



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO.23 OF 2015
GODFREY OUMA OMONDI APPELLANT
VERSUS
REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No. 1355 of 2014 of the Chief Magistrate's Court at Busia by Hon. J.N Maragia – Resident Magistrate)

JUDGMENT

GODFREY OUMA OMONDI, the appellant was convicted for the offence of burglary contrary to section 304(2) and stealing contrary to section 279(b) of the Penal Code and for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code.

The particulars of the offences were that on 21st May 2014 at **Muguyu** village Marachi Central location of Busia County, he broke and entered into the dwelling house of **ERNEST OPATA ODONGO** with intent to steal and did steal from therein six chickens valued at Kshs. 4000/= the property of the said **ERNEST OPATA ODONGO**. On the same day and at the same time he unlawfully assaulted **ERNEST OPATA ODONGO**.

He was sentenced to serve three years imprisonment in count one and two years in count two. The sentences were ordered to run concurrently. He had appealed against both conviction and sentence but in his written submissions, he compromised his appeal on conviction. This is what he said in paragraphs 4 and 10 of his written submissions:

4. Your lordship, I herein does (sic) not challenge the conviction but does (sic) challenge the sentence imposed by the learned trial magistrate.

10. Your lordship, I have realized the outcome of breaking the law and I promise to be industrious, creative and an innovative citizen in society. I also promise to be a law abiding citizen in accordance to the laws of Kenya.

The appellant was in person. He therefore raised the following grounds of appeal:

1. That his mitigation was not considered.
2. That the learned trial magistrate erred in law and in fact by meting out a harsh sentence.

The state opposed the appeal through Mr. Owiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

On 21st May 2014, at about 2 a.m, the complainant and his wife were asleep in their house. When he heard their chickens making noise, he went to check. He however found the door bolted from outside. He managed to get out of the house through a window. He recognized the appellant. When he called him by his name, the appellant cut him severally. His (complainant's) wife who went out through a window as well, also recognized the appellant. A neighbour who went to answer the distress alarm recognized the appellant.

After the trial, he was sentenced. This is the sentence against which he now appeals.

The offence in count one has two limbs. One is that of burglary contrary to section 304 of the Penal Code which provides as follows:

(1) Any person who—

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

(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.

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

The second limb is that of stealing contrary to section 279(b) of the Penal Code which provides the following:

From reading of the foregoing sections, it is clear that the appellant was given very lenient sentence. The learned trial magistrate failed to appreciate that the offence in count one had two limbs and the appellant ought to have been sentenced on each limb. I therefore set aside the sentence in count one and substitute it as follows:

The appellant to serve three years imprisonment on each limb. The sentence to run concurrently.

The offence in county two has a maximum sentence of five years. This is what section 251 of the Penal Code provides:

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

The appellant was sentenced to two years imprisonment. This cannot be termed as a harsh sentence.

From the foregoing analysis of the evidence on record, I find that the appeal has no merit. I have no reason to disturb the sentence meted out by the learned trial magistrate except as I have hereinabove stated. The appeal is therefore dismissed.

DELIVERED and SIGNED at BUSIA this 22nd day of June, 2017

KIARIE WAWERU KIARIE

JUDGE