IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 129 OF 2013

JOSEPH KIMANI NJUGUNA……..APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

JUDGMENT

The appellant, Joseph Kimani Njuguna alias Wanjeri was charged jointly with 3 others with the offence of burglary and stealing contrary to **Sections 304(2)** and **279(b)** of the **Penal Code**. The four of them were alleged to have broken and entered the store of Charles Kagathi Macharia on 23/4/2012 in Molo Town, from where they stole 167 bags of Mea fertilizer and 2 mattresses, the property of Charles Kagathi Macharia all worth Kshs.676,000/-. In the alternative, the appellant faced a charge of handling stolen property contrary to **Section 322(2)** of the **Penal Code**. After the trial, the appellant was found guilty and convicted on the main charge and was sentenced to serve 3 years imprisonment on each limb. On 19/12/2013, the court noticed the error in the sentence and ordered that the sentence run concurrently instead of consecutively.

In his petition of appeal which is undated, the appellant was challenging both the conviction and sentence for reasons that the prosecution did not call essential witnesses; that the trial court shifted the burden of proof onto the appellant; that the conviction went against the weight of the evidence; that the appellant's defence was not considered and lastly, that the sentence meted was too harsh. He therefore urges the court to quash the conviction and set aside the sentence and set him free. At the hearing of the appeal, the appellant relied on submissions filed in court on 20/2/2014, in which at number 5 he abandoned the ground on conviction and basically asked the court for leniency on the sentence for reasons that he is 39 years old, is a family man, he had a business before his arrest, that during the 7 months of incarceration he has been fully rehabilitated; that he is a first offender and his family now lives in abject poverty; that he is remorseful and promised to be a law abiding citizen and begged the court to reduce his sentence.

Mr. Omutelema, Learned Counsel for the State opposed the appeal both on conviction and sentence for reasons that the appellant was found in possession of the stolen goods 2 days after the theft as he tried to sell off the goods, he did not lay any claim to the fertilizer and the only inference that could be drawn was that he was the thief.

PW1, Charles Kigathi, told the court that on 24/4/2012, when at his home near Molo Academy, he received a call from an employee about 7.00 a.m. and was informed that his store had been broken into. He went to the store and found the door removed and placed on the ground; He found all his 157 bags of fertilizer and two mattresses had been stolen. His property was worth Kshs.669,000/-. Later, the police called to inform him that his fertilizer had been recovered. He went to Molo Police Station where he

positively identified the fertilizer.

PW2, Anthony Mwangi, an employee of PW1 testified that he closed PW1's store (Mali Rahisi Wholesalers) at 6.00 p.m. on 23/4/2012 and on going to open the store on 24/4/2012, found it broken into. Together with PW1, they found 2 mattresses and over 150 bags of fertilizer missing.

PW3, Sammy Mwenze, of Mea Fertilizer Ltd confirmed that Mali Rahisi in the trade name for the complainant, who placed an order for 480 bags of fertilizer on 10/4/2012 and they were delivered. He had a copy of the delivery note signed by the driver.

PW4, Andrew Kimngetich Langat, said that on 26/4/2012, the appellant called him informing him that he had fertilizer for sale. He met the appellant at Olenguruone and saw over 100 bags of 50kg each of fertilizer. Each was to be sold at Kshs.280/- per bag. When loading the fertilizer on the vehicle the police arrived and all of them were arrested. The lorry and fertilizer were photographed.

PW5, PC Kennedy Nyagwa, of DCIO's office Molo was the Investigations Officer, testified that he first interrogated the complainant, recorded his statement and on 26th he got information of fertilizer being loaded on a lorry in Olenguruone at accused's home where they found the lorry being loaded with fertilizer. The vehicle with the fertilizer were photographed and the people arrested and charged.

The complainant produced delivery notes through which the fertilizer was delivered.

In his defence, the appellant said he was at work when police arrived and started beating people and as he fled he was arrested in a swoop and it was alleged he had fertilizer. He claimed to have been framed.

There was overwhelming evidence from PW4 and PW5 that the fertilizer that was recovered was found with PW4 and the appellant who was buying it from the appellant. After arrest, the appellant did not lay any claim to the fertilizer. PW1 and PW3, produced evidence that demonstrated that PW1 had bought the fertilizer from PW3's place of work, Mea Fertilizer Ltd. The appellant was arrested only 2 days after the theft on 24/4/2012. I find that he was in recent possession of the stolen goods. The goods were positively identified by PW1 and PW3 by production of exhibits i.e. delivery notes. The appellant failed to explain how he came by the fertilizer and the only inference that can be drawn is that he is the thief. See **Isaac Nganga Kahiga v Rep** alias **Peter Kahiga v Rep CRA 272/05.**

The appellant was charged with the offence of burglary and stealing contrary to **Section 304(2)** as read with **Section 279(b)** of the **Penal Code**. However, the evidence of PW1 and PW2 is clear, that the fertilizer was stolen from a store. The appellant should have been charged with breaking into a building and committing a felony contrary to **Section 306(a)** of the **Penal Code**. The trial court did not notice that anomaly nor did the Learned State Counsel. In my view, the appellant should have been convicted of breaking and stealing from a store contrary to **Section 306(a)** of the **Penal Code**. Since this is the first appellate court and the court is required to re-evaluate and analyse the evidence afresh, I hereby quash the conviction on the offence of burglary and stealing and instead convict the appellant for the offence of store breaking and committing a felony therein contrary to **Section 306(a)** of the **Penal Code**.

In my view, the sentence of 3 years imprisonment was not excessive or harsh given that the maximum sentence for the offence was 7 years imprisonment. Under **Section 306(a)** of the **Penal Code** the maximum sentence is also 7 years imprisonment. In the result, I sentence the appellant to the same sentence of 3 years imprisonment to run from the date the appellant was convicted by the trial court. In the end the appeal is dismissed. It is so ordered.

DATED and DELIVERED this 14th day of March, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant present in person

Mr. Chebii for the State

Kennedy – Court Assistant.