

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 41 OF 2015

BENSON NYAGA NDERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR 312 of 2015 at Siakago Senior Principal Magistrate's Court by Hon J. Omwange - RM on 11th May, 2015)

JUDGEMENT

This is an appeal against a sentence of a fine of Kshs 20,000/- in default 3 years imprisonment imposed by the Court of the Resident Magistrate at Siakago on 11th May, 2015. The appellant had pleaded guilty to a composite charge of housebreaking contrary to section 304 (1) (b) and stealing contrary to section 279 (b) in count I, both of the Penal Code (Cap 63 Laws of Kenya). In count II, he also pleaded guilty to the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. In count I, the appellant stole property worth Kshs 9,000/- whereas in count II, he damaged a thermos flask valued at Kshs 300/-

In sentencing the appellant, the trial court considered his mitigation before sentencing him to a fine of Kshs 20,000/- in default to serve 3 years imprisonment for each count.

This is a first appeal. As a first appeal court, I have reassessed the plea of guilty proceedings and I am satisfied that the convictions are sound.

As regards the sentence, I find that the stolen properties were recovered and were subsequently produced in court as exhibits. I also take into account that the appellant was a first offender in addition to his plea that he was drunk at the time he committed the offence.

However, the sentence imposed by the trial court is not one that is authorized by the law. According to section 28 of the Penal Code, the default sentence of imprisonment where the fine is Kshs 15,000/- but not exceeding Kshs 50,000/-, is 6 months imprisonment. It therefore follows that in this case, the default sentence should have been 6 months imprisonment. And for that reason, I hereby set aside the sentence imposed and substitute in its place a default sentence of 6 months imprisonment.

The appellant's appeal is allowed to the extent that he is to serve 6 months imprisonment in default of the fines that were imposed.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 18th day of NOVEMBER, .2015

In the presence of the applicant and counsel for the respondent.

Court clerk Nyaga

J. M. BWONWONGA

JUDGE

18.11.15.