

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. 317 OF 2018

NOAH KIPSANG KEMBOI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

[1] The Applicant herein, **Noah Kipsang Kemboi**, was charged before the lower court with two counts of Having Suspected Stolen Property contrary to **Section 323** of the **Penal Code, Chapter 63** of the **Laws of Kenya** and Possession of Public Stores contrary to **Section 324(2)** as read with **Section 36** of the **Penal Code**. He denied those charges and was taken through the trial process at the conclusion of which, the lower court found the Applicant guilty and convicted him on both counts. He was consequently sentenced to 18 months imprisonment on each count with an order that the terms would go concurrently.

[2] By his letter dated **24 May 2018** he applied for revision of the lower court proceedings and sentence pursuant to **Sections 362, 364 and 365** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. He accordingly asked the Court to call for and examine the lower court proceedings, Judgment and Sentence for purposes of satisfying itself as to the correctness, legality and regularity thereof with a view of ascertaining the following:

[a] Whether the omission to impose a fine was an oversight which ought to be corrected in the interest of justice;

[b] Whether the Applicant was entitled to a non-custodial sentence granted the nature of the offences;

[c] Whether or not it can be said that a fair hearing was undertaken.

[3] I have carefully gone through the lower court record and it cannot be faulted in terms of plea-taking and the conduct of the proceedings. It is also manifest that in her Judgment the Learned Trial Magistrate adhered to the provisions of **Section 169** of the **Criminal Procedure Code** by setting out the Charges and the particulars in support thereof, the brief facts of the case, the issues for determination and the applicable law. She then analyzed the evidence in the light of the applicable law and in that analysis, she gave consideration to the Applicant's defence. In the end, she found the Prosecution Case believable and gave reasons for that conclusion, hence the conviction and sentence.

[4] The offences with which the Applicant was charged are both misdemeanours with no special penalty. Accordingly, since **Section 36** of the **Penal Code**, which gives the general punishment for misdemeanours where no punishment is specially provided for provides for a term not exceeding two years, or a fine, or both; it was in the discretion of the Learned Trial Magistrate to impose the sentence that she opted for, noting that the Applicant's mitigation was taken into consideration as well.

[5] It is trite law that an appellate court does not alter sentence unless certain key principles, clearly spelt out in the case of ***Ogalo s/o Owuora vs. Republic [1954] 21 EACA 270***, exist. In the stated case the court held:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v Republic [1950] 18 EACA 147*, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that he sentence is manifestly excessive in view of the circumstances of the case.”

[6] In the result, having reviewed the proceedings and judgment of the lower court I am satisfied as to the legality, propriety and regularity thereof. I would accordingly dismiss the application for review filed herein by **Noah Kipsang Kemboi** on **24 May 2018**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF DECEMBER, 2018

OLGA SEWE

JUDGE