



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 241 OF 2009**

***(From original conviction and sentence in Criminal Case No. 837 of 2008 of the Senior Principal Magistrate's Court***

***at Narok - A. G. Kibiru {SRM}***

**WYCLIFF**

**JUMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was, with two other co-accused charged on Counts I, II and III with the offence of burglary contrary to Section 304(2) and stealing contrary to Section 279(b) of the Penal Code (*Cap. 63, Laws of Kenya*).

The Appellant and the 2<sup>nd</sup> co-accused were also charged with the alternative charge of handling stolen goods contrary to section 322(1) and (2) of the Penal Code.

The Appellant was also charged alone, with the alternative charge of handling stolen goods contrary to Section 322(1) of the Penal Code.

The third accused was on the evidence acquitted on all counts while the Appellant and the 2<sup>nd</sup> accused were also acquitted on Counts I, II, III and IV (*all burglary charges*) for lack of evidence but were put on their defence on the two alternative charges of handling stolen property.

The Appellant opted to remain silent, while the 2<sup>nd</sup> accused gave an unsworn statement and called no witnesses. The Appellant and the 2<sup>nd</sup> accused were on the evidence found guilty on the said alternative charges of handling stolen property and were convicted accordingly.

The Appellant was sentenced to imprisonment for a term of seven years. The second accused being a first offender was put on probation for 2 years.

Aggrieved with his sentence, the Appellant preferred an appeal to this court on four grounds -

- (1) that I am remorseful and apologetic and promise not to repeat criminal acts any where any more since I have reformed and learnt a better lesson already from such commission of the act and so request for a lessening of the sentence, or**
- (2) that I be accorded a non-custodial sentence so as to go and fend for my dependant family which is desperate and in need without me, or**
- (3) that your Lordship pardon and acquit me altogether since I promise to lead a positive and constructive life henceforth,**
- (4) that I beg to be present in court in person during the hearing of the appeal.**

Indeed the Appellant was present during the hearing of the appeal. His submission to the court was -

***"I ask the court to reduce my sentence. My children are suffering without my support."***

On his part, Mr. Omwega learned Senior Principal State Counsel supported the sentence. Counsel submitted that the Appellant was found guilty and convicted of the alternative charge of handling stolen goods, the punishment for which is fourteen years while the Appellant was sentenced to half the period, 7 years imprisonment. Counsel also submitted that the Appellant had seven (7) previous convictions to which he had pleaded guilty and the latest was a conviction in the year 2003, and all of them related to burglary, ranging from 1992 Bungoma, Kapenguria, Bungoma, Nyahururu, Eldama Ravine, Eldama Ravine, and Narok (March 2003) in respect of which the Appellant was convicted and sentenced to custodial terms and strokes of the cane before corporal punishment was outlawed.

I have reviewed and evaluated the evidence before the lower court. The Appellant had been engaged in breaking into his victims' houses while they were at work or on safari. There was evidence that the Appellant broke into the house of PW3 on 21<sup>st</sup> January 2008 and stole items valued at Shs 7,000/=. He went home, but returned on 14<sup>th</sup> May 2008 and broke into the house of PW1 through the rear window. PW1 lost her beddings, video deck, DVD Sony, Booster, TV, generator, utensils and other household goods.

When arrested, the Appellant was found in possession of PW1's cooking utensils including nine sufurias (cooking pans), a lamp and a small tin where she stored sewing threads.

The Appellant also led PW4 the Investigating Officer, to the house of the 2<sup>nd</sup> Accused, where PW1 identified her generator and TV. Neither the Appellant nor the 2<sup>nd</sup> co-accused could account for possession of these recently stolen items. The irresistible conclusion was that the Appellant and his co-accused had stolen those items from the complainants PW1 and PW2.

When put on their defence, the Appellant as already observed, opted to keep silent which was his

statutory right, but from which the court could reasonable infer that he had no reasonable explanation for the stolen items found in his possession. The 2<sup>nd</sup> accused in her unsworn statement explained that nothing was recovered from her house and that she was being framed. None of the complainants knew her, and she gave no plausible reason why any one of them would frame her up. The trial court was correct in finding that there was no merit in the defence of the 2<sup>nd</sup> accused. I concur with this finding and also the conviction of the Appellant.

The Appellant has in his appeal prayed for the reduction of the sentence, and/or even a non-custodial sentence and even the quashing of the conviction and setting aside of the sentence.

Firstly, the Appellant was on the evidence of the prosecution convicted, so there is no reason for acquitting him. Secondly, the punishment for the offence of handling stolen goods, contrary to Section 322(1) & (2) is imprisonment for the term of fourteen years (*and not twenty as learned State Counsel suggested*). The Appellant was sentenced to seven (7) years. That is a fair sentence for the offence for which the Appellant was convicted.

It is commendable that the Appellant says he has reformed, but with seven previous convictions, it would be very unsafe to reduce that sentence or to substitute it for a non-custodial sentence. The Appellant is a recidivist subject to usual remission under the Prisons Act, (*Cap. 90 Laws of Kenya*) he should serve his full term in prison.

For those reasons, I find no merit in the Appellant's Petition of Appeal dated 5<sup>th</sup> August 2009 and dismiss it. I confirm the conviction and sentence by the lower court.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 25<sup>th</sup> day of November 2010**

**M. J. ANYARA EMUKULE**

**JUDGE**