



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. 169 OF 2016**

**(COMMITTING A FELONY)**

**(CORAM: J.A. MAKAU – J.)**

**KEVIN OKOTH NGESA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the sentence dated 4.4.2016, in Criminal***

***Case No. 129 of 2016 in Ukwala By Hon. R.M. Oanda – S.R.M.)***

**JUDGMENT**

1. The Appellant **KEVIN OKOTH NGESA** was charged with an offence of Breaking into a building and committing a felony contrary to Section 306(A) of the Penal Code. The particulars of the charge are that on the 25<sup>th</sup> day of March 2016 daytime jointly with others not before court at Ugunja Town, Ugunja Sub-County within Siaya County broke and entered a building namely a house of Mr. Jackson Omari and committed a felony therein namely stealing and did steal a T.V. make LG, computer, mouse and keyboard, gas cylinder, plastic can, weighing machine, clothes, two pairs of black leather shoes and several electronics and electronic appliances being the property of the said Mr. Jackson Omari as per the inventories valued at KShs.150,000/=. The appellant also faced an alternative count of Handling Stolen goods contrary to Section 322 (1) (2) of the Penal Code. The particulars of the alternative charge are that on the 25<sup>th</sup> and 27<sup>th</sup> day of March 2016 at Ugunja Town Urefu Village of Ugunja Sub-County within Siaya County otherwise than in the course of stealing dishonestly received and retained a TV make LG computer mouse and keyboard, plastic can, weighing machine, gas cylinder, two pairs of black leather shoes, clothes and several electronics and electronic appliances as per the inventories all valued at KShs.150,000/= having reason to believe them to be stolen goods.

2. Upon the charge being read to the appellant, the appellant pleaded guilty and upon facts being given he admitted the same, was convicted and sentenced to serve 3 years imprisonment.

3. Aggrieved by the sentence the appellant filed petition of appeal setting out the following mitigation

***i. That the Appellant is a student under sponsorship and wish to pray for the leniency of the Honourable court so as to proceed with his education.***

*ii. That the Appellant was under duress to plead guilty and was not in the right state of mind during the plea.*

*iii. That the Appellant has served three quarters (1/3) of the sentence since he was convicted.*

*iv. That the Appellant is the first offender and begs leave of the Honourable Court to set him for a non-custodial sentence.*

*v. That the Appellant begs to raise more grounds at the hearing thereof hence habeas corpus.*

4. The Appellant prayed that the sentence imposed upon him be reduced or substituted as the court deems fit.

5. The State submitted that the appellant was convicted on his own plea of guilty and told the court he committed the offence to raise school fees, however the offence has a maximum sentence of 7 years urging the sentence of 3 years was lenient and should not be interfered with.

6. **Section 306 (A) of the Penal Code** under which the appellant was charged provides that:

*“Section 306. Any person who –*

*(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) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.*

7. The facts of the case are that on 25.03.2016, the complainant in this case, Jackson Omari, locked their house and left for Easter celebrations. Thereafter some people broke using a fake key, managed to unlock the padlock and stole various items from the house the following items: Aloe Vera soap, onions (1kg), a Zuka decoder, two adapters, electronic appliances totaling to KShs.150,000/=.

Members of public intercepted accused persons and took him to write police statement and items recovered from the house. Accused did not prove any ownership. He was then charged of stealing the items as listed in the charge sheet being:- LG(Led TV) Exhibit P1, Microwave Exhibit P2, Tissue Paper, Exhibit P3 One tin (tea leaves) Exhibit P4, Sausages Exhibit P5, Del monte juice Exhibit P6 (a) (b), Scotch super brite Exhibit P7, Tomato paste Exhibit P8, Foil paper Exhibit P9, Multi functioning light Exhibit P10, Cloth line Exhibit P 11, Famila (Wimbi flour) Exhibit P.12, Santa Lucia Spaghetti Exhibit P 13, Sunlight Soap(50g) Exhibit P.12, One build Exhibit P 15, Tomato Sauce Exhibit P 16, Maziwa Lala Exhibit P 19, Two Adopters Exhibit P20, Two pairs Exhibit P 21.

8. I have considered the mitigating factors in favour of the Appellant, that at the time of the commission of the offence he was a student, that the items stolen were all recovered. That the Accused is a first offender, he is remorseful, that he wants to go back to school and continue with his education, that he needs to be fully rehabilitated, that he is a young man who fell in the wrong company and needs counseling to keep off from bad company, that he has served 14 months, almost half the sentence. In view of the mitigating factors and the period served I am of the view that the Appellant needs a non custodial sentence to enable him to be rehabilitated. I shall therefore substitute the custodial sentence with non-custodial sentence for the remainder of unserved sentence thus a period of 2 years and 2 months.

**9. The Upshot is that conviction is confirmed, sentence set aside and substituted with non-custodial sentence of 2 years 2 months during which period the Appellant shall serve the remainder of his**

**sentence under the supervision and direction of the Probation Officer, Siaya County.**

**DATED AND SIGNED AT SIAYA THIS 22ND DAY OF JUNE, 2017.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN THE OPEN COURT.**

**IN THE PRESENCE OF:**

**Appellant in person**

**M/s M. Odumba for the STATE**

**ACCUSED: PRESENT**

**C.A. 1. LABAN ODHIAMBO**

**2. PATIENCE OCHIENG**

**3. SARAH OORO**

**J. A. MAKAU**

**JUDGE**