

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 91 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

JUSTO MWATHEE KIREMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.D. N. Ogoti, CM dated 14th August 2017 at the Chief Magistrate's Court at Maua in Criminal Case No. 1953 of 2017)

JUDGMENT

1. The appellant, **JUSTO MWATHEE KIREMA** was charged and convicted on his own plea of guilty for the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to **section 95 (1) (b)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* and also stealing contrary to **section 268** as read with **section 275** of the *Penal Code*.
2. The appellant was sentenced to 6 months' imprisonment on the first count and 3 years' imprisonment on the second count. The trial magistrate did not specify whether the sentences were to run concurrently or consecutively. Although he has appealed against conviction and sentence, at the hearing of the appeal the appellant told the court that he did not wish to proceed with the appeal.
3. I have considered the matter and I am constrained to intervene in the sentence on the second count as it is not only harsh but excessive. The maximum sentence for stealing under **section 275** of the *Penal Code* is 3 years' imprisonment. In the sentencing notes the trial magistrate agreed that the facts fitted the offence of robbery with violence contrary to **section 296 (2)** of the *Penal Code* hence the appellant was lucky and as such a stiff sentence warranted.
4. In this case though, the appellant was charged with stealing and he pleaded guilty. These were mitigating factors which the trial magistrate did not consider. Moreover, it is not proper to impose the maximum sentence on a first offender as was held in *Josephine Arissol v R [1957] EA 447* that, "*The general rule is that a maximum sentence should not be imposed on a first offender*".
5. I discount the maximum sentence by the fact that the appellant was a first offender and that he pleaded guilty and expressed remorse. However, like the trial magistrate, I find that the offence was aggravated as the appellant stole miraa by threatening the complainant with four men.
6. The sentence of three years' imprisonment is quashed and substituted with one of **two (2) years** imprisonment. As both counts relate to offences that were committed in the same transaction, both sentences shall run concurrently.

DATED and DELIVERED at MERU this 6th day of June 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.