



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

**AT SIAYA**

**HIGH COURT CR. A. NO. 38 OF 2015**

**(CORAM: J. A. MAKAU – J.)**

**MICHAEL KANDEI ANDIPO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both the conviction and the sentence delivered on 2.7.2015 in Criminal Case No. 12 of 2015 in Siaya Law Court before Hon. C.A. Okore - SRM)*

**JUDGMENT**

1. **Michael Kande Andipo** the Appellant herein with another were jointly charged with two counts with an alternative charge. In Count 1 the appellant was charged with an offence of Burglary Contrary to **Section 304 (2) of the Penal Code**. The particulars of the offence are that on the night of 6th and 7th January 2015 at Yala Township in Gem District within Siaya County, jointly with another not before court entered the dwelling house of Julia Adhiambo Ogutu with intent to steal. On count II the appellant faced an offence of stealing in a dwelling house contrary to **Section 279 (b) of the Penal Code**. The particulars of the offence are that on the night of 6th and 7th January, 2015 at Yala Township, Kosoro village in Gem District within Siaya County jointly with another not before Court stole a handbag containing personal Documents and cash Kshs.15,000/= and iron sheets valued at Kshs.7000/= all valued Kshs.23,000 property of Julia Ogutu from the Dwelling house of the said Julia Adhiambo Ogutu. The Appellant also faced an alternative charge of handling stolen property contrary to **Section 322(2) of the Penal Code**. The particulars of the alternative charge are that on the 7th day of January, 2015 at Yala Township in Gem District within Siaya County, otherwise than in the cause of stealing dishonestly received seven (7) iron sheet of 3 metres each knowing or having reason to believe them to be stolen goods or unlawfully obtained.

2. When the charges were read to the Appellant in Kiswahili language which he understood he replied to count I “**that it was true**” and plea of guilty was entered. On count II, he also replied “**that it was true**” and plea of guilty was accordingly entered. The prosecution proceeded to give facts in support of the charge of burglary and stealing, and produced the recovered, iron sheet as exhibit P1. The appellant in his reply stated that “**the facts are true**” and the Court accordingly convicted the appellant on his own plea of guilty on both counts 1 and II.

3. The trial Court considered the mitigation in favour of the appellant and sentenced the appellant to serve

three (3) year imprisonment on count I and also three (3) years imprisonment on count II and ordered both sentences to run consecutively.

4. The sentence to serve three (3) years each on each count and the same to run consecutively provoked this appeal, in which the appellant in his petition of appeal filed on 22.1.2015 set out

the following six (6) grounds of appeal as follows:-

*a) That he pleaded guilty to the charges.*

*b) That he committed the offence at the same time.*

*c) That ordering the sentences to run consecutively was too harsh and excessive in the circumstances*

*d) That both sentences be ordered to run concurrently.*

*e) That he is married with four children and he was the sole bread winner of the family.*

*f) That he was remorseful and regretted having committed the offence.*

5. At the hearing of the appeal the appellant appeared in person while state was represented by M/s. Maurine Odumba, learned state counsel.

6. The Appellant relied on his written submissions in which he pleaded with the court to consider his mitigation and prayed that the sentence be ordered to run concurrently as he faced two counts arising out of the same transaction, that he is an orphan who has young children who are suffering due to his long incarceration in prison and that court should consider placing him on probation so as to help in decongestion of prisons facility.

7. The State in opposing the appeal submitted that the sentence accorded to the appellant was lenient in view of the sentence provided for the offences committed, urging for the sentence to run consecutively is the discretion of the trial Court.

8. **Section 304(2) of the penal Code and Section 279 (b) of the Penal Code** for the offences of burglary and Stealing from dwelling house provides for the sentences of 10 years and 14 years respectively but as Sections provides for maximum sentence and not minimum sentence the sentencing is entirely at the discretion of the trial magistrate.

9. In the instant case the trial Court on count I sentenced the appellant to serve three (3) years and on count II, three (3) years. I find nothing wrong with the sentences as the trial court in doing so exercised its discretion and nothing was put forward by the appellant to show the court acted unjudiciously or applied the wrong principles in imposing such a sentence.

10. In the present case the two counts had arisen out of the same transaction and the facts as given by the prosecution were the same for both of the two counts, however, the trial magistrate ordered the sentences to run consecutively. In the case of **Robert Njogu Mburu V. R. Criminal Appeal 553 of 2010 (Nyeri) The Court of Appeal** held thus:-

*“it was trite law that where a person committed more than one offence at the same time and in the same transaction, the practice was, save in very exceptional circumstances to impose concurrent sentences.”*

11. The Appellant herein committed the two offences at the same time and in the same transaction. The trial magistrate in ordering the sentences to run consecutively he should have indicated the reasons for going against the usual practice, thus indicating the exceptional circumstance informing him to order the

sentences to run consecutively other than concurrently. In view of the foregoing I am convinced that there were no exceptional circumstances to warrant the ordering of sentences imposed to run consecutively.

That as the offences committed were more than one in the same transaction and the facts were the same it would have been proper for the trial court to have ordered that the sentences should run concurrently. On non-custodial sentence I have noted from the facts of the offence that the appellant at the time of the commission of the offence, threatened the complainant with death and as such, I think he does not deserve non-custodial sentence. He has to serve the sentence meted against him.

**12. The Upshot is that the appeal is allowed to the extent that conviction is upheld, sentences of three (3) years imprisonment to run concurrently.**

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF**

**APRIL, 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 21ST DAY OF APRIL, 2016.**

**In the presence of:**

**Appellant in person present**

**M/s. M. Odumba for State.**

**Court Clerk – Kevin Odhiambo**

**Court Clerk – Mohammed Akidah**

**J. A. MAKAU**

**JUDGE**