



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 19 OF 2012

ELIJAH WAITHAKA MUNDIA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal against conviction and sentence from the judgment of the Hon. F.W.Macharia (PM) Othaya dated 02/02/ 2012 in Criminal Case No. 70 of 2011)

JUDGMENT

1. The Appellant, **Elijah Waithaka Mundia alias Top Talent**, was charged on the main count with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.
2. In the alternative, the appellant was charged with Handling Stolen goods contrary to **Section 322(1)(2)** of the **Penal Code**; that on the 11th day of February, 2011 at Ruringu Estate in Nyeri Town within Nyeri County, otherwise than in the course of stealing dishonestly assisted in the disposal of a mobile phone make LG-CE-01618 S/No.351951049547090 knowing or having reasons to believe it to be stolen goods.
3. The appellant was arrested and subsequently charged in court; was tried and convicted on the alternative charge and was sentenced to ten (10) years imprisonment.
4. Being aggrieved by the sentence, the Appellant filed a Petition of Appeal on conviction and sentence; and later abandoned the appeal on conviction and at the hearing hereof proceeded only on one ground of appeal that;
 - (i) The sentence was harsh and excessive:
5. When the appeal was heard the appellant appeared in person and Ms. Gicheha appeared for the State; the appellant and Prosecuting Counsel for the State made oral presentations;

APPELLANTS SUBMISSIONS

6. That the sentence was harsh and excessive and humbly urged the court to reduce his sentence;

RESPONDENTS SUBMISSIONS

- (i) In response Counsel submitted that offence carried a maximum sentence of 14 years; and the one imposed upon the appellant was for 10 years; which was a lenient sentence;

(ii) That the phone found in his possession had occasioned a loss of life due to a robbery; the trial court acquitted him on the main count of robbery with violence; as the appellant had given no reasonable explanation as to how he came into possession of the phone, the trial court thus drew an inference and found him guilty of handling stolen property;

(iii) Counsel prayed for the dismissal of the appeal and for the court to uphold the sentence.

ISSUES FOR DETERMINATION

8. After taking into consideration the submissions of both the Appellant and Respondent this court finds only one issue for determination; which is whether the sentence was harsh and excessive in the circumstances.

ANALYSIS

9. The appellant proceeded only with the appeal against sentence; that he was sentenced to serve a term of ten (10) years; which he contends is harsh and excessive;

10. The case of **Wanjema vs Rep [1971] EA 493** lays down the principles as to when an appellate court may interfere with a sentence imposed by a trial court. The principles to be taken into consideration by the appellate court are that it must satisfy itself that the trial court overlooked material factors; or took into account immaterial factors; or acted on a wrong principle; or in the circumstances of the case the sentence was harsh and excessive.

11. In this instance the trial court convicted the appellant after finding him guilty of the offence; before sentencing the appellant was called to mitigate and he prayed that the trial court consider his medical condition and prayed for a non-custodial sentence.

12. It is this courts considered view that the trial court did not overlook any material factor when passing sentence and took into consideration the circumstances of the case in that a life was lost in the process; that the sentence imposed was also to deter potential handlers of stolen goods;

13. It is also noted that the trial court did take into consideration the fact that the appellant was a first time offender; the sentence is as provided by the law and is found to be legal; the appellant has been incarcerated for a period of five (5) years which is half of the term imposed and this court opines that he has been sufficiently punished and therefore in exercise of this courts powers under Section 354 of the Criminal Procedure Code the sentence is hereby revised and commuted to term served.

FINDINGS & DETERMINATION

14. In the light of the forgoing this court finds the sentence imposed to be legal;

15. The sentence is hereby commuted to term served;

16. The appellant be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 16th day of March, 2017.

HON.A.MSHILA

JUDGE