REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 78 OF 2005

(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in Criminal Case No. 656 of 2004 – R. K. Kirui SRM)

HARRISON WANGANGA KAMITI……..……APPELLANT

VERSUS

REPUBLIC……...…....…….…….RESPONDENT

JUDGMENT

The appellant, Harrison Wanganga Kamiti, was charged with offence of stealing contrary to **Section 275 of the Penal Code.** The particulars of the offence were that on the 25th of February 2004 at Rironi Farm, Molo in Nakuru District, the appellant jointly with others not before court, stole two tonnes of pine timber and offcuts valued at Kshs 22,000/=, the property of John Mureithi Njora. He was alternatively charged with the offence of having suspected stolen property contrary to Section **323(1) of the Penal Code**. The particulars of the offence were that on the same day and in the same place other than in the course of stealing, the appellant dishonestly handled two tonnes of pine timber and offcuts valued at Kshs 22,000/= knowing or having reason to believe it was stolen property. The appellant pleaded not guilty to the charge and after a full trial he was found guilty of the main charge and sentence to serve fifteen months imprisonment. The appellant was aggrieved by his conviction and sentence and has appealed to this court against the said conviction and sentence.

In his petition of appeal the appellant raised six grounds of appeal which may be summarized as hereunder: The appellant was aggrieved that he had been convicted on the charge of theft based on insufficient evidence; He faulted the trial magistrate for convicting him after finding that the evidence he had adduced in his defence corroborated the evidence of the prosecution; He was aggrieved that the trial magistrate had not considered his mitigation and especially his health and age before sentencing him to serve a custodial sentence which in his view was harsh and excessive. The appellant pleaded with the court to sentence him to serve a sentence under the **Community Services Order Act.**

At the hearing of the appeal, I heard the submission made by Mrs Mbeche, Learned Counsel for the appellant and Mr Koech on behalf of the State. Before I consider the said submissions, it is imperative that I set out the facts of this case, albeit briefly. The complainant John Mureithi Njora (PW1) testified that on the material time, he had hired the premises of the appellant to saw timber. He was able to split several tonnes of timber. He left the timber at the said premises of the appellant. On the 25th of February 2004, he hired a lorry with a view to transporting the said timber from the appellants premises to his timber yard at Molo township. When he reached the said premises he discovered that some timber and offcuts had been taken away. The watchman who had been hired to guard the said timber was missing. PW1 went to the house of the appellant. He found some timber in the house of the appellant. Some timber were hidden in his farm while others were hidden on the ceiling of his house. The daughters of the appellant informed the complainant that they had earlier been instructed to carry the timber and offcuts to their home from the premises hired to the complainant by the appellant.

The complainant made the report to the police. The police came to the scene and took photographs of the stolen timber. When the appellant later went to collect the timber from the house of the appellant, he found the timber missing. He was not able to trace the said timber. PW1 was emphatic that all the timber that were found in the said premises belonged to him and not to the appellant. PW2 David Ngugi, an employee of PW1 testified that on the 24th of February 2004, he gave pieces of

firewood to the appellant after he had requested for the same. He was categorical that he did not give any timber to the appellant. PW3 Josephat Karangu Wachira corroborated the evidence of PW1. He testified that when they went to the premises where they had left the timber with view to collecting them, they found the timber missing. When they later went to the house of the appellant they were able to trace thirty-three pieces of timber. The police were summoned. They took the photographs of the timber. When they later went to collect the timber they were unable to trace the same because the appellant had by that time transferred the timber elsewhere. The prosecution was forced to close its case after they failed to avail other witnesses.

The appellant was however put on his defence. He gave sworn testimony. He denied stealing the timber in question. It was his testimony that he had instructed his children to collect firewood from the place that the complainant had sawn timber. He stated that the said firewood had been abandoned by the complainant. He further testified that the photographs of the timber that were allegedly stolen from the complainant and found in his house, were taken when he was already in police custody. He was emphatic that the timber which were found in his homestead belonged to him and not the complainant.

