

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 43 OF 2016

BENARD MAGARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. N. Wairimu – SRM dated 17th November, 2015 at the Senior Principal Magistrate’s Court at Ogembo in Criminal Case No. 1934 of 2015)

JUDGMENT

The appellant, BENARD MAGARA was charged and convicted on his own plea of guilty for the offence of stealing a motor cycle contrary to section 278A of the Penal Code (Chapter 63 of the Laws of Kenya). The particulars of the charge were that on 12th September 2015 at Mogonga Market, Kenyena Sub-County within Kisii County jointly with another before the Court, stole a motor cycle make Bajaj Boxer Registration No. KMDN 843A valued at Kshs. 100,000/= the property of MOSES MEMUSI MPUKAINE. He was sentenced to five years imprisonment and now appeals against conviction and sentence.

At the hearing of the appeal, the appellant abandoned the appeal on conviction and urged the Court to review the sentence.

Sentencing is a discretion of the trial court which the appellate court should not ordinarily interfere unless it is shown that the trial magistrate took into account irrelevant factors, or failed to consider relevant facts or erred in principle or on consideration of the case, the sentence was harsh and excessive (See *Wanjema v. Republic* {1971}EA 493).

Under section 278A of the Penal Code, the maximum sentence is seven years imprisonment. In the sentencing notes the trial magistrate did not set out the reasons or circumstances under which she arrived at the sentence of five years imprisonment.

I have seen a report from the Probation Officer that shows that the appellant was previously convicted and served a prison term. The report was not put to the appellant nor a certificate of conviction or record thereof produced. The report must have influenced the trial magistrate although the proceedings do not make reference to it.

Given that the appellant pleaded guilty, I find the sentence harsh and I accordingly reduce it to three (3) years imprisonment from the date of the sentence.

Dated and delivered at Kisii this 10th day of July 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.