



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 7 OF 2013**

**HERBERT MASANGANJIRA ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

***(Appeal against conviction and sentence from the judgment of [P.O. OOKO, RM] in the Chief Magistrate's Court at Kakamega in Criminal Case No. 536 of 2011)***

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

The appellant was charged with two counts of breaking into a building and committing a felony contrary to **section 306(a)** of the Penal Code. The particulars of the first count were that the appellant and others *on the night of 14<sup>th</sup> and 15<sup>th</sup> of March 2011 at Emakhumbi Primary School, Ematiha sub-location, Butso North location within Kakamega County jointly broke and entered into a building namely principal's office with intent to steal and did steal from therein assorted exercise books, assorted utensils, assorted stationery, one packet of omo, two calendars, four padlocks, one packet of salt and ten football uniform (blue) all valued at KShs.27,818, the property of the said Emakhumbi Primary School.* The particulars for the second count were that the appellant *on the night of 14<sup>th</sup> and 15<sup>th</sup> at Busiri market, North Butso location within Kakamega County otherwise than in the course stealing, dishonestly received or retained four football uniform (blue), fifty one exercise books, pieces of chalks, paper punch, a stapler and pins knowing or having reason to believe them to be stolen property.*

The appellant was also charged with an alternative count of handling stolen property contrary to section 322 of the Penal Code. The appellant was convicted and sentenced to serve five years imprisonment for the two counts of breaking into a building. The sentences are to run concurrently. The grounds of appeal are that the sentence is harsh. The appellant is only seeking a reduction of sentence. The State supported the conviction and opposed the appeal.

Before the trial court, **PW1 PC ELPHAS GATUNGI** was based at the Kakamega police station. He investigated the case and produced two live chickens and two cooked ones that had been recovered from the appellant. **PW2 KENNEDY BARASA** testified that he is the headmaster of Emamba Primary School. On the night of 14<sup>th</sup> March 2011 the school was broken into and several items stolen. On 15.3.2011 he got information that some of the items had been recovered. The items were recovered from the appellant who had a sack with the items. He was not present when the items were recovered. **PW3 SAMMY MUNDA MAPESA** testified that on the 14.3.2011 his house was broken into and six chicken and two jembes were stolen. On the 15.3.2011 he was called and informed that some of his stolen properties had been recovered. He went to the chief's place where he found two live chicken and two dead ones and identified them to be his. He also saw the appellant who had been arrested and he knew him as his immediate neighbor.

**PW4 BERNARD SHIKANDA** is the assistant chief of Ematiha sub-location. The two cases of theft were reported to him. They arrested the watchman of the school who charged together with the appellant. The watchman mentioned the name of the appellant. He later got information that the appellant had been arrested by members of the public with a sack containing chickens and the items stolen from the school. He went there and arrested the appellant. **PW5 CPL JOTHAM WANGA** was attached at the Emukoba AP camp. The report on the breaking in of the school was made and he went to the school. He confirmed the theft and they arrested the watchman. On the 15.3.2011 the area assistant

chief (PW4) went to the camp with members of the public having arrested the appellant. The appellant was re-arrested and later charged with the offence.

The appellant was put on his defence and he gave sworn evidence. He testified that some of the witnesses are his neighbours. On the 14<sup>th</sup> and 15<sup>th</sup> March 2011 he slept in his house with his two children. On the 15.3.2011 at 6.00 a.m. he left his house and on the way he met two people who are brothers of PW3. They started beating him saying that he was a thief. He gave them the phone number of his father who was called. His father notified the area assistant chief. He was later taken to the Kakamega police station and charged with the offence. He denied committing the offence.

The main ground of appeal is that the sentence is harsh. From the evidence on record it is established that the appellant committed the offences. He was not arrested at the two scenes of crime but was arrested a few hours after the offences were committed. The stolen items were found in his possession. I do find that the conviction is proper. With regard to the issue of sentence the appellant kept on stating that he is a college student. He is also married with two children and is a first offender. I will reduce the sentence to the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 26<sup>th</sup> day of June 2014

**SAID J. CHITEMBWE**

**J U D G E**