



**Okuto alias Denoh v Republic (Criminal Appeal E029 of 2024)  
[2024] KEHC 13147 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13147 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E029 OF 2024  
KW KIARIE, J  
OCTOBER 30, 2024**

**BETWEEN**

**DENNIS ONYANGO OKUTO ALIAS DENOH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal case NO. E101 of 2024 of the  
Principal Magistrate's Court at Ndhiwa by Hon. B. W. Murangasia–Resident Magistrate)*

**JUDGMENT**

1. Dennis Onyango Okuto, alias Denoh, the appellant herein, was convicted after pleading guilty to housebreaking and stealing contrary to sections 304 (1) and 279 (b) of the Penal Code.
2. The appellant, along with others not before the court, committed the offence between 0300 hours and 1700 hours on the 8<sup>th</sup> day of September 2023 at Oredhi village, Central Kwabwai location, Ndhiwa sub County within Homa Bay County, jointly with others not before the court, they broke into the dwelling house of Paul Odiwour. They stole a blue mattress and four plastic chairs valued at Kshs. 4,300/=, the property of the said Paul Odiwour.
3. The appellant was also charged with a second count of handling stolen property. It was found that on the 27<sup>th</sup> day of March 2024, he retained one blue mattress, knowing or having reasons to believe it was stolen property other than in the course of stealing.
4. In count one, the appellant was sentenced to five years imprisonment, and in count two, to three years imprisonment. The sentences were ordered to run consecutively. He was aggrieved and filed this appeal against the sentence. His prayer was that the sentences run concurrently.
5. The state opposed the appeal for want of merits.



6. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence before the lower court afresh and drawn my conclusions, bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
7. Section 348 of the [Criminal Procedure Code](#) provides as follows:

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.
8. The prosecution erroneously duplicated the two counts. What was indicated as the second count ought to be an alternative to count one. Upon conviction in count one, the court should have made no findings on the alternative charge. This was prejudicial to the appellant.
9. I, therefore, quash the conviction in count two and set aside the sentence imposed therein.
10. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to do so. *Nelson v Republic* [1970] EA 599 as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does 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 will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shersbewsity* (1912) CCA 28 TLR 364.
11. The appellant had several other convictions for similar offences. Section 304 (2) of the [Penal Code](#) provides as follows:

If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.
12. Given the previous record, the sentence meted out cannot be said to be excessive. I will not, therefore, interfere with the sentence.
13. The appeal has succeeded, as observed hereinabove.

**DELIVERED AND SIGNED AT HOMA BAY THIS 30<sup>TH</sup> DAY OF OCTOBER 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

