



**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO 25 OF 2014**

**JERRY AMBEVA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant was the 1<sup>st</sup> accused in the trial court. He was jointly charged with another person in count 1 with **burglary** contrary to **section 304(2)** and **stealing** contrary to **section 279(b)** of the **Penal Code**. It was alleged that on 7<sup>th</sup> December 2013 within Kangema Township in Kangema District of Murang'a County, jointly with others not before the court, they broke and entered a building, namely a church used by followers, with intent to steal therein, and that they did steal from therein various goods, all valued at KShs 86,000/00, the property of **Deliverance Church**. After a full trial the Appellant's co-accused was acquitted. The Appellant was acquitted of the 1<sup>st</sup> limb of the charge but was convicted of the second limb (stealing contrary to section 79 (b) of the Penal Code). He was sentenced to serve 5 years imprisonment.
2. The Appellant appealed against both conviction and sentence. At the hearing of the appeal on 23rd February 2015 however, the Appellant insisted that he wished to proceed with the appeal against sentence only. His appeal against conviction was therefore considered withdrawn.
3. I have however evaluated the evidence placed before the trial court in light of the relevant law. The conviction under section 279(b) cannot stand. The theft was not from a **dwelling house**; it was from a **church**. There was also no proof that the Appellant at or immediately before or after the time of stealing, used or threatened to use violence to any person.
4. The Appellant should thus have been convicted of **simple theft** contrary to **section 275** of the Penal Code. This is a minor cognate offence to the charge of burglary and theft contrary to section 304 (2) and section 279 (b) of the Penal Code.
5. In the circumstances I will quash the conviction under section 279(b) and substitute therefor a conviction for simple theft under section 275 of the Penal Code.
6. As for the sentence, the prosecutor had no records of the Appellant. He should therefore have been treated as a first offender. There is nothing in the trial court's notes on sentencing to indicate that he was treated as a first offender. Those notes were –

**“Court: Mitigation considered. The accused ought to have known better the source of the items he was found with. Having been a DJ for long as he told the court he ought to have known better. He did not and that he has to suffer the consequences. The offence is serious. Worshipers were deprived the advantage of a generator, amplifier and DVD because of the theft.”**

The Appellant's mitigation was as follows –

**“I am a father of two children and I am the sole bread winner. I plead for leniency.”**

7. The trial court clearly misdirected itself by not treating the Appellant as the first offender that he was. This resulted in a sentence that was manifestly harsh in the circumstances, even for an offence under

section 279(b). As it now is, simple theft carries a maximum of imprisonment for three years. In the circumstances of this case the Appellant clearly deserved that maximum sentence for simple theft.

**8.** In the event I will partially allow the appeal against sentence. I will set aside the sentence of five years imprisonment imposed by the trial court and substitute therefore imprisonment for three years. To that limited extent only is the appeal allowed. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 12<sup>TH</sup> DAY OF MARCH 2015**

**H.P.G.WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 13<sup>TH</sup> DAY OF MARCH 2015**