

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 54 OF 2014

(FORMERLY KISII HCCRA NO. 19 OF 2012)

BETWEEN

GODFREY OMONDI ABUTA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 104 of 2012 at the Principal Magistrate's Court at Homa Bay, Hon. O. J. Ongondo, Ag. SRM dated 23rd January 2011)

JUDGMENT

1. The appellant was charged with one count of burglary and stealing contrary to **sections 304(2) and 279B** of the *Penal Code (Chapter 63 of the Laws of Kenya)* and a second count of handling stolen goods contrary to **section 322(1)** of the *Penal Code*. He pleaded guilty on the second charge and was sentenced to seven years imprisonment. He appeals against the sentence only.
2. At the hearing of this appeal Mr. Oluoch, learned counsel for the respondent, conceded to the appeal on the ground that the appellant was 17 years old at the time and he ought not to have been committed to prison as he was a child within the meaning of **section 2** of the *Children Act*.
3. I have looked at the record and it disclosed that after the issue was raised before the learned magistrate, a medical assessment was conducted at Homa Bay District Hospital. The appellant's age was estimated to be over 18 years old. Nevertheless, I agree with the concession, as the appellant ought to have been given the benefit of doubt on that issue.
4. Having considered the sentence, I find that the learned magistrate fell into error in accepting that the appellant was not a first offender without proof of court records to show the previous conviction. The sentence of 7 years imprisonment was therefore manifestly harsh and excessive considering the appellant pleaded guilty and his age.
5. In the circumstances, I allow the appeal, set aside the sentence and substitute it with that of time served. The appellant is set free unless he is otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 29th day of April 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.