



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 82 OF 2014**

**FRANCIS ACHOLA ODERA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 697 of 2013 in the Principal Magistrate's at Bondo)*

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

1). The appellant was charged with the offence of Burglary contrary to section 304 (2) (1) of the Penal Code.

The particulars of the charge were that on the night of the 18th and 19th August 2013 at around 0400 hrs at Sinapanga Village Nyawita Sub location in Bondo District within Siaya County, broke and entered the dwelling house of Fred Meshack Awila Ndisi with intent to commit a felony namely theft therein.

The appellant went through the full trial and was sentenced to 4 years imprisonment hence this appeal.

2). The summary of the facts of this case are that **PW1 Fredrick Meshack Ndisi**, was alerted at around 4 am by his wife that there was somebody cutting the grills of the window. He went to the scene and found the appellant having removed the window pane. He called for help and the neighbours came, where they arrested the appellant. They also recovered a torch and a stick.

3). **PW2 Dan Odhiambo**, who is the landlord to the complainant, PW1, was told that a thief had been arrested in his premises. He came and found the appellant and saw the damage done at the door as well as the recovered items.

4). **PW3 PC David Boro**, got report from PW1 while he was on duty at Bondo police station. He went to the scene and rearrested the appellant. He also recovered and produced the items found with the appellant.

5). The appellant when put on his defence, gave unsworn evidence denying the charge. He said that somebody knocked him from behind while he was waiting to board a vehicle to town. That person turned out to be PW1. He also hit him with a stick on the head. The police came and they were both taken to Bondo police station. He was taken to hospital then back to police and the following day charged.

6). The court has perused the evidence on record as well as the parties submissions. The substance of

the appellant's petition dated 2-9-2014 is that the charge was defective, the sentence was excessive and that the evidence on record was insufficient to have had him convicted.

7). The state opposed the appeal and argued that the sentence in fact ought to be enhanced pursuant to the provisions of section 354 of the Civil Procedure Code.

8). This court is enjoined to reevaluate the evidence afresh with a view of arriving at an independent finding. See **Okeno -VS- Republic [1972] EA 32**. The first issue to determine is whether the charge was defective. Earlier the prosecution had charged the appellant with the offence of preparation to commit a felony but during trial they changed it to burglary. This of course is within the constitutional mandate of the prosecution. As to whether the charge is defective, I do not think so. My findings are buttressed by the fact that the facts as adduced by the witnesses are in tandem with the charge of burglary. The scene was a dwelling house and the appellant was found in the process of breaking the window at 4 am in the morning in, which one can easily conclude that the intention was to steal from the said dwelling house.

9). The other argument presented by the appellant in his written submissions is that the wife of PW1 was not called to testify. This is neither here nor there. The bottom line in my view was that he was arrested by PW1 at the scene. That house did not belong to him and neither did he deny that he was arrested at the scene. Secondly, there was overwhelming evidence that he was arrested with some items which clearly portrayed his intention.

10). I further do not buy the appellant's argument in his defence that he was hit on the head by PW1 while he was waiting for a vehicle near Cereals Board that particular morning. There is no evidence from hospital to suggest that he was taken for treatment. Neither did he request for an OB so as to show that he made any complaint regarding the assault by PW1.

11). The appellant argued that the sentence meted against him was excessive. The state on the other hand prayed for the sentence to be enhanced. Section 304 (1) (a) (2) provides for an imprisonment for a period of 10 years. I do not think that 4 years sentence is excessive. Further there was evidence that the appellant had another case at Siaya of same nature. Although the outcome of that case was not disclosed, it appears *prima facie*, that the appellant is an habitual offender. I shall nevertheless hold that the 4 years sentence imposed against him is sufficient to deter him from undertaking further criminal acts hopefully.

13). The upshot is that the appeal is disallowed. There is sufficient evidence that the charge of burglary was well established against the appellant. The offence took place at night, in a dwelling house which clearly was not the appellant's. He was caught red handed and his attempt to explain otherwise was insufficient and far away from the truth. Appeal dismissed.

**Dated, signed and delivered at Kisumu this 25th day of May, 2015.**

**H.K. CHEMITEI**

**JUDGE**