



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**CRIMINAL APPEAL NO. 20 OF 2013.**

JOSEPH KIPROTICH TOO .....APPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT.

**(BEING AN APPEAL FROM ORIGINAL CASE NO. 394 OF 2013 IN BUSIA ON SENTENCE)**

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

The Appellant was charged with the offence of breaking into a building committing a felony contrary to section 306 (a) of the Penal Code. That on the 29<sup>th</sup> January, 2013, at Busia Administration police lines, jointly with others not before court, broke and entered into a building namely dwelling house of Alphanas Mariba with intent to steal, and did steal from therein one TV make JVC, 3 suitcases containing assorted clothes, six pairs of shoes, one DVD player make Sonny, one heater, and one pair of jungle uniform all valued at Kshs.62,000/=, the property of the said Alphanas Mariba.

When the Appellant appeared before the learned trial Magistrate on 3<sup>rd</sup> April, 2013, the charge was read over to him and he pleaded guilty. The facts were presented by the prosecutor on 4<sup>th</sup> April, 2013 and the Appellant confirmed them as true. The court thereafter convicted him. The prosecutor indicated to the court that the Appellant was a 1<sup>st</sup> offender. The Appellant then presented his mitigation asking the court for leniency. Before sentencing the Appellant, the learned trial Magistrate observed that the offence was serious and needed a deterrent sentence. He proceeded to sentence the Appellant to 5 years imprisonment. The Appellant, being dissatisfied with the sentence, filed his appeal on 16<sup>th</sup> April, 2013 relying on the following five grounds;-

1. That he pleaded guilty to the charge.
2. He is a 1<sup>st</sup> offender.
3. That the trial magistrate did not consider his mitigation.
4. That he is suffering due to the long sentence.
5. That the long sentence is detrimental to his family.

When the appeal came up for hearing today the 16<sup>th</sup> October, 2013, the state did not oppose the appeal on the sentence, conceding that five years imprisonment for a 1<sup>st</sup> offender was a harsh sentence.

I have carefully considered the grounds of appeal and the submissions by the state and I am in agreement that had the trial court considered the fact that the Appellant was a 1<sup>st</sup> offender and the fact that the offence was not aggravated, the learned trial Magistrate would have come to a more lenient sentence. Under the provisions of section 354 (3) (a) (i) of the Criminal Procedure Code, this court is empowered to reduce a sentence issued by a trial court where it is satisfied that the sentence is harsh. The sentence given to the Appellant in this case of five years imprisonment is hereby reduced to 3 years imprisonment.

It is so ordered.

**S.M. KIBUNJAJUDGE.**

**DATED AND DELIVERED ON...17TH.....DAY OF OCTOBER, 2013.**

**IN THE PRESENCE OF;**

**JUDGE**