



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 9 OF 2008**

*(From original conviction and setnece in Criminal Case No. 4673 of 2006 of the Principal Magistrate's court*

*at Nyahururu – M.T. KARIUKI, RM)*

**JAMES KAIBOGO ARUOTO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant herein is James Kaibogo Aruoto who was convicted of an offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code and was sentenced to 5 years imprisonment. In count III he was charged with the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code and in the alternative, handling stolen goods contrary Section 322(2) of the Penal Code. He was convicted and sentenced to serve 7 years imprisonment on the alternative charge. He is aggrieved by the sentences which he says are harsh and excessive. He abandoned his appeal against conviction.

Mr. Omutelema, the Principal State Counsel urged the court to uphold the sentence of 5 years on count 1 but conceded that the sentence of 7 years on the alternative charge to count 3 was harsh taking into account the fact that the goods that were recovered were only assorted shop goods, worth Kshs.1,500/-.

I have had occasion to peruse the lower court file. In my view, as regards the charge of assault, it seems the appellant should have been charged for a more serious offence than simple assault. The evidence of the complainant (PW1) was that the appellant accosted him for no apparent reason, beat him up and took away his bicycle. The appellant later gave the complainant's bicycle to PW5 to keep for him till the next day, but later on the same evening, the appellant, in the company of police (PW6) went to get the bicycle from PW5. Though the appellant was charged with a simple offence of assault, it seems the offence that was committed was a more serious one because property was also stolen from the complainant in the process. But since conviction was not contested, I will not delve further into that issue. An offence of assault is a misdemeanor and carries a maximum sentence of five years. The appellant was handed the maximum sentence and I find that the circumstances were not aggravated to warrant a maximum sentence. The complainant only suffered soft tissue injuries to the body and in my view, 5 years is harsh and excessive.

As regards the alternative charge, I find that for unexplained reason, the magistrate opted to find the

appellant guilty of the alternative charge instead of the main charge of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code. The charge sheet indicates that the shop was broken into on the night of 5<sup>th</sup> and 6<sup>th</sup> November 2006. The goods were recovered from the appellant on 7/11/2006, a day after the shop breaking and theft. It is immaterial that the owner of the shop only noticed the goods missing on 6/11/2006. The appellant was in recent possession of the goods and the doctrine of recent possession should have been invoked. Section 322(2) carries a maximum sentence of 14 years. The appellant was found in possession of goods worth Kshs.1,5000/-. Though the magistrate seems to have misdirected herself on the finding on conviction, that is not before me now. I find that the sentence on the alternative charge is excessive in the circumstances.

It seems that the court considered the submissions made by the prosecution that the appellant is a habitual offender and had other pending cases in other courts. But the appellant's past criminal records were not availed to the court nor were the details relating to the other cases given.

For all these reasons, I hereby reduce both sentences in count 1 and the alternative charge to count 3. I substitute count I with 3 years imprisonment and the alternative to count III with 3 years imprisonment. Sentences to run concurrently. It is so ordered.

**DATED and DELIVERED this 3<sup>rd</sup> day of December 2010.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT**

The appellant present in person  
Mr. Nyakundi for the state.  
Kennedy – Court Clerk.