REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 18 OF 2018

BENJAMIN MUTUKU WAMBUA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal against the sentence by Hon. J.O Magori (SPM) in Makindu

in Criminal Case No. 528 of 2018 delivered on 30th May, 2018)

JUDGEMENT

1. The appellant herein was convicted on his own plea of guilty for two counts of the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code. He was subsequently sentenced to 5 years imprisonment for each count which is to run concurrently.

2. The appellant lodged this appeal against the sentence on the following grounds: -

1. That he is deeply remorseful, repentant and regret is action.

2. That, prior to his arrest and subsequent conviction he was a sole bread winner of his family, married to a house wife, bestowed with heavy responsibility of taking care of 3 school going children.

3. That he also pray for a non-custodial sentence or community-based sentence to give him a chance to provide for his young innocent dependents.

4. That, he has learned the value of patience and uprightness.

5. That he also pray for a non-custodial sentence or community based sentence.

6. That may this Honourable Court issue any other orders it deems fit in his circumstances of which he promise to abide by.

3. The appellant in sum sought that his appeal be allowed and his imprisonment sentence be substituted with non-custodial sentence or sentence reduced to time served.

4. The appellant filed his written submission dated 9th March, 2019 and filed on 11th March, 2019. He reiterated his grounds in the memorandum of appeal, adding that the sentence given was harsh and without an option of fine and that there was no probation report called for by the court for consideration together with his mitigation.

5. Further, the appellant submitted that he is a first offender and urged the court to evaluate the evidence before the trial court and pass its own judgment.

Issues and Analysis:

6. section 306(a) and 306(b) of the Penal Code provides as follows:-

"A person who -

a. Breaks and enters a school house, shop, warehouse, store, office, counting house, garage, pavilion, club, factory or workshop or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor or a building which is adjacent to a dwelling house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or

b. Breaks out of the same having committed any felony therein; is guilty of a felony and is liable to imprisonment for seven years".

7. The Court of Appeal in the case of ***Ogolla S/O Owuor vs Republic [1954] EACA 270***, pronounced itself on this issue as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R -v- Shershowsky (1912) CCA 28TLR 263)." See also **Omuse -v- R (supra) while in the case of Shadrack Kipkoech Kogo -vs- R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-**

> **sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (**see also **Sayeka –vs- R. (1989 KLR 306)."**

8. The appellant herein has been charged with two counts of the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code. He pleaded guilty to the said offences and was convicted.

9. The facts presented were that in respect to count one, the appellant broke and entered into a building belonging to one Phoebe Kyenze and stole clips cutting machines, 5 tables, 3 jikos, 20 plastic chairs, 50 cups, 30 plates, 2 thermos flasks, 40 spoons, 5 sufurias and 5 hot pots and on the second count he broke into Jamrock bar belonging to one Francis Ndinda and stole 10 crates of beer, 7 cartons of spirit, a Samsung TV and an Akira TV, a woofer with 4 speakers and 10 chairs.

10. The accused in his plea of guilty admitted to have committed the offence and indeed an inventory of the above items found with the accused was prepared. His mitigation is that he is remorseful and that he is a first offender.

Conclusion:

11. It is my finding that in view of the circumstances aforementioned and the fact the items were recovered, that the appellant is a first offender and that he is remorseful of his actions, a sentence of three (3) years would suffice and is reasonable. The court has also taken to account the fact that the appellant saved court time by pleading guilty. Therefore the appeal succeeds to that extent.

12. The court thus makes the following orders;

i. The sentence is set aside and its substituted with a sentence of 3 years for each count to run concurrently from the date accused was sentenced in the lower court.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

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C. KARIUKI

JUDGE