REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 43 OF 2017

STEPHEN OPIYO MUYODI.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

(From the original conviction and sentence in Criminal case No. 1613 of 2017

of the Chief Magistrate's Court at Busia by Hon. G.N Wakahiu– Chief Magistrate)

JUDGMENT

1. The appellant, **STEPHEN OPIYO MUYODI**, was convicted after pleading guilty to a charge of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code.

2. The particulars of the offence were that on 10th October 2017 at Busia Police station Administration Block in Busia Township Location of Busia County, jointly with others not before the court, broke and entered into a building namely Officer Commanding Station's office the and did steal from therein two laptops, two chargers, a pair of shoes and assorted academic and professional certificates all valued at Kshs. 150,000/= the property of **NICHOLAS KIPRONO.**

3. He was sentenced to serve 4 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 as was spelled out in Those 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. Section 306 (a) of the Penal Code provides as follows:

> ***Any person who—***
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> ***(a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or***

(b) …

is guilty of a felony and is liable to imprisonment for seven years.

8. Though I had entertained doubts on the age of the appellant, this issue has been put to rest by the probation officer's report which indicates that the appellant was born on 9th March 1999. This means that at the time of the offence, he was 18 years of age.

9. Given the age of the appellant, this is a matter where a non-custodial sentence would have been the most ideal. However, given his standing with the community, a custodial sentence was the only appropriate sentence. I will not therefore interfere with the sentence meted out by the learned trial magistrate. The appeal is accordingly dismissed.

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

KIARIE WAWERU KIARIE

JUDGE