



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 124 OF 2008

JOSIAH KAIGA OMBIS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein, **Josiah Kaiga Ombis** was convicted on his own plea of guilty to a combined charge of **housebreaking** and **stealing** contrary to **sections 304(1)** and **279(b) of the Penal Code** respectively. He was sentenced to seven (7) years imprisonment. His appeal is against the sentence which he considers to be harsh and excessive.

The State has conceded this appeal, mainly, on the ground that the facts of the case as stated by the prosecution at the trial were inconsistent with the charge and failed to disclose the basis upon which the Police concluded that the appellant was indeed involved in the commission of the offence.

The particulars of the offence as stated in the charge sheet were that:

***“on the 5th day of January 2007 at 5.00 p.m. in Laikipia District within the Rift Valley Province the appellant broke (into) and entered the dwelling house of Susan Oles Ombisi with intent to steal and did steal therein (sic) (a) video deck machine L.G., 2 jackets, 1 sweater, 1 album, one small Panasonic radio, a pair of shoes, the property of the said Susan valued at Shs 12,000/=.*”**

The facts as recorded by the learned trial magistrate were that on the material day the complainant securely locked her house and went to work. Upon her return at 5.00 p.m. she found the house had been broken into and her properties stolen. She reported the matter at Nyahururu Police Station. Investigations were carried out and the appellant was arrested and charged with the offence.

Although the appellant accepted the facts as stated by the prosecution to have been correct I share the view of the State that by merely stating that:

“After investigations the accused was arrested and charged with the present offence”

the prosecution failed to lay a sound basis upon which a conviction can lie. There having been no sufficient or adequate facts set out before the court, I am of the considered view that the learned trial magistrate misdirected himself when convicting the appellant on those facts. The conviction and sentence

cannot therefore stand.

All circumstances taken into consideration, the sentence of seven (7) years was harsh and excessive. The appellant has been in custody for over two years, a period which, in my view would have sufficed as a punishment even if the plea of guilty on its own were considered, particularly since the appellant was said to be a first offender.

For the above reasons I allow the appeal, quash the conviction and set aside the sentence. Accordingly, the appellant is set at liberty and shall be set free from jail forthwith unless he is, for some other reason lawfully held.

Dated, signed and delivered at Nakuru this 28th day of May, 2009.

M. G. MUGO

JUDGE

In the presence of:

Mr. Njogu - For the State

Appellant - In Person