



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA No. 40 OF 2016

SIMON SHADRACK MUSHIRA.....APPELLANT

=VERSUS=

REPUBLICRESPONDENT

(An Appeal against the sentence of 5 years imprisonment imposed by Hon. V. YATOR (RM) in CR. CASE No. 1295 of 2014 at MOMBASA LAW COURTS on 28th day of July 2014)

JUDGMENT

1. **The Appellant pleaded guilty to a charge of stealing of motor vehicle** parts contrary to section 279 (g) (1) of the penal code and he was sentenced to 5 years imprisonment.
2. The particulars of the charge were that on 16th July 2014 at CENTI KUMI area in Likoni District within Mombasa County, the Appellant stole motor vehicle parts namely two side mirrors valued at Kshs. 26,000/= from motor vehicle registration number KBV 320H make Toyota ISIS grey in colour the property of JANET NDAGO EKUMBO MBETE.
3. The facts as presented by the prosecution were that on 15.07.2014 at St. Juliet at Likoni at about 6 a.m the Appellant was found stealing side mirrors of motor vehicle KBV 320H belonging to Janet Ndago Mbete, members of the public saw him and started beating him until the owner of the motor vehicle pleaded with the mob. Members of the public called the police and rushed to the scene and on reaching there, they found the Appellant injured and the members of the public ran away. They took the Appellant to Likoni District Hospital, where he was treated and discharged.
4. The Appellant has appealed to this court against the sentence only on the following grounds of appeal:-
 - (i) **That he was a first offender and a layman on issues pertaining to the law.**
 - (ii) **That he is a poor man and a sole breadwinner to his aging parents and his continuance detention means they will continue suffering.**
 - (iii) **That he has promised not to repeat the same mistake upon consideration of his appeal as he is a reformed person and he has acquired grades and skills in building and construction which will assist him to get a job.**

(iv) That it is his humble prayer that this impartial court considers his appeal meritorious and reduces his sentence and puts him on a non-custodial sentence.

5. The Appellant submitted in writing that he is a first offender and he is seeking leniency for reasons that he is the sole breadwinner of his family. The Appellant further submitted that he has now reformed.

6. The Respondent opposed the Appeal and submitted that the trial court was lenient considering that the charge provides for a sentence of 14 years imprisonment.

7. I have carefully re-evaluated the proceedings in the trial court and my findings are as follows:-

8. The duty of the first appellate court is to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (*See OKENO VS REPUBLIC (1972) EA 32*).

(i) The Appellant pleaded guilty and was convicted on his own plea of guilty. Section 348 of the Criminal Procedure Code reads as follows;

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence”.

(ii) To the case of *ADAN -VS- REPUBLIC (1973) EA, 443*. It summarizes the procedure of taking a plea of guilty as follows:-

(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.”

(v) I find that the magistrate adopted the procedure outlined in the case of Aden (supra) and the plea herein is unequivocal. The sentence is also lawful. In the case of *Jeremiah Kipkorir Tarus v Republic [2016] eKLR* the court held as follows:-

“The legal parameters within which an appellate court can interfere with a sentence imposed by a trial court were well laid out in the case of *Macharia V Republic (2003) KLR 115* where the Court of Appeal held as follows;

“The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v R, (1950) 18 EACA 147* “it is evident that the judge has acted upon some wrong principles or overlooked some material factors”. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case...”

(vi) Taking into account the circumstances of this case and especially the fact that the Appellant pleaded

guilty and saved on court's time and also the fact that he is a first offender, I find the sentence imposed reasonable since the Law provides for 14 years imprisonment.

9. However, the Appellant has been in custody since he was arrested and he has submitted that he has now reformed.

10. The Appeal is allowed on sentence only and his sentence is accordingly reduced to the period already served.

11. I accordingly order that the Appellant be set free forthwith unless lawfully held for any other reason.

Delivered and signed at Mombasa this 15th day of November 2016.

ASENATH ONGERI

JUDGE.