



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 115 OF 2008**

*(Appeal from conviction and sentence of the Chief Magistrate’s Court at Kakamega in Criminal Case No. 927 of 2008 [P. N. ARERI ESQ., RM])*

PAUL KHAMALA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**JUDGEMENT**

1. The Appellant, **PAUL KHAMALA** was charged with the offence of burglary contrary to **304 (2)** of the Penal Code and stealing contrary to **S.279 (b)** of the Penal Code. It was alleged that; *“on the 7.6.2008 at Maraba village, Kakamega District jointly with others not before court, [he] broke and entered into a dwelling house and stole two sofa sets, four stools, five tables, six chairs and curtains valued in total at Kshs.56,000/- the property of Priscilla Vulifa.”*
2. He was sentenced to ten (10) years imprisonment and he now seeks a reduction of the sentence.
3. In addressing sentence at the appellate stage, this court is bound by the principles set out by the Court of Appeal in the case of **Macharia vs. Republic (2003) EA 559** where it was stated thus: *“The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of **Ogola s/o Owuor (1954)EACA 270** wherein the predecessor of this Court [the Court of Appeal] stated: “The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in **James vs. R. (1950) 18 EACA 147** it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case **R. vs. Shershawsky (1912) CCA 28 TLR 263.**”*
4. In the instant case, and from the evidence on record, the Appellant and his confederates committed the burglary and theft because the complainant’s tenant had been a Kikuyu who had left the house and all the items in it because of post election violence. Later, according to PW2, **James Imbetsi Ingotsi**, the Appellant and his gang openly bragged that they had stolen Kikuyu property and PW2 was the one who blew the whistle and later participated in the recovery of the stolen items.
5. The Appellant was therefore part of a gang that reaped from the misery of those who had suffered because of ethnic violence as a result of differences arising from the 2007 General Elections. He has now failed to state why the sentence imposed on him in the circumstances of his case should be interfered with.
6. **S.279 (b)** of the Penal Code and **S.304 (2)** thereof provide as follows; *“S. 279 (a) ..... (b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred*

*shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling house.”.*

*“S.304 (1) .....*

*(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.”*

7. The ten (10) year sentence is clearly within the law and I see no reason to interfere with it.

8. The Appeal has no merit either on conviction or sentence and I will quickly dismiss it.

9. Orders accordingly.

*Delivered, dated and signed at Kakamega this 4<sup>th</sup> day of November, 2010.*

**ISAAC LENAOLA  
J U D G E**