



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 152 OF 2019**

**ERICK MUTISO WAIRIMU.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence by Hon. Otiemo J (RM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 134 of 2019 delivered on 3<sup>rd</sup> September, 2019).*

**JUDGMENT**

1. **Erick Mutiso Wairimu** the Appellant was charged with the offence of **House Breaking** contrary to section 304(1) and stealing contrary to section 279(b) of the Penal Code. The particulars were that the Appellant on the 13<sup>th</sup> day of March 2019 at about 10:00 am at Mwanzo estate, Makueni sub-county of Makueni county broke and entered a dwelling house of Benjamin Muloki Mutua and did steal from therein Ksh.20,000/= the property of **Benjamin Muloki Mutua**.
2. He denied the charge and the matter proceeded to hearing. However after two witnesses (Pw1 and Pw2) testified the Appellant opted to change plea.
3. The charge was read to him afresh and he pleaded guilty. The facts were read out by the prosecutor and the appellant confirmed them to be correct. He was thereafter convicted.
4. The prosecutor indicated he was a first offender. A pre-sentence report was called for and received on 3<sup>rd</sup> September 2019.
5. The learned trial Magistrate found it unfavourable to the Appellant as he had been to a borstal institution before. She sentenced him to serve six (6) years imprisonment from 13<sup>th</sup> March 2019. In addition, she ordered him to compensate the complainant with Kshs.25,000/= or serve one (1) year in prison.
6. He filed this appeal against sentence only on the following grounds:
  - i. *He was a first offender.*
  - ii. *He is remorseful and repentant and promises not to repeat the mistake*
  - iii. *The court has power under section 165(7) of the Constitution to review the sentence.*
7. In his oral submissions he has asked the court to review and reduce the sentence for him.
8. Learned counsel for the Respondent Mr. James Kihara submits that the Appellant has sought for leniency from this court. He has no objection to the review of sentence as the Appellant was a student and may wish to pursue his studies.
9. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. See **Okeno –vs- Republic (1972) E.A 32; Simiyu and Another –vs- Republic (2005) I KLR 192**.
10. Its stated hereinabove that two witnesses had testified before the Appellant changed plea. The charge was read to him afresh and facts given and he admitted them. I am satisfied that the plea is unequivocal.
11. The only issue for determination is whether the sentence should be reviewed. Before sentence was passed the trial court called for a pre-sentence report which was filed. The report is a detailed one. It talks of two previous convictions but no case files were referred to. This

information contradicts what the prosecutor told the trial court that the Appellant was a first offender. The report also shows that it was the boy's mother's wish for him to be committed to a borstal institution.

It did not say he had been committed to a borstal institution and the reason for such committal.

12. At the time of his committal the Appellant was aged 20 years and is still young. The reports from the administration portray him as an untruthful person and a thief. He stole from his own friend which is the worst thing that he ever did. He has been in prison since his date of appearance in court which is the 13<sup>th</sup> March 2019, i.e. one year plus six months. I believe he has picked his lessons.

13. The offence he was charged with has two limbs. He was only given one sentence of six (6) years imprisonment which is an error. The trial court also ordered for compensation with a default prison sentence which is another error. **Section 175 Criminal Procedure Code** provides:

**(2) A court which –**

- a) Convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and
- b) Finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the "injured party")

May order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.

**(6)** An order under this section that has taken effect is enforceable in the same manner as a judgment in civil proceedings for the amount awarded by the order.

**(7)** An award by order under this section in respect of a civil liability is to the extent of the amount awarded, a defence in any subsequent proceedings instituted in respect of that liability.

14. An order for compensation under section 175 Criminal Procedure Code is only enforceable as a Judgment in civil proceedings. It means a decree must be applied for prior to enforcement. It is therefore erroneous for the court to give an order for compensation with a default prison term.

15. I have considered the Appellant's mitigation, sentence served pre-sentencing report, his age plus all other circumstances and find that the Appellant is a brilliant young man who allowed himself to be engaged in unproductive activities. He needs direction and mentorship.

16. I therefore confirm the conviction. The sentence is however set aside, and substituted with an order for the period already served. He is also warned against engagement in criminal activities.

Orders accordingly.

**Delivered, signed & dated this 1<sup>st</sup> day of October 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**