



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO 92 OF 2017**

**BETWEEN:**

**REPUBLIC**

**and**

**FUJO KIPONDA KABWERE**

**JUDGMENT**

**(Being an Appeal from the Judgment of Hon. G. K. KIMANGA Resident Magistrate at PM's Court Taveta. CR. Case No 277 of 2017 delivered on 16<sup>th</sup> August 2017)**

1. The Court has before it an Appeal from the Judgment of G. K. Kimanga RM delivered in The Magistrate's Court in Taveta on 16<sup>th</sup> August 2017. The Petition of Appeal was filed together with a Notice of Motion Application for leave to appeal out of time. The Application does not provide any explanation as to why the appeal was not filed earlier. However, in a Supporting Affidavit to the grounds/submissions filed on 17<sup>th</sup> July 2018 he states he was not issued with certified copies of the Judgment within the 14 days.

2. The Petition of Appeal states "I the under mention do most humbly beg to leave to appeal against both the conviction and the sentence for an offence of shop breaking and handling stolen goods passed upon me by the chief/principal/senior resident/1<sup>st</sup> class/and 2<sup>nd</sup> class Magistrate PM's Taveta in Criminal Case no 277/017 dated 16/8/17. I plead not guilty. I am a poor man and have no money for appeal.

3. The Appellant was granted leave to file his Appeal out of time by Hon. J. Kamau J on 27<sup>th</sup> February 2017. It was admitted for hearing on the same day. The Appellants Grounds/Submissions were filed on 17<sup>th</sup> July 2018 and the Respondent (the State) filed Written Submissions on 1<sup>st</sup> October 2018 when a date for judgment was given.

4. In brief the Appellant feels that the Learned Trial Magistrate in Taveta did not consider his mitigation or give it due weight. He is asking the Court to re-consider his mitigation. The statement setting out his mitigation was also filed on 17<sup>th</sup> July 2018. It states;

1. *"That I beg lenience of this hon. Court to grant me relief due to my heavy burden of serving seven years in prison in a charge of shop braking c/s 306 and being in possession of stolen goods c/5 322 (1) (2) of penal code for:*

a) *I pleaded with the trial court urging it to note that I was the sole bread winner of my young family with solely depended on my for its survival*

b) *That my stay in prison has greatly teach me a lesson and I promise to live an exemplary life if given a second chance*

2. *That I am a first offender and I learned my mistake even before imprisonment and that's why I changed my please so that I could be punished for my wrong deeds*

3. *That I beg this hon. Court to grant me a lienency sentence for I promise that I will not longer engage in any crime activity."*

5. It is clear from the above that the Appellant is appealing against his sentence only. He recognises that he pleaded guilty and is now asking for leniency. For the avoidance of doubt, the Appellant pleaded guilty. He was charged with two counts on the charge sheet. The first count was "Shop breaking and committing a felony contrary to **Section 306 (a)** of the **Penal Code**. The particulars of the offence were that on the night of ....29 – 30<sup>th</sup> April 2017 he broke into and entered a shop known as Lemu Communication Shop and committed there a felony namely theft of mobile phones, credit cards and mobile phone accessories having a value of Kshs480,000, the property of Mary Wanjiku Wangotho. The Second Count was handling stolen goods contrary to **Section 322 (1) (2)** of the **Penal Code**. The particulars are

that on 10<sup>th</sup> July 2017 at Taveta township, otherwise than in the course of stealing, he dishonestly received or retained one mobile phone.

6. Briefly the evidence before the Court was that Lemu Communication shop was broken into and around 13 mobile phones and accessories were stolen. A fortnight later the Accused was arrested with one of those phones. The phone was identified from its imei number which is a unique number by which every handset is identified. The phone was tracked and it led the police to the Appellant who was arrested. When the Appellant was first arraigned on 11<sup>th</sup> July 2017 he pleaded not guilty. However, his wife attended Court for the arraignment and after being questioned by the police she led them to 12 other phones concealed in the Appellant's home. It was after that discovery that he changed his plea to guilty. The Record of Proceedings shows that both counts were read to him and he pleaded guilty to both. In the circumstances, no Appeal lies from a conviction based on a plea of guilty (**Section 348 of the Criminal Procedure Code**).

7. Moving on to the sentence. The Prosecutor in the Trial Court submitted "The fact that the accused and complainant were neighbours. It is a bond and appropriate sentence needed. His mitigation is negated since he visits all these atrocities on his neighbour. Shop/home breaking cases are rampant in Taveta. We submit that sentence be done to send a strong message on deterrence. We urge maximum/serious sentence for the offender.....". That Prosecutor was a D.O. Omondi. The Trial Magistrate sentenced the Appellant to the maximum term of 7 years.

8. The Written Submissions on behalf of the State now argue that sentence is excessive. To that extent the Appeal is conceded. However there is no submission as to what would be an appropriate sentence. Section 306 of the Penal Code provides "any person who breaks and enters a school-house, shop, warehouse, store, office.... or any building or part of a building which is licensed for the sale of intoxicating liquor or a building which is adjacent to a dwelling house and occupied with it... and commits a felony therein is guilty of a felony and is liable to imprisonment for 7 years.

9. It is argued that the phrase 'liable to imprisonment' suggest that such sentence may be applied but it not mandatory. In the circumstances, the Court has a discretion. That argument must be right. In order to be just a sentence must fit the crime and therefore a single term for all offences under Section 306 could not be the appropriate interpretation.

10. The record of proceedings shows that the Trial Magistrate simply adopted that term. He did not provide any reasons for why and how he exercised his discretion. He states "records and mitigation considered". In fact the Appellant was a first offender and so there was no record to be considered. In the circumstances, it is clear that the trial magistrate did not exercise his discretion in a proper and judicious manner. Therefore, the jurisdiction of this Court engages. The Written Submissions on behalf of the State rely on one authority to wit **Joseph Muriithi Nyaga & 2 others v R (2013)KLR** putting forward the proposition that the correct sentence is five years. That authority does not take into account the fact that the Appellant sought to conceal and benefit from the proceeds of his crime until they were discovered.

11. It is therefore ordered as follows: Appeal against conviction dismissed. Appeal against sentence allowed. This Court will sentence the Appellant after a probation report has been prepared.

12. It is therefore Ordered that the National Probation Service do appoint an appropriate officer to conduct the appropriate inquiries and file a probation report on the Appellant within 28 days. Such report shall include a victim impact assessment together with a report on the prevalence of such crimes in Taveta.

Order accordingly.

**FARAH S. M. AMIN**

**JUDGE**

**Dated 1<sup>st</sup> November 2018**

**Signed Dated and Delivered on this the 20<sup>th</sup> day of November 2018.**

In the presence of:-

Court assistant – Simon Tshelo

Appellant: in person

Respondent: Ms Anyumba