



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

**CRIMINAL APPEAL NO. 61A OF 2016**

**JOHN THENGA ..... 1<sup>st</sup> APPELLANT**

*versus*

**REPUBLIC ..... RESPONDENT**

**Consolidated with**

**CRIMINAL APPEAL NO. 61B OF 2016**

**DANIEL TOTO ..... 2<sup>nd</sup> APPELLANT**

*versus*

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate’s Court Criminal Case No. 328 of 2014 by Hon. B. S. KHAPOYA Ag. Resident Magistrate on 3<sup>rd</sup> July 2014.)*

**JUDGMENT**

1. The 1<sup>st</sup> appellant in this appeal is **JOHN THENGA** while the 2<sup>nd</sup> appellant is **DANIEL TOTO**. They were charged with criminal offences before the Principal Magistrate’s Court Maralal. I need to state that the record of the charges is unclear in regard to whether those charges were main or alternative charges. The judgment of the learned magistrate does not assist this court in that regard. What however is clear is that both appellants were charged with the **offence of breaking into a building contrary to Section 304(1) of the Penal Code, Cap 63**. There is a separate charge against the **1<sup>st</sup> appellant of handling stolen goods contrary to section 322(2) of Cap 63**. The record does not show whether this charge was alternative to the main charge of breaking into a building. The 1<sup>st</sup> appellant was additionally charged with what is indicated as 2<sup>nd</sup> count. On that 2<sup>nd</sup> count **1<sup>st</sup> appellant** was charged with the **offence of conveying suspected stolen property contrary to Section 323 of Cap 63** and an **alternative charge of handling stolen goods contrary to Section 322 of Cap 63**.

2. After trial the learned trial magistrate convicted both appellants without indicating, particularly in respect to the 2<sup>nd</sup> appellant whether his conviction related to the main count in the 1<sup>st</sup> count or the alternative, and whether he was convicted to the main count in 2<sup>nd</sup> Count or to the alternative and after receiving the appellant’s mitigation the learned trial magistrate in sentencing both appellants confused the matter further by stating:-

**“On the main charge the 1<sup>st</sup> accused (1<sup>st</sup> appellant) 4<sup>th</sup> ..... accused person (not before court) is each sentenced to serve in jail for a period of 5 years. On Count 2 the 1<sup>st</sup> accused person is sentenced to serve in jail for a period of 2 years”.**

The learned magistrate then followed this with sentencing a person he designated as 2<sup>nd</sup> accused to 5 years imprisonment even though the learned trial magistrate in his a judgment had not convicted any person referred to as 2<sup>nd</sup> accused.

3. Both appellants are before this court seeking to appeal only against sentence. They both abandoned their appeal against conviction.

4. The trial court’s record in as far as it related to the sentencing of the appellants is not clear. It is not clear which of the sentences meted out to the appellants relate to which count. In my view because of that confusion this court is entitled to vary the orders of sentence by the trial court.

5. The appellants were sentenced in July 2014. The appellants were in custody while awaiting the conclusion of their trial from May 2014. With that in mind and because of the confusion in the conviction and sentencing alluded to above I will allow the appellants’ appeal against sentence.

6. The appellants **JOHN THENGA** and **DANIEL TOTO’s appeal against sentence succeeds. Their sentence is hereby set aside and they are sentenced to the period already served in prison. Both appellants shall be released from custody unless they are otherwise lawfully held.**

7. It is so ordered.

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER 2016.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant .....

Appellants: John Thenga .....

Daniel Toto .....

For the State: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**