



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL APPEAL NO. 125 OF 2014**

**BETWEEN**

**FREDRICK OMONDI ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. C. N. Njalale, RM dated 24<sup>th</sup> November 2014 in Criminal Case No. 1579 of 2014 at Senior Resident Magistrate's Court at Winam)*

**JUDGMENT**

1. The appellant **FREDRICK OMONDI ODHIAMBO** was charged with two counts of breaking into building and committing a felony contrary to **section 306(a) and (b)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* and burglary contrary to **section 304(2)** of the *Penal Code*. The particulars of the first count were that on the night of 1<sup>st</sup> and 2<sup>nd</sup> November 2014 at Mbeme area in Kisumu East District within Kisumu County, he broke into and entered a building namely a store of Jorim Onyango and committed a felony namely stealing and stole therein two white plastic chairs and one dining table all valued at Kshs. 1,750/- the property of Jorim Onyango. The particulars of the second count were that on 4<sup>th</sup> November 2014 at Mbeme area in Kisumu East District within Kisumu County, he broke and entered into the dwelling house of Kelvin Otieno with the intent to steal and did steal therein one suit case, one blanket, one blue jeans trouser, two trousers, four blouses, four t-shirts, three skirts all valued at Kshs. 5,500/- the property of the said Kelvin Otieno.

2. He was convicted on the two counts on his own guilty plea and sentenced to serve 3 and 7 years' imprisonment for count 1 and count 2 respectively. The sentences were to run consecutively. The appellant has now appealed against the conviction and sentence on the grounds that he did not understand the charge due to illiteracy and that charge was not properly drawn. When the appeal came up for hearing, the appellant prayed for reduction of the sentence.

3. What this court should ascertain is whether the plea was unequivocal. **Section 281** of the *Criminal Procedure Code (Chapter 63 of the Laws of Kenya)* provides that an accused person may plead not guilty, guilty or guilty subject to a plea bargain. The requirements recording a guilty plea provided for under **section 207** of the *Criminal Procedure Code (Chapter 75 Laws of Kenya)* were elucidated in *Adan v Republic* [1973] EA 445 as follows:-

i The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language he understands

ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the fact or add any relevant facts.

iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered.

v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.

4. In the present case, the proceedings in the lower court show that when the charges were read and explained to the appellant in *Dholuo* for the first time on 6<sup>th</sup> November 2014, he pleaded not guilty. The matter was stood over for mention on 20<sup>th</sup> November 2014 when he informed the court that he requested the court to read to him the charges. The charges were read to him and in response to each count he stated, "*It is true.*" The matter was adjourned to another date for the prosecutor to read facts and present the exhibits. The facts were read to him and he confirmed them to be true by stating as follows:

*The facts are correct. I was found with the said items. It is true that I broke into the store and stole the items listed and also broke and entered a dwelling house and stole the items listed in the charge sheet.*

5. From the above I am convinced that the appellant understood the charges against him as he confirmed the items he has stolen to be the ones listed in the charge sheet and stated eloquently that the facts were true. It is therefore immaterial for him to state that he did not know the consequences of pleading guilty to the charges so long as he understood them. It is also notable that the appellant changed his plea from one of not guilty to guilty showing that he understood the charges against him.

6. Even where the accused has admitted the facts as read to him, the court may yet record a plea of not guilty where the accused says something in mitigation that negates the offence. The Court of Appeal in ***John Muendo Musau v Republic NRB CA No. 365 of 2011 [2013]eKLR*** observed that, "*We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence.*"

7. I have read the facts and they disclose the offences charged and which the appellant understood. I have also examined that mitigation and there is nothing in his statement that would suggest a change of plea as the appellant admitted what he had done and he prayed for leniency. He stated;

*I did the said acts from 2<sup>nd</sup> November 2014. I did not know what was happening to me. I just found myself in the hand of the members of the public after being found with the items. I pray for forgiveness, I shall not repeat the offences herein again.*

8. The appellant contended that the sentence was harsh and excessive. This court can only interfere with the sentence if it is manifestly harsh or excessive or that the magistrate took into account irrelevant factors or failed to take into account relevant factors (see ***Macharia v Republic [2003]KLR 115***).

9. In my view, a custodial sentence was warranted since the appellant committed two offences in quick succession. According to the particulars of the offence, the offences were committed on two separate nights hence the learned magistrate was entitled to impose consecutive sentences. **Paras. 7.13 and 7.14** of the ***Sentencing Policy Guidelines, 2016*** provide as follows;

*7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively.*

7.14 *The discretion to impose concurrent or consecutive sentences lies in the court.*

**10. Sections 304(2) and 306** of the ***Penal Code*** provides that any person found guilty of burglary is liable to imprisonment for 10 years while a person found guilty of breaking into a building and committing a felony is liable to imprisonment for 7 years. The imposition of 7 years' imprisonment on the Count 2 was excessive and disproportionate when compared to the term imposed on the Count 1.

11. I affirm the conviction and allow the appeal to the extent only that I vary the sentence on Count 2 to 4 years' imprisonment. Both sentences shall run consecutively hence the appellant shall be in prison for a total of 7 years from the date of conviction and sentence.

**DATED and DELIVERED at KISUMU this 5<sup>th</sup> day of August 2016.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Osoro, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.