



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 33 OF 2013
HILLARY KIPLAGAT KIPYEGO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case No. 588 of 2011 Republic v Hillary Kiplagat Kipyego in the Resident Magistrates Court at Eldoret by J. A. Owiti, Resident Magistrate dated 18th November 2011)

JUDGMENT

1. The appellant was convicted of stealing a motor cycle contrary to section 278A of the Penal Code. The particulars were that on 8th February 2011 at Langas Stage, Eldoret he stole motor cycle registration number KMCN 299P valued at Kshs 79,000 the property of Erick Oundu Omwanchi. The appellant was sentenced to *five years* imprisonment.
2. The *present* petition of appeal is on *sentence* only. The *original* petition of appeal was filed out of time on 24th May 2012 but with leave of the court. On 25th February 2016, the appellant prayed for leave to amend his grounds of appeal. Leave was granted under section 350 of the Criminal Procedure Code. At the hearing of the appeal, the appellant relied entirely on the submissions filed on 25th February 2015. For the avoidance of doubt, he confirmed that he was *no* longer challenging his conviction.
3. The appellant prays for *leniency*. He states that he is a first offender; that he is remorseful; that he has reformed; and, that he is the breadwinner for his family. He also states that he is suffering from chronic ulcers. A medical report dated 21st October 2015 from Uasin Gishu District Hospital is annexed. The appellant also pleads with the court to consider the time he spent in custody from 14th February 2011 to 18th November 2011. He undertook to the Court to be a law abiding citizen. In a synopsis, the entire appeal is a plea for *clemency*.
4. The appeal is contested by the State. The case for the State is that the sentence was well within the law. I was implored to dismiss the appeal.
5. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
6. Sentencing is at the discretion of the trial court. But power still reposes in an appellate court to review

the sentence if material factors were overlooked; or, the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559, *Simon Muge Kipketer v Republic* Eldoret, Criminal Appeal 25 of 2014 [2015] eKLR.

7. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may.....(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or..... ”

8. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

“The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. ...The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.”

9. The appellant is a *first* offender. From the record of the lower court the appellant tendered the following mitigation-

“I pray for leniency. I have two children and a wife. They depend on me. One of my children is diabetic. He solely relies on me”.

10. The learned trial Magistrate considered that the appellant was a first offender. He also took into account the mitigation offered. But he was of the opinion that a *deterrent* sentence was appropriate. He sentenced the appellant to *five years* imprisonment. The plea for mercy before this court must be looked at through those lenses.

11. Section 278A of the Penal Code provides for a sentence of up to *seven* years. True, the appellant had spent *ten* months in *custody*. Section 333 (2) of the Criminal Procedure Code requires the trial court, in sentencing, to take into consideration the time spent in custody. I would have been thus sympathetic had the lower court imposed the maximum sentence. That was not the case. The sentence meted out of *five years* was well within the law.

12. I have however considered that the appellant has peptic ulcer disease. The illness is confirmed by the report dated 21st October 2015 from the Medical Superintendent Uasin Gishu District Hospital. He has been under treatment since 2013. The appellant was jailed on 18th November 2011. He has served sentence for *four years and four months* now. He says he has learnt his lesson and will henceforth keep to the straight and narrow. I would accordingly temper justice with a little mercy in this case and *reduce* the sentence to the *time served*.

13. The upshot is that the appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 10th day of March 2016

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant (in person).

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court clerk.