



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 74 of 2008**

**STEPHEN OPILO AFUMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, Stephen Opilo Afumba together with another were charged with the offence of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code. The particulars were that the appellant and his co-accused on the 1<sup>st</sup> day of July 2007 at Mgeno village, Mwatate Location in Taita Taveta District within Coast Province, jointly broke and entered a dwelling house of Benson Kyalo Musyoka with intent to steal therein and did steal therein two jembes, two sufurias, two pangas, one kilogramme of baking flour, one hen, nylon paper and six empty sacks all valued at Kshs. 1,700/= the property of the said Benson Kyalo Musyoka. The appellant also faced an alternative count of handling stolen goods contrary to section 322 (2) of the Penal Code.

The appellant and his co-accused appeared before J. Ndubi, then a Resident Magistrate on 5<sup>th</sup> July 2007 and pleaded guilty to the main count. The prosecution stated the facts of the case and the appellant was invited to react to the same upon which he stated that the facts were correct. The Learned Resident Magistrate then convicted the appellant on his own plea of guilty. The prosecution informed the Learned Resident Magistrate that the appellant had no previous record and could be treated as a first offender. In mitigation the appellant stated that he had a wife and two children who rely upon him. He further stated that he would not repeat the offence. The Learned Resident Magistrate noted that the mitigation of the appellant was moving but still sentenced him to five (5) years imprisonment.

The appellant was dissatisfied and has appealed to this court against the said sentence on the main ground that the same is manifestly excessive in the circumstances. The appellant has reiterated that he is a first offender, that he is the breadwinner of his family and that he is remorseful. In those circumstances, he pleads that his appeal against sentence be allowed.

I have considered the record of the Learned Resident Magistrate and note that although she stated that she had taken into account the moving mitigation of the appellant, the sentence she imposed did not reflect that consideration. The Learned Resident Magistrate does not appear to have considered that nearly all the stolen items were recovered. In those circumstances I am not surprised that Mr. Onserio, Learned State Counsel did not support the sentence. I will in the premises interfere. I allow the appellant's appeal against sentence. The appellant has been in prison for slightly over two (2) years. He has learnt his lesson. His appeal against the sentence of imprisonment for five (5) years is hereby allowed. The sentence is set aside and substituted with a sentence of imprisonment for the period already served. The appellant should be released forthwith unless he is otherwise lawfully held.

**DATED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

The Appellant and Mr. Onserio for the Republic.

**F. AZANGALALA**

**JUDGE**

**22<sup>ND</sup> SEPTEMBER 2009**