REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CRIMINAL APPEAL NO. 24 OF 2015

(Being appeal from original Conviction and Sentence in the Chief Magistrate's Court at Narok Criminal Case No. 164 of 2015 – Z Abdul, RM)

ONESIMUS NYAKUNDI……………………………...………………………………..APPELLANT

-VERSUS-

REPUBLIC……………………………………………………………………………..RESPONDENT

JUDGMENT

1. The Appellant was arraigned before the Senior Principal Magistrate's Court Narok for the offence of Shop breaking and Stealing Contrary to Section 306 (a) of the Penal Code. Particulars stated that on the 3rd day of February 2015, at Narok Township in Narok North Sub-County within the Narok County, he broke and entered the shop of Jane Kamunya and committed therein a felony, namely theft of Kshs. 3,000/=.

2. The Appellant pleaded guilty and was sentenced to serve 3 years imprisonment. His appeal to this court relates to the sentence and is based on the personal circumstances of the Appellant as set out in the petition. He has also set out these matters in his submissions in addition to the new ground concerning alleged variance between the charge and the prosecution facts.

3. The state opposed the appeal and argued through Mr. Kibelion that the guilty plea was unequivocal, that the facts read out by the prosecution supported and were not in variance with the charge. Moreover, that the sentence was legal and not harsh or excessive.

4. Having considered the matters raised by this appeal, I am of the view that, the Appellant's assertion to the effect that the facts read out were in variance with the charge, is not supported by the original or certified record of the plea taking proceedings. The amount of money stolen in both the charge and facts read out is Kshs 3,000/= and not Kshs 30,000/=.

5. Reviewing the said record, I am satisfied that the trial court in taking the Appellant's plea did as much as possible comply with the guidelines in **Adan –Vs- Republic [1973] EA 445** and restated in **Kariuki –Vs- Republic (1984) KLR 809** at page 810 as follows:

> **"a) The trial magistrate or judge should read and explain to the Accused the charge and all the ingredients in the Accused's language or in a language he understands;**
>
> **b) He should then record the Accused's own words and if they are an admission, a plea of guilty should be recorded;**

c) The prosecution may 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;

d) If the Accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the Accused's reply."

6. On the question of the sentence, the appellate court will not ordinarily interfere with the sentence meted out by the lower court unless there is demonstrated some misdirection on the part of the court as for instance, that the court has considered irrelevant matters while failing to consider relevant ones.

7. In the case of **Ogalo s/o Owuora –Vs- Republic [1954] 19 EACA 270**, it was stated:-

> **"(1). The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the Appellant, he might have passed a somewhat different sentence, and it would not ordinarily interfere with the discretion exercised by the trial Magistrate unless it is evident that the Magistrate acted upon some wrong principles or overlooked some material factors. (See also JAMES VS REPUBLIC (1950) 10 EACA 147)**
>
> **(2). The test criterion is that if the sentence is manifestly excessive in view of the circumstances of the case, the sentence will be disturbed. The Appellate Court should not interfere with the sentence of a lower Court unless it is satisfied that the same was so severe as to amount to a miscarriage of justice. (SEE NILSON VS REPUBLIC (1970) EA 599)."**

8. And in **Wanjema –Vs- Republic (1971) EA 493**, the court stated:-

> **"[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."**

9. In view of the above authorities, bearing in mind the amount of money stolen and the fact that no previous conviction was proved against the Appellant, I am of the view that a sentence of 3 years sentence out of the possible 7 years is on the higher side. It would appear from the court's notes that the presiding magistrate concluded from the Appellant's failure to mitigate, that he was not remorseful. Surprisingly on this appeal the Appellant has raised many mitigatory factors.

10. It is not clear why he did not present these matters at the time of plea. I would say that an accused who willfully fails to raise mitigation in the lower court has only himself to blame for the lost opportunity. However not all persons who fail to raise mitigation upon conviction do so willfully and it would be unsafe to make a general conclusion that in every case, such lack of mitigation is an indication of absence of remorse on the part of the Accused. Possibly, such an approach influenced the sentence in the instant matter. Such a conclusion, in absence of a further inquiry may well amount to a misdirection by the court.

11. In view of all the foregoing, I deem it fit and just to interfere with the sentence by reducing it to 10 months imprisonment from the date of sentence (5/2/2015).

It is so ordered.

Delivered and signed at Naivasha, this **15th** day of **October, 2015.**

In the presence of:-

State Counsel : Mr. Kibellion

For the Appellant : N/A

C/C : Steven

Appellant : Present

C. MEOLI

JUDGE