



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HIGH COURT CRIMINAL APPEAL NO 5 OF 2016

WILBERFORCE OMOTO.....1ST APPELLANT

MAXWEL MUSUNDI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising out of the sentence of Hon. J. N MARAGIA, RM delivered on 8th January, 2016 in Busia CM Criminal Case No. 34 of 2016)

JUDGMENT

1. The Appeal before this court is against sentence only. Wilberforce Omoto and Maxwell Musundi (the appellants) are currently each serving three years imprisonment for the offence of burglary contrary to Section 304(2) of the Penal Code and one year imprisonment for stealing contrary to Section 279(b) of the same Code. The sentences were ordered to run concurrently.
2. In this appeal, both appellants are seeking a reduction of the sentence. They have indicated in their submissions filed in court and the petition of appeal that they are remorseful and blame involvement in the crime for bowing to peer pressure.
3. Further, that they are the sole breadwinners for their respective families. The 2nd Appellant is also a student at Jaramogi Oginga Odinga University. Both are of the view that since they were first offenders, a non-custodial sentence was appropriate. They assert that their current sentence was indeed harsh.
4. The state counsel on the other hand disagreed with the sentiments advanced by the appellants. He began his submission by stating that although both appellants confessed to the crime, they understood very well the repercussions of such a plea.
5. It is the state's position that the trial court in passing sentence considered their mitigation and the fact that they were first offenders. The court also took judicial notice of the fact that cases of burglary were on the rise and a custodial sentence was appropriate. In his concluding remarks, he submitted that the court was indeed lenient as the maximum sentence for burglary was ten years and that of stealing from a dwelling house is fourteen years.
6. In an appeal like the one before this court, the Court is guided by Section 348 of the Criminal Procedure Code which provides that:

“No Appeal shall be allowed in the case of an accused person who has pleaded guilty and has

been convicted on that plea by a subordinate, except as to the extent or legality of the sentence.”

7. As pointed out by the prosecutor, any person who commits the offence spelled out by Section 304(2) of the Penal Code is liable to imprisonment to a term not exceeding ten years. On the other hand for an offence of stealing from a dwelling-house contrary to Section 279(b) the maximum sentence is fourteen years imprisonment.

8. The magistrate had this to say after considering the appellants’ mitigation and before passing sentence:

“I have carefully considered the mitigation by each accused person. I have also considered that they are first time offenders but the manner in which they broke and entered the complainant’s house at night is very dangerous. Besides, cases of burglary have been on the rise in this region. A deterrent sentence is called for to act as a warning to other members of the public.”

9. The statement of the trial court was not an idle one. The appellants in the course of committing the crime had found the complainant in the house and commanded him to keep quiet. Had the complainant reacted there would have been dire consequences.

10. One of the purposes of sentencing is deterrence. The trial court indicated that it was imposing the sentence with a view to deterring commission of similar crimes.

11. On the other hand, the appellants have not shown that they were in any way undeserving of the punishment imposed.

12. Consequently, I find that the appeal lacks merit and the same is dismissed.

Dated, signed and delivered at Busia this 28th day of July, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT