

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 26 of 2009

ONESMUS MUSEMBI DISHON.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

The Appellant was convicted, after trial, of the offence of **shop braking and committing a felony therein** contrary to **section 306(a)** of the **Penal Code**. He was on 3rd of February 2009 sentenced to serve 3 years in imprisonment. He has appealed against sentence only.

The particulars of the offence were that in the night of 5th October 2008 at Mwanyani Village, Kitumbu Location of Mbooni District within Eastern Province, jointly with his co-accused, **John Kakotho Mutie**, they broke and entered the shop of one **Charles Safari** with intent to steal therein, and that they did steal from therein various shop goods valued at KShs. 100/00. The co-accused pleaded guilty and was sentenced to serve 2 years imprisonment.

The Appellant was a first offender. He appears to have been sentenced to serve 3 years imprisonment, that is, 1 year more than his co-accused, simply because he insisted on being tried. That is not a just reason for penalising an offender. A full trial is the constitutional right of any accused person who does not plead guilty, and he should not be penalised for it.

There was no reason here why the Appellant could not attract the same sentence as his co-accused who pleaded guilty. There are no circumstances disclosed in the record that exacerbate the offence committed by the Appellant vis-a-vis that of his co-accused.

Justice here will be served by reducing the Appellant's sentence from 3 years to 2 years imprisonment effective from the date of sentencing, which was 3rd February, 2009. To that limited extent only the appeal of the Appellant is allowed. It is so ordered.

DATED AT MACHAKOS THIS 4TH DAY OF MAY 2010

**H. P. G. WAWERU
JUDGE**

DELIVERED THIS 7TH DAY OF MAY 2010