



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 214 OF 2012**

*(An appeal against both conviction and sentence of the Chief*

*Magistrate's court at Kakamega in Criminal Case No. 1986 of 2011 [P. O. OOKO, RM] dated 7<sup>th</sup>  
October, 2011)*

**WYCLIFFE MUKHUVERO..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged in the subordinate court with burglary contrary to Section 304 and stealing contrary to **Section 279 (b)** of the Penal Code. The particulars of charge were that on the 2nd night of October 2011 at Maranda Location, Mukulusu Sub-location in Kakamega East District within Western Province broke and entered the house of Nicholas Liyayi with intent to steal therein and did steal therein 150 kg of fertilizer valued at kshs.2,000/= the property of Nicholas Liyayi. In the alternative, he was charged with handling stolen goods contrary to **section 322 (2)** of the Penal Code. The particulars of the alternative charge were that on the night of 2nd October 2011 at the same place other than in the course of stealing, dishonestly received or retained 150 kg bag of fertilizer knowing or having reason to believe it to be stolen goods.

He was recorded as having pleaded guilty to the main count. He was therefore convicted of the offence. He was sentenced to pay a fine of Kshs.10,000/= and in default to serve three years imprisonment on the 1st limb of the charge, and Kshs.10,000/= and in default three years imprisonment on the 2nd limb of the charge. The sentences were ordered to run concurrently.

Being dissatisfied with the sentence, he has appealed to this court. His grounds of appeal are firstly that he is very remorseful for having committed the offence. Secondly, that he is seeking leniency from this court. Thirdly, that the sentence is very harsh. Fourthly, that he will never be engaged in any criminal activity in future. Fifthly, that he has learnt the lesson the hard way.

On the date of hearing of the appeal, the appellant submitted that he was asking for a reduction of the sentence. That he only had one living parent and that he was poor.

The learned Prosecuting Counsel, Mr. Oroni submitted that the maximum sentence for burglary was ten years imprisonment. The default sentence of three years imprisonment for the 1st limb of the offence was therefore reasonable though the appellant was a first offender. However, counsel submitted that the maximum sentence for theft was three years imprisonment and the fertilizer stolen was worth only Kshs.2,000/=. In counsel's view therefore, the sentence of Kshs.10,000/= fine and in default three years imprisonment for the second limb of the charge was excessive.

This is an appeal against sentence only. I have perused the record the trial magistrate. In my view, the appellant was properly convicted on his own plea of guilty. The plea was in my view correctly recorded.

The learned Prosecuting Counsel has stated that he is conceding to the appeal on the sentence on the

2nd limb of the charge. In the 2nd limb, the appellant was charged with theft contrary to **Section 279 (b)** of the Penal Code. The minimum sentence is fourteen years imprisonment. It is not three years imprisonment as suggested by the learned Prosecuting Counsel. Therefore, on the face of it, the sentence is not excessive.

Sentencing is the discretion of a trial court. Since the offences were charged together in one charge, there was in my view, no justification for the consecutive default sentences of imprisonment imposed by the trial court. The default sentences should in my view have been concurrent. The appellant was also a first offender. Therefore the learned magistrate should have considered that factor as well.

Having re-evaluated the position on the sentences herein, I order that the default prison sentences do run concurrently. I therefore allow the appeal in part. I uphold the sentences of fines on both limbs of the charge. I however order that the default sentences of imprisonment run concurrently rather than consecutively from the date on which they were pronounced by the trial court.

It is so ordered.

*Dated and delivered at Kakamega this 19<sup>th</sup> day of June, 2014*

**George Dulu**

**J U D G E**