



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 11 OF 2019

HASSAN KASSIM KARANIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal case No.557 of 2017 of the Chief Magistrate’s Court at Busia by Hon. S.O Temu–Principal Magistrate)

JUDGMENT

1. **Hassan Kassim Karani**, the appellant herein, was convicted for the offence of burglary and stealing contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code.

2. The particulars were that on the night of 13th and 14th April 2017 at **Lukolis** village, **Akoret** location in Busia County, he broke and entered into the dwelling house of **Ali Eukorot Emoru** with intent to steal and did steal from therein one T.V set, some utensils, assorted clothes, three window curtains and one mattress all valued at Kshs. 209,000/= the property of **Ali Eukorot Emoru**.

3. The appellant was initially sentenced to one year probation but he absconded. When he was arrested for absconding, he was sentenced to serve six years imprisonment on each limb. The sentence was ordered to run concurrently. He appeals against the sentence.

4. He raised eight grounds of appeal that can be summarised as follows:

- a) That the sentence was harsh and excessive.
- b) That he has a young family.

5. The appeal was opposed by the state through Mr. Gacharia, learned counsel who contended that in the circumstances, the sentence was lenient.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

7. Sections 279 (b) and 304 (2) of the penal code provide as follows:

279 (b) **If the theft is committed under any of the circumstances following, that is to say—**

(b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;

...

the offender is liable to imprisonment for fourteen years.

304 (2) **If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.**

8. Instances when an appellate court would interfere with the discretion of a trial court on the issue of sentence were clearly defined by the

Court of in the case of in. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. Those circumstances were well illustrated in the case of **Ogalo Son of Owuora vs. Republic (1954) 21 EACA 270** 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 vs 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 vs. Shershewcity (1912) C.CA 28 T.LR 364.*

9. In the instant case, the sentence that was meted out cannot be described as harsh. The appellant abused the leniency extended to him by the court. He decided to abscond when placed on one year probation. I therefore have no reasons to interfere with the sentence. The appeal is accordingly dismissed.

DELIVERED and SIGNED at BUSIA this 18th Day of December, 2019

KIARIE WAWERU KIARIE

JUDGE