



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 150 of 2009

KEVIN ONYANGO OPIYO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant **Kevin Onyango Opiyo** was charged with the offence of house – breaking and stealing contrary to Section 304 (1) and Section 279 (b) of the Penal Code in that on the 11th October 2009 at around 8:00 a.m. at Kibos Kisumu District broke and entered into the dwelling house of **Isaac Otieno Opiyo** with intent to steal and did steal from therein assorted items all valued at Kshs. 16,670/= the property of the said Isaac Otieno Opiyo.

There was a second alternative count of handling stolen goods contrary to Section 322 of the Penal Code, in that on the 12th October 2009 at Kunya Village Kisumu District otherwise than in the course of stealing dishonestly retained one phone make Orange, one speaker make Semitone, two pairs of long trousers, one Zoe soap, a kilogram of sugar and a bar of soap knowing or having reasons to believe them to be stolen goods.

The charges were read and explained to the appellant when he appeared before the learned Resident Magistrate at Winam. He pleaded guilty to the second alternative count and was convicted accordingly after his acceptance and confirmation of the facts narrated in court by the prosecution. He was thereafter sentenced to serve seven (7) years imprisonment on count two.

Being dissatisfied with the sentence, the appellant filed this appeal on the basis of the grounds contained in the petition of appeal dated 23rd October 2009.

The grounds are essentially a plea for leniency based on the facts that the appellant was at the time of his conviction a minor aged sixteen (16) years and a pupil at Obinju Primary School in Manyatta Estate Kisumu about to sit for his final year examination. There is also the suggestion that the appellant did not properly defend himself due to ignorance and was not accorded conducive environment during the hearing of his case. He also complained of the violation of his constitutional rights under Section 72 (3) of the Constitution and lamented that his continued stay in prison would negatively affect his

future.

At the hearing of the appeal, the appellant represented himself and reiterated his plea for leniency saying that he wished to go back to school.

The learned State Counsel, **Mr. Okeyo**, opposed the appeal saying that the sentence imposed by the learned trial magistrate was neither illegal nor excessive.

The learned Counsel noted that the appellant did not mitigate before the trial court and that he was unremorseful.

Basically, the principles upon which an appellate court can interfere with the discretion of a trial magistrate as regards sentence are well settled. The appellate court can only interfere where the trial magistrate acted on wrong principles or has imposed a sentence which is manifestly inadequate or manifestly excessive (**See, Diego =vs= republic [1985] KLR 621**).

Herein, the appellant entered an unequivocal plea of guilt on the second alternative count.

Under Section 322 (2) of the Penal Code, a person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen (14) years.

The appellant was handed down a sentence of seven (7) years imprisonment for an offence which carries a maximum sentence of fourteen (14) years imprisonment. It may not therefore be said that the sentence was unlawful or that it was based on wrong principles.

However, given that the appellant was a minor and a first offender, the sentence of seven years imprisonment was rather excessive in the circumstances.

Consequently, the appeal succeeds to the extent that the sentence imposed by the learned trial magistrate is hereby set aside and substituted for one covering the period already served.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 17th day of March 2010.

J.R. KARANJA

JUDGE

JRK/aao