

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. REVISION NO. 33 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD HERMAN OPIYO.....ACCUSED

(Arising from the Conviction and Sentence dated 29th June, 2015 in Limuru Criminal Case No. 519 of 2015 presided over by Hon. Ole Tanchu, Senior Resident Magistrate)

RULING ON REVISION

1. The Applicant was presented before the Senior Resident Magistrate, Limuru charged with a single count of House breaking contrary to section 304(1) and stealing contrary to section 279(b) of the Penal Code. The particulars were that the Applicant together with a co-accused, on 14/06/2015, at an unknown time at AIC Kijabe Hospital at a residential house in Kijabe location within Kiambu County, broke and entered a dwelling house of John Welton Fitzwater with the intent to steal and did steal from therein two computers of the make *Macbook Pro* all valued at Kshs. 400,000/= being the properties of the said John Welton Fitzwater. They also faced an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code.

2. At their first arraignment, the Applicant and his co-accused both pleaded guilty to the main charge. They persisted in their guilty plea after the facts were read. Consequently, the Learned Trial Magistrate convicted them on their own guilty plea. After listening to their mitigation, the Learned Trial Magistrate proceeded to sentence the Applicant to three years imprisonment.

3. The Applicant has approached this Court seeking for a revision of his sentence. He says that he has been in prison for two years already and that he reckons that that is enough punishment for his crime. He told the Court that he has done Grade 3 and 2 certification while in prison and that he is now reformed. He looks forward to starting a new life when he is released. Further, the Applicant says that he has a wife and children who depend on him. He thinks the sentence imposed on him was excessive since he is a first offender and he is remorseful. The Applicant further told the Court that he was depressed at the time he committed the offence and that he had lost a family member as well as his shop which was his only source of livelihood.

4. On his part, Mr. Ongira, the Prosecutor, opposed the application for revision. He argued that the offence is a serious one and carries a maximum penalty of fourteen years. Further, he argued, the value of the stolen goods was Kshs. 400,000/=. Mr. Ongira suggested that the Applicant's attitude betrayed an attitude of non-remorse and that the Applicant did not seem to realize that he had received a very lenient sentence given the maximum sentence for the offence he faced. Mr. Ongira argued that there was no basis for interfering with the Learned Magistrate's sentence.

5. *The circumstances upon which a reviewing court will interfere with a sentence lawfully imposed by a trial Court are circumscribed. It will only do so if it is evident that the trial Court acted on wrong principles or overlooked some material factor or the sentence is illegal or is manifestly excessive or lenient as to amount to a miscarriage of justice. Lastly, a reviewing Court can interfere with sentence a Trial Court has imposed a sentence that is demonstrably unfit in the given circumstances. It is not enough that the reviewing Court would have imposed a different sentence if it was sentencing in the first place. See: **Ogalo s/ o Owora vs. R [1954] 24 EACA 70.***

6. In this case, it cannot be said that the Learned Trial Magistrate failed to address himself to all relevant factors and it cannot be said that he acted on any wrong principles. The Learned Magistrate explicitly considered that the Applicant was a first offender and that the Applicant was remorseful. He found that imprisonment for three years was an appropriate sentence in the circumstances.

7. Given the amounts involved and the fact that the maximum sentence for the offence is fourteen (14) years, I am unable to say that the sentence was in anyway disproportionate or excessively harsh. It is also clear that the Learned Magistrate took into consideration all the factors before sentencing and did not consider any extraneous factors.

8. Consequently, I find no reason to review the sentence. The Application for revision is hereby declined. The sentence is affirmed and the Applicant shall serve the remaining part of his sentence.

9. Orders accordingly.

Dated and delivered at Kiambu this 20th day of July, 2017.

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JOEL NGUGI

JUDGE