The appellant called one witness, Beth Muthoni, his daughter. She testified that on the 25th of February 2004 while she was at home the police came and arrested her with her sister. They were taken to the Mau Summit Police Station on suspicion that they had stolen the timber from the complainant. They were detained for a day and released the following day. Their father, the appellant was however arrested instead. DW2 denied that she stole the timber. She further denied that her father stole the timber belonging to the complainant.

This being a first appeal, this court is mandated to re-evaluate and re-examine the evidence adduced before the trial magistrate afresh so as to reach its own independent decision whether or not to uphold the conviction of the appellant. In reaching its decision this court is required to put into consideration the fact that it neither saw nor heard the witnesses as they testified (**See Njoroge –versus- Republic [1987]1KLR 19).** In the instant appeal, the prosecution adduced evidence which placed the timber in the house of the appellant. According to PW1 and PW3 the thirty three pieces of timber were found in the homestead of the appellant. Some were hidden on the ceiling of his house whilst the others were hidden in his farm. The ones hidden in the appellants farm were covered with grass. The complainant went and reported the matter to the police. The police photographer went to the scene and was able to photograph the said timber. However when the complainant went to collect the timber he was unable to find the same. The timber had been transferred to an unknown place by the appellant. Upto the time of the trial, the complainant was not able to recover the said timber.

PW2 testified that he gave some firewood to the appellant when he made a request for the same. He was however was emphatic that he did not give any timber to the appellant. When he was put on his defence, the appellant denied that he had stolen the timber belonging to the complainant. It was his testimony that the timber which was found in his homestead and photographed by the police belonged to him. It was his defence that the timber which was found in his homestead were of a different type than the timber which belonged to the complainant.

The issue for determination by this court, is whether on the evidence on record, the prosecution established beyond any reasonable doubt that it was the appellant who stole the timber belonging to the complainant. The prosecution was required to prove that the appellant, fraudulently and without any claim of right took the property of the complainant with an intention of converting to his own use the said timber or permanently depriving the complainant of the same. Having re-evaluated the evidence adduced in the lower court and also considered the submissions made before me by the parties to this appeal, there is no doubt that the prosecution proved the case of theft against the appellant. The prosecution proved that the appellant, with the intention of fraudulently converting to his own use and in the process permanently depriving the complainant of his timber, took the timber from where the complainant had kept them. The complainant was able to trace the stolen timber to the house of the appellant. The timber was found hidden on his ceiling and also in his farm. If the evidence of the appellant to the effect that the timber belonged to him were to be believed, why did the appellant deem it necessary to hide or conceal the pieces of timber which are his? Secondly, why did the appellant take

upon himself the decision to transfer the timber from his house and from his farm after the said timber had been photographed by the police? The appellant was aware at the time that the timber was subject to police investigation. Why didn't the appellant avail the timber to the police so that he could establish his ownership of the same? The answers to the above questions are clear. The appellant did not have any means of proving that the timber in question belonged to him.

In actual fact, the appellants conduct clearly shows that he was aware that the timber belonged to the complainant. However, he mistakenly thought that the theft case against him would not be proved in the absence of the stolen timber being produced in evidence as exhibits. In this case, I hold that without the production of the exhibits, the prosecution proved that the appellant stole the timber from the complainant. The appellant's conduct after the discovery of the timber at his homestead clearly point to the fact that he stole the timber from the complainant. For the reasons stated above, I find no merit whatsoever in the appeal filed by the appellant challenging his conviction. His appeal against conviction is consequently dismissed.

On sentence, I agree with the appellant that the custodial sentence meted out on him was harsh and excessive. Considering the fact that the value of the stolen items were Kshs 22,000/=, the sentence of fifteen months imprisonment imposed by the trial magistrate was not merited. I noted that the appellant was a first offender. He is a man of advanced age. I have also considered that he has served five months of the imprisonment term imposed by the trial magistrate. In the circumstances of this case, I will set aside the sentence imposed by the trial magistrate and substitute it with an appropriate sentence of this court commuting the sentence of the appellant to the period already served. In my considered view the appellant has sufficiently been punished. He is consequently ordered set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 12th day of October 2005.

L. KIMARU

JUDGE