing, or took irrelevant considerations into account or failed to take mitigation into account, or failed to indicate why a severe sentence was imposed or failed to require the accused to mitigate and sentenced without any mitigation or failed to indicate the circumstances that the court took into account in meting out the sentence, there will be a basis for interfering with the trial court discretion.

In the circumstances of this case, the trial magistrate did not have regard to the amplitude of the circumstances attendant to the commission of the offence besides the fact of the appellant having pleaded guilty and being a first offender. He did not consider for instance the value of the items stolen and the fact that they were recovered and returned to the complainant. If he had, perhaps the sentence meted out would have been less harsh. The Prosecutor had not sought a severe sentence but the trial magistrate appears to have taken judicial notice that the offence was rampant. There was nothing wrong with this. Being the magistrate at Vihiga, he was entitled to take cognizance of such fact.

It is my considered view that the sentence was a tad too excessive and I accordingly reduce it to four years on the 2nd limp of the offence so that the appellant will now serve on each of the two limps imprisonment for four years, both to run concurrently. It is so ordered.

Dated at Kakamega this 14th day of July, 2005.

G. B. M. KARIUKI

J U D G E