REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 44 OF 2017

RASHID WANDERA YUSUF.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

(From the original conviction and sentence in Criminal case No. 1630 of 2017 of the Chief Magistrate's Court at Busia by Hon. G.N Wakahiu– Chief Magistrate)

JUDGMENT

1. The appellant, **RASHID WANDERA YUSUF**, was convicted after he had pleaded guilty to a charge of house breaking and stealing contrary to section 304 (1) (b) as read with section 279 (b) of the Penal Code.

2. The particulars of the offence were that on 13th October 2017 at **HIGH ROCK** estate in **BUSIA** Township Location of **BUSIA** County, jointly with others not before the court, broke and entered the dwelling house of **PETER KIMATHI KIVUVO** with intent to steal and did steal from therein a TV set valued at Kshs. 9, 000/= the property of the said **PETER KIMATHI KIVUVO**.

3. He was sentenced to serve 3 years imprisonment.

4. The appellant was in person. He appealed against the sentence which he contended was harsh and excessive.

5. 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.**

6. It is trite law of practice that an appellate court can only interfere with the sentence meted out by the trial court upon satisfaction of some circumstances. These circumstances were well illustrated in the case of **NILSSON VS REPUBLIC [1970] E.A. 599,601** 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 Shershewsity (1912) C.CA 28 T.LR 364.***

7. The penalty for the offence under section 304 (1) of the Penal Code is provided as follows:

> ***(1) Any person who—***
>
> ***(a) …***
>
> ***(b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.***

8. In the instant case I do not find any circumstance to warrant my interference with the sentence nor can the sentence be described as excessive and harsh.

The upshot of the foregoing analysis of the evidence on record is that the appeal is bereft of merits and it is accordingly dismissed.

DELIVERED and SIGNED at BUSIA this 19th day of April, 2018

KIARIE WAWERU KIARIE

JUDGE