

fork jembes, 5 mattocks, two stupllers and slashers valued at Kshs.27,450, the property of the *Kenya Forest Service*.

- 3.** In count II, he was charged with the offence of preparation to commit a felony contrary to *Section 308 (3) (c)* as read with *Section 308 (4)* of the *Penal Code*.

The particulars alleged that on 22nd July 2023, the appellant was found at the *Kenya Forest Service* Murang'a offices store, trying to create an opening by lifting an iron sheet wall with an intention to steal.

- 4.** Upon conviction, the appellant was sentenced in count I to serve three years imprisonment in the first limb of store breaking and 3 years imprisonment for the second limb of stealing.

In count II, he was sentenced to serve 3 years imprisonment. The sentences were ordered to run consecutively.

- 5.** The appellant was aggrieved by the trial court's decision on sentence. He proffered the instant appeal through a petition of appeal filed 2nd of August 2023.

- 6.** In his petition of appeal, he advanced a total of seven (7) grounds of appeal which can be summarised as follows: That the learned trial magistrate erred in law and fact by: sentencing him to maximum sentences without considering his mitigation including the fact that he was a first offender; sentencing him without considering that he pleaded guilty to the offence hence saved the court's time; imposing sentences that were not proportionate to the nature of the offences committed.
- 7.** The appellant also complained that the learned trial magistrate failed to appreciate that there were no aggravating circumstances to justify meting out harsh sentences and also failed to consider non-custodial sentences which were also recognised in law as alternatives to custodial sentences.
- 8.** At the hearing, the appellant appeared in person and submitted that the sentences passed against him were harsh and excessive particularly the trial court's order that the sentences should run consecutively. He submitted that he

had been fully rehabilitated while in prison and had also gained many skills after going through several training programs in prison; that the acquired skills will help him earn a livelihood and live a crime free life if released on a non-custodial sentence.

9. He further submitted that he committed the crime because of peer pressure and being a first offender, he now understood the consequences of crime.

10. The appeal is contested by the State. In her submissions, *Ms. Manyal*, learned prosecution counsel supported the trial court's sentence in each count contending that the sentences were lawful and were within the trial court's discretion. She argued that when passing sentence, the learned trial magistrate considered all relevant factors including the mitigating and aggravating circumstances in the appellant's case. She submitted that the appeal lacked merit and ought to be dismissed.

11. This being an appeal against sentence only, I wish to state at the outset that sentencing is a matter that rests in the

discretion of the trial court and for that reason, an appellate court will only interfere with that discretion if it was satisfied that the impugned sentence was illegal or that it was manifestly excessive or that the trial court, when passing sentencing, acted on wrong legal principles, or overlooked some material factors.

12. This principle was restated in **Bernard Kimani Gacheru V Republic (2002) eKLR** in which the Court of Appeal stated as follows:

“ It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself

not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

13. In this case, the appellant was convicted in count one with the offence of store breaking and stealing contrary to *Section 306 (a)* of the *Penal Code*. According to *Section 306 (b)* of the *Penal Code*, the offence carries a maximum penalty of seven (7) years imprisonment. In this case, the learned trial magistrate erred by sentencing the appellant twice for the same offence. It is apparent that the learned trial magistrate wrongly interpreted *Section 306 (a)* of the *Penal Code* and was of the view that the section created two different offences, namely, the offence of store breaking and the other of committing a felony, which was not the case.

14. Unlike the offences of house breaking or burglary and stealing created

under *Section 304 (1)* and *Section 304 (2)* as read with *Section 275* of the *Penal Code* which consists of two

different offences charged in one count, the offence of store breaking and stealing is one complete and distinct offence and it was wrong for the learned trial magistrate to proceed as if it constituted two different offences. The imposition of two separate sentences for one offence was a serious error on the trial court's part which gravely prejudiced the appellant.

15. From the foregoing, it is evident that the sentence passed by the learned trial magistrate in count 1 was illegal and cannot be sustained. The sentence is therefore set aside. Considering that the appellant was a first offender, the sentence is hereby substituted with a term of two years imprisonment.

16. Regarding the sentence in count II, the appellant was convicted of the offence of preparation to commit a felony contrary to *Section 308 (3) (c)* as read with *Section 308 (4)* of the *Penal Code*. He was sentenced to serve three (3) years imprisonment.

17. The maximum sentence prescribed for the offence as stipulated in *Section 308 (4)* of the *Penal Code* is

imprisonment with hard labour for five years, or where the accused had previously been convicted of a felony relating to property, a maximum sentence of ten (10) years imprisonment.

- 18.** In my view, although the sentence imposed by the trial court in count II was not illegal, given that the appellant was a first offender and he pleaded guilty to the offence and thereby saved the court's precious time and considering also the manner in which the offence was committed, I find that the sentence imposed by the trial court was excessive in the circumstances of this case. I consequently set aside the trial court's sentence and substitute it with a sentence of two years imprisonment.
- 19.** Lastly, the appellant urged this court to revise the order made by the trial court that the sentences in count I and count II shall run consecutively and not concurrently.

The Court of Appeal in Peter **Mbugua Kabui V Republic (2016)** discussed the circumstances in which the court can

order that sentences should run concurrently or consecutively and expressed itself as follows;

“ As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”

See also: BMN V Republic (2014) eKLR.

- 20.** In this case, it is clear from the court record that the offences charged in both counts were not committed at the same time in a single criminal act. They were committed on different days and they were not therefore committed in the course of the same transaction.
- 21.** Flowing from the foregoing, it is evident that had the sentence in count 1 been lawful, the trial court would have been correct in ordering that the sentences in both counts

were to run consecutively since the offences had been committed in different criminal transactions.

21. For all the above reasons, the appellant's appeal partially succeeds to the extent that the trial court's sentence in count 1 is set aside and is substituted with a sentence of two years imprisonment. The trial court's sentence in count 2 is also set aside and is substituted with a sentence of two years imprisonment. The sentences shall take effect from the date of the trial courts sentence and shall run consecutively.

It is so ordered.

DATED, SIGNED and DELIVERED at **MURANGA** this 17th day of December 2025.

HON. C. W. GITHUA
JUDGE

In the presence of :

The Appellant
Ms. Muriu for the Respondent
Ms. Susan Waiganjo, Court Assistant