



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

HCCRA NO.3 OF 2011

(From the Judgement of Honourable E.O. Obaga – Principal Magistrate, Busia in `CR.No.1912 of 2009)

DAVIS WESONGA)
ANDRIAN MISINDAI WETIRA)APPELLANTS

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

The appellants David Wesonga and Andrian Musindai Wetira were convicted by Busia Principal Magistrate of the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code and sentenced to four (4) years imprisonment. This appeal is against sentence only.

The State Counsel Mr. Okeyo opposed the appeal on grounds that the sentence was lawful.

The facts of the case was that the store of the complainant (PW1) was broken into in the night of 4th and 5th December 2009 and sh.52,000 – cash stolen. The 1st appellant is the son of PW1. Information was received by PW1 and his wife that the 1st appellant was the suspect. Police were informed and arrested the 1st appellant recovering cash sh.8450/- from this person. The 2nd appellant was the friend of the 1st appellant. Led by the first appellant, the 2nd appellant was arrested and sh.5000/- recovered from him. The recovered cash was produced in court.

The 1st appellant says he is remorseful for having stolen from his father. He says he is sickly after he was assaulted by police offices on arrest. He now requires specialized treatment which can only be accessed when he is out of prison. The second appellant said he stole due to temptation to get free food. He is now very remorseful and that he was also tortured by police on arrest.

The maximum sentence under section 306 (a) of the Penal Code is seven years imprisonment. The amount stolen was sh.52,000/- which PW1 said he had accumulated for a period of three months in his business. PW1 said his son the appellant had formed the habit of stealing chicken from home. He went to spend the sweat of his father with a girl at Mapesa Hotel in Namable where he was arrested. In his mitigation, the 1st appellant told the court that his father cursed him and chased him away from home. At the age of 22 years at the time of the offence the appellant was a school drop out and acquired delinquent habits. The 2nd appellant said he was an orphan.

The trial magistrate said she had considered the mitigation of the appellants before passing

sentence. Whatever their situation, the appellants were not justified to commit the offence.

I find the sentence lawful and reasonable in the circumstances. I note that no medical evidence as to the sickness of the appellants was produced. The appellants can still be treated in prison or referred to the country's referral hospitals for specialized treatment if the need arises.

The appeal lacks merit and is dismissed. The conviction and sentence are hereby upheld.

F.N. MUCHEMI
J U D G E

Judgement dated and delivered on the 14th day of December 2011 in the presence of the appellants and the State Counsel Mr. Okeyo.

MUCHEMI

J U D G E

F.N.