REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 10 OF 2015

SULEIMAN LUBAWA……..……...……...…APPELLANT

VERSUS

REPUBLIC……..……....……RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. P. O. Ooko Ag. PM in Criminal Case No. 930 of 2013, delivered on 22nd September 2014 at the Principal Magistrate's Court at Mavoko)

JUDGMENT

The Appellant was one of two accused persons in the trial Court and was charged and convicted of burglary contrary to section 304(2) of the Penal Code and stealing contrary to section 279 (b) of the Penal Code. He was sentenced to serve five (5) years imprisonment for the offence of burglary and seven (7) years imprisonment for the offence of stealing, and the sentences were to run concurrently.

The Appellant has now preferred this appeal against the sentence only, as stated in the Amended Grounds of Appeal and submissions he availed to the Court, wherein he states that he is a first offender and an orphan, has been reformed and rehabilitated while in prison, and that he has been in custody since 2013. He asked that his sentence be reduced to term served.

The Respondent opposed the appeal in written submissions dated 22nd August 2016 filed by Rita Rono, the learned Prosecution counsel. She stated therein that section 304 (2) of the Penal Code stipulates a maximum of seven years imprisonment for burglary, whereas section 279(b) of the Penal Code stipulates a maximum sentence of fourteen (14) years imprisonment. Therefore that the sentences passed against the Appellant were lawful, fair and lenient.

I have considered the Appellant's mitigation and the arguments by the Prosecution, and find that the issues for determination by the court are whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute, and whether the said sentence is amenable to reduction and /or variation.

Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-

> **" In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence".**

The principles upon which an appellate Court will act in exercising its discretion to review or alter a

sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated 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)."**

In the instant appeal, the Appellant was charged with, and convicted of the offence of burglary contrary to section 304(2) of the Penal Code, which provide as follows:

> **304. Housebreaking and burglary**
>
> **(1) Any person who—**
>
> **(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or**
>
> **(b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.**
>
> **(2) If the offence is committed in the night, it is termed burglary, and the offenderis liable to imprisonment for ten years.**

The sentence of 5 years imprisonment meted on the Appellant was therefore lawful to the extent that it is provided for by the said provisions of the Penal Code.

The second offence that the Appellant was convicted of was that of stealing contrary to section 279(b) of the Penal Code. Section 279 of the Penal Code provides as follows in this regard:

> **"279. Stealing from the person; stealing goods in transit, etc.**
>
> **If the theft is committed under any of the circumstances following, that is to say —**
>
> **(a) if the thing is stolen from the person of another;**
>
> **(b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;**
>
> **(c) if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;**
>
> **(d) if the thing stolen is attached to or forms part of a railway;**
>
> **(e) if the thing is stolen from a vessel which is in distress or wrecked or stranded;**
>
> **f) if the thing is stolen from a public office in which it is deposited or kept;**
>
> **(g) if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of a key or other instrument,**
>
> **the offender is liable to imprisonment for fourteen years."**

The sentence of seven years imprisonment for this offence is therefore lawful.

I also note that the Appellant has served about two and half years of his sentence. However, in light of the remorse shown by the Appellant and the fact that the trial record shows that he is a first offender, I reduce his sentence for the conviction of the charge of burglary contrary to section 304(2) of the Penal Code to time served, and reduce his sentence for the conviction of the charge of stealing contrary to section 304(2) of the Penal Code to five (5) years imprisonment. The sentences are to run concurrently and from the date of his conviction by the trial Court.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF FENRUARY 2017.

P. NYAMWEYA

JUDGE