



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 53 of 2008

*(Appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Mumias in Criminal Case
No. 889 of 2007 [S. N. ABUYA ESQ., RM])*

MICHAEL OFULA MALALA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

1. **MICHAEL OFULA MALALA** was one of the three accused persons in Mumias SRM's court Criminal Case Number 889/2007. It was alleged that on 7.7.2007 at Mumias Township they jointly broke into a hotel belonging to one Hadija Wesonga and stole therefrom half bale of baking flour, 6 kgs of rice, 6 kgs of sugar, 3 sufurias and plates all valued at Kshs.1080/= . In the second count that they jointly broke into a hotel belonging to Hadija Wesonga and stole twenty five dresses and twenty five skirts, the property of one Mohamed Otuya. The offences were all allegedly committed contrary to **Section 306 (a)** of the Penal Code.
2. After trial, the Appellant was found guilty and was sentenced to serve four (4) years imprisonment in respect of each count and the sentences were to run concurrently.
3. Although in his Petition of Appeal he raised two issues; that the case against him was fabricated and that his alibi defence was rejected, at the hearing, he only stated as follows:

“I seek leniency on sentence”.
4. I will not limit myself to that issue only because of what I will shortly say.
5. On sentence, the Appellant did not give any reasons why this court should interfere with the sentences meted out. I have however looked at the circumstances of the case and I am not convinced that the case against the Appellant was proved beyond reasonable doubt.
6. I say so because there was no eye witness to the alleged break-in and the evidence that the Appellant was found in

a house where his co-accused had led the police to recover the stolen items did not point to him as a thief. It was not clear who the house belonged to and whether the Appellant was in actual or constructive possession of the stolen items. In fact in respect of count II, his co-accused was the one in possession and he was sentenced accordingly. It is unclear how the Appellant was connected to that charge.

7. PW2, Mohamed Watuya and PW1, **Hadija Wesonga** said that they were led to one Ismail Babu by a lady who said that she had bought a stolen skirt from him. That lady was never called to testify and PW3, **PC Peter Maritim** who investigated the case said that when he went to arrest Babu, the Appellant was outside the house, ran away and was arrested with nothing incriminating. What then led him to conclude that he had something to do with the break-in. Running away from a Police officer without other evidence is not evidence of culpability in a specific crime. No other evidence tied the Appellant to the charge.
8. In the end, the Appellant's conviction may not have been safe and I will quash it and set aside the sentences.
9. The Appellant's appeal is allowed and he may be released unless he is otherwise lawfully held.
10. Orders accordingly.

Delivered, dated and signed at Kakamega this 16th day of June, 2010.

ISAAC LENAOLA

J U D G E