



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**CRIMINAL APPEAL NO 70 OF 2019**

**EVANS CHEBII.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original sentence of Hon P.C. Biwott, SPM, dated 4<sup>th</sup> December 2019***

***in Criminal Case No 801 of 2019 in the Senior Principal Magistrate's Court***

***at Kabarnet, Republic v Evans Chebii***

**JUDGMENT**

In his petition to this court the appellant has appealed against his sentence of three years' imprisonment in respect of the offence of stealing contrary to section 268 of the Penal Code (Cap 63) Laws of Kenya.

In his mitigation in this court, the appellant has submitted as follows. He is a first offender and he pleaded guilty. He is the bread winner of his family which consists of his wife and two children. The children are staying with his old grandmother, who cannot provide for them.

The appellant has urged the court to impose a sentence of a reasonable fine, so that he can go home to take care of his family. He has in the alternative prayed for a non-custodial sentence.

The has also stated that he is remorseful and has promised to stop drinking alcohol and be a good citizen.

Mr. Mong'are, counsel for the respondent left the matter of sentence to the court to decide.

In sentencing the appellant, the trial court took into account that he was a first offender and that he was remorseful. The court then proceeded to sentence the appellant to three years' imprisonment.

In addition to the foregoing, the court ordered the recovered bag of the victim returned to him.

This is a first appeal and I am required as a first appeal court to independently re-assess the issue of sentence and make my own findings. I have done so. As a result, I find that the trial court did not consider the period the appellant had been in custody from 26/10/2019 to 4/12/2019, which translates to a period of slightly one month. He was mandatorily required to take that pre-trial custody period into account by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya. In this regard, the trial court failed to do so.

In addition to the foregoing, the trial court also failed to take into account that the stolen bag of the victim had been recovered.

Due to these errors of law, this court is entitled to interfere with the sentencing discretion of the trial court in that regard.

I find that the appellant has now been in custody for over one year.

It is important to point out that the trial court should not have ordered for the release of the exhibit produced before it until the period allowed for appeal has expired. In ordering for the release of recovered bag to the complainant before the expiry of the appeal period the trial court committed an error of law. The reason for this is that in the event the appeal is allowed on account of being defective, a re-trial may not be

ordered. Additionally, the exhibits may be connected with the issues that are raised in the first appeal court that require the physical viewing of those exhibits. The absence of those exhibits may impede the hearing and determination of the appeal.

I find that the interests of justice have been served for the period the appellant has been in custody.

In the premises, the appellant's appeal succeeds with the result that he ordered set free unless he is held on other lawful warrants.

Judgment dated, signed and delivered in open court at Kabarnet this 9<sup>th</sup> day of February 2021.

**J M BWONWONG'A**

**JUDGE**

**In the presence of:**

Mr. Kemboi Court Assistant.

Appellant present in person.

Mr. Mong'are for the Respondent.