



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 250 OF 2009

(From Original Conviction and Sentence in Criminal Case No.463 of 2009 of the Senior Resident Magistrate's Court at Taveta: C.N. Ndegwa – S.R.M.)

MWAMBURI MWAMBOGA KAHENI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **MWAMBURI MWAMBOGA KAHENI** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Taveta Law Courts. The Appellant was arraigned before the lower court on 22nd September 2009 and charged with the offence of **BURGLARY CONTRARY TO SECTION 304(2) AND STEALING CONTRARY TO SECTION 279(b) OF THE PENAL CODE**. The particulars of the charge read as follows

“On the 19th day of September 2009 at around 3.00 A.M. in Kimala Village Taveta District of the Coast Province jointly with others not before court broke into the house of BROWN MBOGHOLI with intent to steal from therein and did steal one bicycle, make Nelaam, Sony DVD, Amplifier, Sony Radio, Olympus camera, Yashika Camera, two mobile phones, assorted clothings and shoes, one mattress, one blanket, an empty drum of water and utensils all to the total value of Kshs.30,000/- the property of the said BROWN MBOGHOLI”

The charges were read out to the Appellant on 22nd September 2009 and he entered a plea of guilty. The hearing was post-poned to 23rd September 2009 for the facts to be read. On 23rd September 2009 the Appellant appeared again before the court and requested that the charge be read out to him afresh. This was done. The Appellant entered a plea of **‘guilty’** a second time. The court prosecutor then read out the facts as required by law to which the Appellant responded

“The facts are correct”

This was a clear and unequivocal plea of guilty. The Appellant was even given one day to consider his plea. When he was brought back to court the following day he maintained his plea of guilty. The proceedings were conducted in English and translated into Kiswahili. The fact that the Appellant did not

seek translation into any other language is proof that he was able to comprehend and follow the proceedings.

In his written submissions the Appellant challenges the validity of the charge sheet. I have carefully and anxiously perused the charge sheet and I find the same to have been properly framed. I find no fatal defect in the said charge.

All said and done I am satisfied that the Appellant's plea of guilty was properly recorded and his conviction was sound. I do therefore uphold the same. The appellant was accorded an opportunity to mitigate but he offered no mitigation, (which was his right in law). The learned trial magistrate proceeded to sentence the Appellant to six years imprisonment on each limb of the offence – the 2 terms were to run concurrently. In my view the imposition of this maximum sentence was un-called for and was unduly harsh and excessive in the circumstances. The Appellant had pleaded guilty saving much judicial time and he was a first offender. In my view he merited a lenient sentence. I therefore set aside the six (6) year sentence and instead substitute a sentence of two (2) years imprisonment on each limb of the charge to run from the date of conviction before the lower court. I further direct that the sentences be served concurrently. This appeal succeeds against sentence only.

Dated and Delivered in Mombasa this 1st day of December 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Appellant in person

Mr. Onserio for State

M. ODERO

JUDGE

1/12/2010