



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 40 OF 2019**

**RICHARD KELVIN WAFULA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal case No.2126 of 2018 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi- Senior Resident Magistrate)*

**JUDGMENT**

1. **Richard Kelvin Wafula**, the appellant herein, was convicted of an offence of stealing contrary to section 268 (1) as read with section of 275 of the Penal Code.
2. The particulars were that on the of 9<sup>th</sup> & 10<sup>th</sup> October 2018 at Busia County Referral Hospital, Renal Unit within Busia county, jointly with others already before court stole two visual patient monitors valued at Kshs. 900,000/=the property of the Government of Kenya.
3. The appellant pleaded guilty to the offence and was sentenced to serve four years imprisonment.
4. He has appealed against the sentence.
5. The appeal was opposed by the state through Mr. Gacharia, learned counsel who however partially conceded that the sentence was more than what is prescribed.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. In the case of **Nelson vs Republic [1970] E.A. 599** the court of Appeal stated that an appellate court can only interfere with the sentence of the trial court upon being satisfied of the existence of certain circumstances. This is what the court said:

**The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewcity (1912) C.CA 28 T.LR 364.**

In the instant case, the appellant pleaded guilty. Though he did not have any record of previous convictions, the offence was aggravated by the fact that to dismember a renal machine may spell death to patients. I will therefore only interfere in the sentence as far as its illegality is concerned.

8. Section 275 Of the Penal code provides:

**Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.**

9. A sentence of four years meted to the appellant was therefore illegal. I accordingly set aside the sentence of four years and substitute it with a sentence of three years' imprisonment to run from the date he was sentenced by the trial court. His appeal succeeds to that extent only.

**DELIVERED and SIGNED at BUSIA this 20<sup>th</sup> Day of February, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**