



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 191 OF 2014**

**SILAS MWANGANGI NDII.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the judgment and sentence of Hon. L.A. Mumassabba SRM in Criminal Case No. 799 of 2014, delivered on 26<sup>th</sup> September 2014 at the Principal Magistrate's Court at Mavoko)**

**JUDGMENT**

The Appellant was charged in the original trial Court with the offence of breaking into a building and committing a felony contrary to section 306(a) as read together with section 306(b) of the Penal Code. The particulars of the offence were that on 26<sup>th</sup> June 2014 at Mlolongo township in Athi River District within Machakos County, the Appellant broke and entered into a building namely a shop, of Caroline Nkatha and committed therein a felony namely stealing of cash money Kshs 4,000, Safaricom airtime of Ksh 1,000/=, Airtel airtime of Kshs 100 and ¼ airtime of Kshs 80/= all valued at Kshs 5,180/= , the property of Caroline Nkatha.

The Appellant was first arraigned in the trial court on 30<sup>th</sup> June 2014 when he pleaded not guilty to the charge. When the matter came up for hearing on 19<sup>th</sup> and 24<sup>th</sup> September 2014 the Appellant indicated that he wanted to change his plea. The charge was read to him on 26<sup>th</sup> September 2014, and he pleaded guilty and confirmed the facts as narrated to him as being true. He was consequently convicted and sentenced to serve imprisonment for 3 years. The Appellant has now preferred this appeal against the sentence only.

The Appellant relied on grounds of mitigation dated 13<sup>th</sup> July 2016, wherein it was stated that he is currently suffering from epilepsy, and is always on medication. Further, that he is a first offender, is now reformed, and that he is a family man with a wife and children who depend on him for their welfare. He also attached a letter dated 11<sup>th</sup> July 2016 from the in-charge of Athi River Prison Dispensary detailing the Appellant's medical condition and the medication he is taking.

The Respondent opposed the appeal in written submissions dated 1<sup>st</sup> August 2016 filed by Rita Rono, the learned Prosecution counsel. She stated therein that the letter from the prison doctor opined that the Appellant's illness should be further investigated to know the cause, and that the sentence passed against the Appellant is lawful fair and lenient in view of the fact that the maximum sentence for the offence he

was convicted of is seven years.

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 breaking into a building and committing a felony contrary to section 306(a) as read together with section 306(b) of the Penal Code, which provide as follows:

**“Any person who—**

**(a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or**

**(b) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.”**

The sentence of 3 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.

I am however mindful of the fact that this Court is empowered to order that a term of imprisonment of less than 3 years be served by way of community service under the Community Service Orders Act (Chapter 93 of the Laws of Kenya). Section 3(1) of the Community Service Orders Act provides as follows in this regard:

**“(1) Where any person is convicted of an offence punishable with—**

**(a) imprisonment for a term not exceeding three years, with or without the option of a fine; or**

**(b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate,**

**the court may, subject to this Act, make a community service order requiring the offender to perform community service.”**

I note in this regard that the Appellant has served two years of his imprisonment, and he is sickly. I

accordingly requested the Probation Service to prepare and file Community Service Report on the Applicant, which report was filed in Court on 31<sup>st</sup> August 2016. The Appellant's family members while not being opposed to a non-custodial sentence, recommended that he completes his sentence in prison as he associated with persons of bad character, and the local administration referred to him as a person of bad character. The report also noted that the Appellant is suffering from epilepsy, and is due for release in one month's time.

This Court has considered the Appellant's medical condition and remaining term of sentence of one month, and accordingly orders that that the unexpired term of the Appellant's sentence be served under probation, and the Appellant shall forthwith be set free under the supervision of the Machakos County Probation Officer unless otherwise lawfully held.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 1<sup>st</sup> DAY OF SEPTEMBER 2016.**

**P. NYAMWEYA**

**JUDGE**