



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL APPEAL NO.10 OF 2017

BETWEEN

STEPHEN OCHIENG OGALLO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in original Mbita SRM's Court Criminal Case No.302 of 2016 – Hon. S.O. Ongeru, PM, dated 25th November, 2016)

JUDGMENT

1. **STEPHEN OCHIENG OGALLO** (the Appellant) was convicted on a charge of being in possession of public stores contrary to **Section 324 (2)** as read with **Section 36** of the **Penal Code** and sentenced to serve 1 year imprisonment.
2. Apparently he was also convicted for the offence of breaking into a building and committing a felony contrary to **Section 306 (9) PC** and sentenced to serve 5 years imprisonment.
3. Although he had been discharged under **Section 210** of the **Criminal Procedure Code** for the offence of being in possession of narcotic drugs contrary to **Section 3 (1) (a)** as read with **Section 3 (2)** of the **Narcotic Drugs and Psychotropic Substance Control act No.4 of 1994**, he was nonetheless sentenced to serve 5 years imprisonment for that charge. The sentences were to run concurrently.
4. The appellant pleaded guilty to the offence of breaking into a building and committing an offence. The prosecution case was that on 15/05/2016 at 6.30 p.m., one **MAURICE OKEYO** locked his shop; and it was broken into and assorted shop goods stolen therefrom.
5. Following a tip off, police raided the house belonging to the appellant where his other three co-accuseds were housed and recovered some of the shop goods plus assorted military cape and boots and bhang. The complainant identified his items and produced relevant receipts. Upon pleading guilty the trial magistrate recorded as follows:-

“The 1st accused is convicted on his own plea of guilty on Count 1, alternative charge, Count II and discharged on the main charge of Count II and further convicted on count III.”

In passing sentence, the trial magistrate recorded as follows:-

“He is not a first offender. He is thus sentenced to 5 years imprisonment on Count 1 and 5 years imprisonment on the alternative count of Count II and in default fined 15,000/= on Count III in default 9 months imprisonment.”

6. Thereafter the charge of being in possession of government stores was heard and police officers **APC RICHARD SOI** (PW1) told the trial court how upon raiding the appellant’s house following a tip off from members of the public that it was housing thieves, they found the appellant and his 3 co-accused sleeping. A search resulted in receiving of a military cape and a pair of boots yet none of them was a military officer.

7. On this charge he was sentenced to serve 1 year imprisonment.

8. His appeal is on sentence only and he pleaded with this court to reduce the length of the sentence.

9. In response, Mr. Oluoch on behalf of the state left the issue of reducing sentence to the court’s discretion. He however pointed out that the conviction for the charge of being in possession of bhang could not be sustained as the facts did not disclose who the bhang was recovered from. He pointed out that the appellant was found in the company of three other persons and it was not clear why the trial magistrate was satisfied that he was the culprit.

10. I take into account the fact that most of the stolen items were recovered – so the appellant did not benefit from his mischief and for that he was not a first offender, having been convicted and sentenced in **Criminal case No.397 of 2016**.

11. However the trial magistrate did not record the nature of the offence for the previous conviction and the length of the sentence he was already serving.

12. It was also not put to the appellant to confirm whether indeed he was not a first offender – which was sufficient bearing in mind his mitigation that it was his first time to commit such an offence.

13. I am mindful of the sentencing policy guidelines developed for the judiciary, and in my view a period of 3 years would suffice. I therefore set aside the 5 years sentence on Count 1 and substitute it with 3 years imprisonment to run from the date of conviction.

14. On the charge of being in possession of cannabis sativa (bhang). I am in agreement that the facts did not prove that the appellant was the one found with the substance. The bhang was found inside his house – but there were four men inside the house, and the mere fact that he was the owner of the house did not prove possession. That conviction was unsafe and is quashed and the sentence therein set aside.

15. As for the charge of being in possession of government stores, he was sentenced to one year imprisonment – the offence attracts a 10 year sentence and in my view the one year sentence cannot be termed as harsh or excessive. I decline to interfere with it – for purposes of clarity that sentence will run concurrently with the reduced 3 year sentence and the same runs from the date of conviction on Count 1.

16. It is to that extent only that the appeal succeeds in terms of reduction of sentence.

Delivered and dated this 20th day of June, at Homa Bay

H.A. OMONDI

JUDGE