REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 209 OF 2013

FREDRICK LIYAI……...…..…….…..……..APPELLANT

VERSUS

REPUBLIC……....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case No. 239 of 2013 Republic vs Fredrick Liyai in the Resident Magistrates Court at Kabarnet by B. Limo, Resident Magistrate dated 29th April 2013)

JUDGMENT

1. The appellant was convicted on a count of house breaking contrary to section 304 of the Penal Code. The offence was committed on the 30th January 2013 at Charwa village, Kapsabet Township, Nandi County. The appellant was sentenced to *seven* years imprisonment.

2. The petition of appeal is on *sentence* only. It was filed on 20th November 2013. The appellant prays for *leniency*. He states he is a first offender; that he is remorseful; that he needs to take care of his aging mother; and, that his assets including a *posho* mill and a farm are going to waste. He pleaded with the court to substitute the custodial sentence with a non-custodial punishment.

3. At the hearing of this appeal, the appellant relied on detailed hand-written submissions to buttress the grounds of appeal. He added that he has learnt some useful trades in prison. 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 not to disturb the sentence.

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. I have carefully studied the records of the trial court. The appellant was charged for breaking and entering into the complainant's dwelling house in Kapsabet. The complainant was Felester Obaga (PW1). I have found on the totality of the evidence of PW1, PW2 and PW3 that the charge was proved beyond any reasonable doubt. The defence proffered by the appellant was feeble and a sham. As I have stated, the appellant is no longer challenging his *conviction*.

7. That leaves the matter of the *sentence*. 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.

8. 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….. "*

9. 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 entirely before settling for any given sentence."

10. Although the appellant states he is a *first* offender, it is *untrue*. At page 11 of the typed record, the prosecution informed the court that the appellant had been convicted in *Criminal Case 2414 of 2011* for *housebreaking* and sentenced to pay a fine and in default to serve two years imprisonment. The appellant did not challenge that record. The learned trial Magistrate in the present case called for the appellant's mitigation. The appellant offered *no* mitigation. The learned trial Magistrate correctly found that the appellant was *not* remorseful. He sentenced him to seven years imprisonment. The plea for mercy before this court must be looked at through those lenses. The appellant is to blame for forfeiting an opportunity to mitigate in the lower court.

11. Section 304 of the Penal Code provides for a sentence of up to *seven* years. The appellant was *not* a first offender. He had a previous and similar conviction for breaking and entering. The offence is a *felony*. He offered *no* mitigation. The sentence was well within the law. I cannot then say that the learned trial Magistrate *acted upon some wrong principles or overlooked some material factors*. I am unable to find that the sentence was *harsh* in the circumstances. The sentence in this case was *commensurate* with the *moral blameworthiness* of the offender. *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.

12. In the result, I find that the appeal is devoid of merit. I uphold the conviction and sentence handed down by the learned trial Magistrate. The entire appeal is dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 10th day of March 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

Appellant (in person).

Ms. Karanja for the State.

Mr. J. Kemboi, Court clerk.