



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL APPEAL NO. 156 OF 2013**

*(From the original conviction and sentence Criminal case No. 1151 of 2012 of the Chief Magistrate's court at Mombasa)*

**MERCY WAMBUI KAMAU .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The appellant faced four (4) counts of house breaking and stealing as follows:

**Count 1**

House breaking contrary to section 304 (1) (b) and stealing contrary to section 279 (b) of the Penal Code.

On 5<sup>th</sup> day of April, 2012 at Kiembeni Blue Estate in Kisauni District within the Coast Province, the appellant jointly with others not before court broke and entered the dwelling house of NEEMA KARISA and stole therein one Nokia 122 valued at Ksh 2500 the property of the said NEEMA KARISA.

**Count II**

House breaking contrary to section 304 (1) (b) and stealing contrary to section 279 (b) of the penal code. The facts are that on the 6<sup>th</sup> day of March, 2012 at Customs Nyali Estate in Kisauni District within the coast province the appellant jointly with others broke and entered the dwelling house of JOSEPH LAVINGTON AKWIRI and stole therein one TV make Sony 21", one home theater make LG, one laptop, one pair of shoes, one CD rack 100 CD, one Blender, one microwave, one gas cylinder 13 kg, one plate cooker and one suit case, all valued at Ksh 180,000/=, the property of the said JOSEPH LAVINGTON AKWIRI.

**Count III**

House breaking contrary to section 304 (1) (b) and stealing contrary to section 279(b) of the penal code.

The facts being that on 23<sup>rd</sup> day of March, 2012 at Kiembeni Blue estate in Kisauni District, the appellant jointly with others broke and entered the dwelling house of MWAKUNI MBURA and stole therein one TV make LG 40" S/No. LDU 3BB UD 000 26, two laptops make Dell, one CD changer make LG, one digital camera, and one hard Disk, all valued at Ksh 309,495 the property of MWAKUNI MBURA.

## **Count IV**

House breaking contrary to section 304 (1) (b) and stealing contrary to section 279 (b) of the penal code.

The particulars are that on 16<sup>th</sup> day of March, 2012 at Blue Estate, Kiembeni in Kisauni District, the accused jointly with others the accused broke and entered the dwellinghouse of IRENE AYIEMBA OLANG' and stole therein one Sony Bravia TV 32 " one home theater make LG, one TV make LG 21, one DVD make LG, one Mecco gas cylinder and two suits Cases, all valued at ksh 358,000 the property of the said IRENE ANYEIMBA ALANG'.

The appellant pleaded not guilty to the three counts and the case proceeded for hearing. After the hearing of the case, the trial court convicted the appellant and her co-accused and sentenced them to serve three (3) years imprisonment for the 1<sup>st</sup> limb of the offence and two ( 2) years imprisonment for the 2<sup>ND</sup> limb of the offence in court 1. The sentences were ordered to run consecutively.

The appellant being aggrieved by the sentence preferred this appeal setting out five ( 5) grounds of appeal being as follows:

- 1 That the learned trial magistrate erred in law and fact by not considering her mitigation.
- 2 That the learned trial magistrate erred in law and fact by considering her plea for a non custodial sentence.
- 3 That the learned trial magistrate erred in law and fact by not considering her plea for her sentence to run concurrently.
- 4 That the learned trial magistrate erred in law and fact by Not considering that she was an active member of the society, she has represented Kenya in East Africa, Kenya and outside Kenya in Football cup tournament through Mathare youth Sports Association (MYSA).
- 5 That the learned trial magistrate error in law and fact by not considering that she is a first offender.

M/s Ocholla for the state conceded to the appeal on the grounds that there was an error in the order for the sentences to run consecutively, the appellant having been sentenced to serve 3 years imprisonment and 2 years imprisonment for the two limb in the offence of house breaking contrary to section 304 (1) (b) and stealing contrary to section 279 (b) of the penal code, respectively.

Before considering the substance of the appeal, I wish to briefly set out the case that was before the trial court.

The prosecution called five (5) witnesses who gave sworn evidence in support of their case.

The prosecution case was that on the 16<sup>th</sup> March, 2012 Pw3, Irene Ayiembra, who had travelled upcountry on 15<sup>th</sup> March, 2012, was called by her son and informed that her house in Kisauni had been broken into and things stolen therein. The things stolen included one Sony Bravia TV 32", one Home theater make LG, TV make LG 21", one Meko, one DVD make LG and two suit cases . That upon inquiry, he was informed by a neighbour that the stolen items had been ferried in a white pick up and none could intervene as they thought she was moving to another house. Nothing was recovered.

