



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 15 OF 2015**

**PETER MUTEMI MWENDE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The appellant was charged with breaking into a building committing a felony contrary to section 306 (a) of the Penal Code. The particulars of the offence were that on the night of 22nd/23rd September 2014 at Nguni Shopping Centre Nguni Location of Mwingi East District within Kitui County broke and entered into a building namely hardware of Bastan Kimanzi Kula and committed therein a felony namely theft.

Initially he pleaded not guilty and Bastan Kimanzi Kula testified and was cross examined. Thereafter on 23rd December 2014 the appellant was recorded as having changed his plea. He was convicted on his own plea and sentenced to serve 3 years imprisonment after a probation report was tendered in court.

He has now appealed to this court. His initial petition of appeal was filed in February 2015. He later filed an amended petition of appeal as well as written submissions. He stated in the amended grounds as follows:-

1. That the plea of guilty pleading to the conviction and sentence was equivocal.
2. That he did not understand the meaning of the charges and every element as indicated in the charges
3. That though he did commit the offence he was misdirected to accept the offence being petty as he was to be released through probation.
4. That he was a first offender and not involved in any criminal activities.
5. That the sentence was harsh and a great burden on him and his life.
6. That he was praying for leniency and pardon on the sentence.

At the hearing of the appeal, the appellant relied on his written submissions, which I have perused.

Learned Prosecution Counsels Mr. Mwangi opposed the appeal. Counsels submitted that the appellant understood which was Kiswahili. He initially denied the charges but later asked that the charges be read to him. He pleaded guilty and also admitted the facts. The conviction was thus proper as the plea was an equivocal. Counsel added that a probation report was also used before the appellant was sentenced. He was imprisoned for 3 years while the maximum sentence was 7 years imprisonment. Counsel submitted that the probation report indicated that the appellant was a habitual criminal though no previous conviction has been recorded. According to counsel the appeal should be dismissed.

I have perused the record. The appellant was first brought to court on 11th November 2014. On that

day he did not plead to the charge. On the 12th November 2014 he pleaded not guilty. The case came for hearing on 20th November 2014 and the complainant testified and was cross examined by the appellant. The case was then adjourned to 14th December 2014 and again to 18th December 2014. On the 23rd of December 2014 the prosecutor stated that she had three witnesses present and the appellant requested that the charge be read to him which was done in Kiswahili and he admitted the charge and a plea of guilty was entered. Thereafter the prosecutor summarized the facts and the appellant stated that the facts were correct where upon he was convicted. On his request a social inquiry from the probation officer was availed before sentencing. He was then sentenced to serve 3 years imprisonment.

Considering what was put on record by the trial court in my view the appellant pleaded guilty. The plea was properly taken. He was thus properly convicted on his own plea of guilty as the facts narrated by the prosecutor disclosed the offence alleged. Some items were found in his house though he was absent then. Since he admitted the facts as being true he cannot now change.

With regard to sentence, the maximum sentence of the offence is 7 years imprisonment. The report by the probation officer talks about him being involved in numerous criminal incidences in Mwingi town. However there is no record that he was convicted or charged in court for any of those numerous incidences. In my view therefore the sentence of 3 years imprisonment appears to be on the higher side for a first offender. Though sentencing is the discretion of a trial court, I am of the view that a sentence of 2 years imprisonment would suffice taking into account that the appellant pleaded guilty to the offence and did not waste the courts time. I thus will substitute the sentence with one of 2 years imprisonment from the date on which he was sentenced by the trial court.

Consequently and for the above reasons, I dismiss the appeal on conviction. I uphold the conviction of the trial court. With regard to sentence I set aside the sentence imposed by the trial court and order that the appellant do serve a sentence of 2 years imprisonment from the date on which he was sentenced by the trial court.

**Dated and delivered at Garissa this 7th day of October, 2015**

**GEORGE DULU**

**JUDGE**