



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL APPEAL 6 OF 2007**  
**ABDALLAH MOHAMED SWALEH .....APPELLANT**

- Versus -

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

Abdallah Mohammed Swaleh, (the appellant) was convicted on a charge of office breaking contrary to section 307 of the Penal Code; and sentenced to five (5) years imprisonment. His appeal is on sentence only.

The prosecution case was that on 26<sup>th</sup> day of March 2007 at about 2.00am at Lamu District Hospital within Coast Province broke and entered the cash office of the said hospital with intent to commit a felony, namely theft.

Mohammed Mikahi (PW1) a night watchman at Lamu District Hospital was on duty on 26-3-07 with his colleague Mohammed Shora when at about 2.00am, he heard screams and rushed to the scene. He met Mohamed Shora chasing the appellant and the appellant was arrested. Appellant had broken into the cash office i.e the padlock was broken with the door. As appellant was being escorted to the police station, he jumped onto a passing donkey and fled. Appellant was arrested 3 days later.

Mohamed Shora (PW2) corroborated evidence of Pw1 and stated that at about 2.00am, the office lights suddenly went off and upon rushing there, found that the padlock had been broken and appellant fled.

PW4 Pc William Mutiso carried out investigations and established that nothing was stolen from the cash office.

On being put to his defence, appellant said he had reported to the police station that he had been robbed on 23-3-07 and was advised to go back on 26-3-07. When he went there he was arrested. Appellant is not contesting the conviction. The learned trial magistrate having found that appellant was properly identified as he was actually caught red handed and that he time spent was enough to dispel a possibility of mistaken identity.

The prosecutor informed the court that appellant was a first offender. Appellant's mitigation was that he did not have any parents. His appeal is only against sentence and in his grounds of appeal he asks the court to reduce the sentence imposed. He explained that he is a married man with three children and that the 18 months spent in prison have been a lesson to him.

Mr. Ogoti on behalf of the State indicated that State was not opposed to reduction in the sentence as nothing was stolen, noting that appellant was given the maximum sentence.

Indeed section 307 of the Penal Code provides that:

*“Any person who breaks and enters ....office.....or any building belonging to a public body ....is guilty of a felony and is liable to imprisonment for five years.”*

I have taken into consideration the circumstances under which the offence was committed, the fact that nothing was stolen, and that appellant was a first offender. Under these circumstances then I find that to have meted out the maximum sentence of five years was rather harsh and I find it fair and just to interfere with the sentence and set it aside.

I substitute the sentence with a two year sentence which takes effect from date of conviction.

Delivered and dated this 9<sup>th</sup> day of February 2009 at Malindi.

**H. A. OMONDI**  
**JUDGE**