There was also evidence that on 23<sup>rd</sup> March, a Swiss National, who had been in Kenya for a period of two ( 2) months, saw someone who looked like the second accused peeping next to her house as if she was looking for something. Later, during the day, Pw1 and her boy friend proceeded to the car wash. They returned after one (1) and half ½ hours to find that the main gate was unlocked, though they had securely locked it before leaving. They also found that the doors inside the house were also broken and various

electric goods which included TV make LG 40”, two laptops make Dell, one CD changer make LG, one digital camera LG, one disk and other personal items, all amounting to approximately Ksh 200,000 having been stolen. She recorded a statement at Kisauni police station. She also said nothing was recovered.

Further evidence was that on the 5<sup>th</sup> April, 2012 Pw2 Nancy Karisa securely locked her house at around 11.00am and left for the shop. And as she was leaving, she saw people going towards her house. That Pw2 thought they were her visitors and hurried back. She described that she saw a lady in a skirt and a man in a red T shirt, and the lady was opening the door to her house followed by the man. That when she got to the house. Pw2 found the man outside. She identified him as the 2<sup>nd</sup> accused person. She asked him whether the owners of the house were there and he replied that his cousin was in. She then inquired the name and he replied that she was Emma. She then informed them that she was the owner of the house and the 1<sup>st</sup> accused person who is the appellant herein, took off. Pw2 went after her and with the assistance of a man who was passing by, the appellant was arrested. Pw2 got to the house and found her phone missing but the colour TV and many other house hold goods in the sitting room. They went to the police station where the appellant was searched and Pw2’s phone recovered. She identified her phone and the appellant and another in the dock to court respectively.

The accused persons were placed on defence and the appellant opted to give a sworn testimony in defence. She called no witness.

In her evidence, the appellant testified that she was a resident of Nairobi and a footballer. She said that on the night of 4<sup>th</sup> April 2012 she travelled and arrived in Mombasa since she was visiting the team which was playing at 4.00pm. That she had come to pick her passport and while going to take a ticket, she found a woman who came and fell next to her. That there was a man behind her who asked that they perform first Aid on the lady. They took her to the police station canteen where she regained consciousness. The appellant said that she was retained there to record statements since the lady was claiming she had stolen from her. That she was searched and nothing was recovered from her. She was released by the police who asked the people who wanted to beat her to cool down. She was taken to Bamburi at 9.00 pm because the members of public were many. According to the appellant, she was charged with an offence she knew nothing about.

I have considered the record of the proceedings before the lower court with regard to the decision in the case of **OKENO VRS REPUBLIC ( 1992) E A 32** and page 36, where the duty of the appellate court to submit evidence tendered before the trial court to a fresh and exhaustive examination so as to reach its own conclusion was laid down . The judge went on to state that in doing this the court should make allowance for the fact that the trial court had had the advantage of hearing and seeing the witnesses.

I find that the charge was defective and the trial magistrate ought to have struck it off or invited an amendment to be made thereto.

In the instant case, the appellant was charged with four ( 4) counts where the offences alleged, occurred, on different dates, times and to different people in total breach of the provisions of Section 135 (1) of the Criminal Procedure code which states;

***“any offence, which follows or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same fact, or form or are part of a series of offense of the same or similar character.”***

The misjoinder of offences which occurred at different times, places or dates, is of such fundamental nature as it will lead to affect the flow of evidence and the whole concept of a fair trial. It even makes it difficult for an accused person to know what case they are to defend themselves against, hence causing embarrassment.

To add on this, although the trial magistrate acquitted the appellant of the charges in courts II, III and IV under section 215 of the Criminal Procedure Code, she proceeded to convict her for the offence of house

breaking and stealing in count 1, whereby she sentenced her to serve 3 years imprisonment for the 1<sup>st</sup> limb and 2 imprisonment of the 2<sup>nd</sup> limb she ordered that the sentence run consecutively.

This is clearly un-lawful and illegal since the two limbs the charge are based on the same facts or transaction. The trial magistrate ought to have carefully based that the sentences run con currently.

Section 14 (3) of Criminal Procedure Code provides that:

***“Except in cases to which sections 1 (1) applies, nothing in this section shall authorize a subordinate court to pass on any person at one trial, consecutive sentences”***

In Nyamo Ileme s/ vrs Republic (1951) 18 E A C A 119, it was laid down that.

***“ if the facts of a case disclosed two offences in involving two acts the accused might be charged with or punished for something that but that if all facts amended to one act, he cannot be punished twice of for that act”.***

Accordingly, I allow the appeal against the sentence as the same was unlawful and illegal.

That appellatant is hereby set free unless lawful held.

Judgment delivered, dated and signed on 29<sup>th</sup> December 2015.

**D. CHEPKOWNY**

**JUDGE**

**In the presence of;**

M/s Ocholla for the state.

Appellant in person

C/Assistance – Kiarie