



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Criminal Appeal 220 of 2006**

**(Being an appeal from original conviction and sentence of the SRM's court
at Homa Bay in criminal case No. 1207 of 2006 – Edwin K. Mwaita, RM)**

JUSTUS OTIENO AILA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with five counts of burglary contrary to **section 304 (2)** and stealing contrary to **section 279 (b)** of the **Penal Code**. He pleaded guilty on counts 1, 2, 3 and 5 but denied count 4.

The prosecution gave facts in respect of all the 5 counts. The appellant responded that some of the facts were true but the facts regarding counts 2 and 3 were not correct.

The trial magistrate convicted him in respect of counts 1 and 5. The appellant then tendered his mitigation. He requested for a non-custodial sentence.

The prosecutor proceeded to give more facts which were admitted to by the appellant.

The learned trial magistrate sentenced the appellant to 4 years' imprisonment on both counts 1 and 5. He further stated:

**“Sentences for each count runs concurrently but sentences in
count 1 and 5 runs consecutively.”**

The appellant preferred an appeal against the said conviction and sentence. He argued that the plea was not properly taken.

Mr. Kemo, Senior Principal Prosecution Counsel, did not oppose the appeal and in my view rightly so. The record does not show whether the appellant was convicted. Additional facts were also given after mitigation. All these anomalies vitiated the trial court's decision.

I allow the appeal, quash the convictions and set aside the sentences that were passed by the trial court. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 16TH DAY OF MARCH, 2010.

D. MUSINGA

JUDGE.

16/3/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Gitonga for the State

Appellant – present

Court: Judgment delivered in open court on 16th March, 2010.

D. MUSINGA
JUDGE.