



NO. 2050

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.146 OF 2010

BETWEEN

JARED AGER ORWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in Criminal case No.1282 of 2010 of the SRM's court at Homa Bay dated 29th June 2010 – O.J. Ong'ondo, RM)

JUDGMENT

1. The appellant herein Jared Ager Orwa was the accused in SRM's Court at Homa Bay Criminal case No.1282 of 2010. He was charged with House Breaking contrary to **Section 304 (1)** and Stealing contrary to **Section 279 (b)** of the **Penal Code**. The particulars of the offence were that on the 25th day of June 2010, at Sindo Town in Suba District within Nyanza Province, he broke and entered the dwelling house of Damianos Onyango Ouma with intent to steal therein and did steal a Sony 3 CP charger Radio, 2 Osram Lamps, 3 sufurias lids and 4 sufurias all valued at Kshs.50,000/= the property of the said Damianos Onyango Ouma.
2. In the alternative count he was charged with Handling Stolen Property contrary to **Section 322 (1)** and **(2)** of the **Penal Code**, the particulars of the offence being that on the 28th day of June 2010 at Sindo Town in Suba District within Nyanza Province, otherwise than in the course of stealing dishonestly handled a Sony 3 CD charger Radio, 2 Osram lamps, 5 sufurias lids and 4 sufurias all valued at Kshs.50,000/=, the property of Damianos Onyango Ouma knowing or having reason to believe them to be stolen property.
3. He pleaded guilty as charged, convicted and sentenced to nine (9) years' imprisonment. The evidence against the appellant was as follows:- On 25th June 2010 at 8.00 a.m., the complainant Damianos Onyango Ouma had locked his house and left for work. When he came back during lunch time, he found the front door wide open. He however recalled that he had locked the same with a padlock before he left for work. The rear door was also open. On entering and checking his house, the complainant noticed that his Sony 3 CD charger Radio he had left in the house was missing together with 2 Osram lamps, 5 sufuria lids and 4 sufurias all valued at Kshs.50,000/=. He reported the matter at AP Camp Sindo.
4. Later, on 28th June 2010, he received information that the appellant had been seen somewhere trying to sell a radio. He (complainant) went to the AP camp and together with some Aps they

proceeded to the place where appellant was hiding. Appellant was arrested and upon interrogation, he volunteered and led officers to a nearby bush where he had hidden the stolen items. On arrival at the place, the officers recovered 1 Sony 3 CD charger radio with 2 speakers which was produced as P. **Exhibit 1**, 2 speakers produced as **P. Exhibit 2 (a) and (b)**, 2 Osram lamps produced as **Exhibit 3** and 4, sufuria lids produced as **Exhibit 5 (a-c)** and 4 stainless steel sufurias produced as **Exhibit 6 (a-d)**. That appellant was then escorted to Mbita police station with exhibits. He was subsequently charged. He pleaded guilty to the charge and upon conviction was sentenced to 9 years' imprisonment.

5. The appellant being dissatisfied with the conviction and sentence appealed against the judgment to this court. In his home made petition of appeal filed in court on 4th July 2010, he has appealed against the conviction and sentence on grounds; *inter alia*, that:-

1. *He pleaded guilty to the offence preferred against him by the prosecution;*
2. *He did not break into the house and steal anything. He is a fisherman by profession since he was born. That the goods which he was found with do not belong to him, they belong to one Duncan Odhiambo who he was sharing one house but who was not found.*
3. *There was no eye witness who saw the appellant breaking into a building and stealing. That appellant by passed one Odhiambo at night while bargaining with one Duncan Odhiambo who was willing to purchase the goods.*
4. *The appellant is a victim of circumstances in that one Odhiambo who is beach leader and boss saw the goods while being sold to one Duncan Odhiambo at around 7.00 p.m. at night.*

6. The appellant prays the honourable court to reduce the sentence imposed on him by the trial court to any lesser sentence.
7. This being a first appeal, this court has a duty to evaluate all the evidence given at the trial and come to its own independent conclusion on the same. See **Okeno -vs- Republic [1972] E.A 32**.
8. When the matter came before me on 30th July 2014, the appellant elected to drop his appeal on conviction and submitted that his appeal was against sentence alone. He submitted that 9 years imprisonment was excessive and he would wish the same reduced to a shorter sentence.
9. The appeal was opposed by the State. Mr. Ochieng learned prosecution counsel submitted that the law provides for a minimum sentence of 7 years for house breaking and 14 years for the second offence of stealing. That the 9 years imprisonment was adequate and fair. He thus urged the court to dismiss this appeal.
10. In **Antony Kariuki Maina -vs- Republic**, [2008] eKLR, the court restated the principle that, sentencing is a matter for the discretion of the sentencing court, with a rider that such discretion must judiciously be exercised and not capriciously. The sentencing court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. It has been said again and again that an appellate court can only interfere with the sentence imposed by a subordinate court if it is shown to be unlawful and illegal or if it is manifestly harsh and excessive as to amount to a miscarriage of justice. See generally **Ogola s/o Owuora -vs- R [1954] 19 EACA 270**, **James -vs- R [1950] 10 EACA 147**, **Nilsson -vs- Republic [1970] E.A 599** and **Wanjema -vs- Republic [1971] E.A 493**.
11. The offences for which the appellant was convicted carry a maximum sentence of 7 and 14 years imprisonment respectively. The appellant was sentenced to 9 years imprisonment. To that extent the sentence appears to be manifestly harsh and excessive. I say so because the items which were stolen were recovered intact from the appellant. The appellant was a first offender and appellant in fact pleaded guilty to the charge thus saving the court its valuable judicial time. This in my view should have accounted for something.
12. The appellant has been serving his sentence since 29th June 2010. I think that the appellant has been sufficiently punished. I would therefore interfere with the sentence to the extent that I would commute the same to the term so far served by the appellant with the consequences that the appellant should forthwith be set at liberty unless otherwise lawfully held.

JUDGMENT WRITTEN AND SIGNED BY

R.N. SITATI

JUDGE.

**JUDGMENT READ, DELIVERED AND COUNTERSIGNED IN OPEN COURT AT KISII THIS
9TH DAY OF JANUARY 2015**

C. NAGILLAH

J U D G E

In the presence of:-

Appellant in person for Appellant

Otieno for the State

Edwin Mongare Court Assistant