



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 64 of 2007

GEOFFREY OCHIENG OWINO..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case

No.7491 of 2005 of the Chief Magistrate's Court at Makadara)

J U D G M E N T

GEOFFREY OCHIENG OWINO, the appellant was convicted of housebreaking contrary to section 304(1) and stealing contrary to section 279(b) of the Penal Code. The particulars of the offence were that on 2nd December 2005 at Santoni estate Nairobi within the Nairobi area province jointly with another broke and entered the dwelling house of **SIMON NJANE** with intent to steal and did steal from therein a carpet, a car radio make Artech and a radio equalizer make Jec all valued at Kshs.4,500/= the property of the said **SIMON NJANE**. He was recorded on 23/6/2006 having pleaded guilty. He was convicted and sentenced to serve 3 years imprisonment on the limb of housebreaking and 2 years imprisonment on the limb of theft. The two sentences were ordered to run consecutively.

He has now appealed to this court against sentence, contending that the sentences imposed were harsh and excessive, as he was a first offender. The learned State Counsel, Mr. Makura, has conceded to the appeal on the ground that the appellant pleaded guilty and did not waste the court's time. In addition, counsel added, the sentences should have been concurrent rather than consecutive, as they arose from the same transaction.

This is an appeal against sentence. Sentencing is essentially the discretion of the sentencing court. An appellate court will be slow to interfere with the exercise of that discretion unless it is shown that the sentencing court took into account an irrelevant factor or that it failed to take into account on irrelevant factor or that it failed to take into account a relevant factor or that it applied a wrong principle or short of these the sentence is so harsh and excessive that an error of principle must be inferred see **SHADRACK KIPROTICH KOGO –VS- REPUBLIC ?** Criminal Appeal No. 253 of 2003 – Eldoret (CA).

In our present case, the appellant pleaded guilty to the charge. He was a first offender. The learned magistrate did not indicate at all that he took into account any of the above, including the mitigation of the appellant who asked for leniency. The maximum sentence for the first limb of the offence is 7 years imprisonment while the maximum sentence for the second limb is 14 years imprisonment. However, the offences were part of the same transaction. In my view, had the learned magistrate taken the above factors in mind she would not have ordered that the sentences run consecutively. In addition the appellant was sentenced to a longer term of imprisonment for the less serious limb of the offence, without any

reason being assigned for same. I consider this to be an applicant of a wrong principle. I also observe that the stolen items seem to have been recovered. Consequently, I find justification in interfering with the magistrate's exercise of discretion in sentencing. I will sentence the appellant to 2 years imprisonment on each limb of the charge, and order that the two sentences run concurrently.

Consequently, I allow the appeal on sentence. I set aside the sentences imposed by the learned magistrate and order as follows ?

1. ***The appellant will serve a sentence of 2 years imprisonment for each of the two limbs of the offence from the date he was sentenced by the subordinate court.***
2. ***The two sentences will run concurrently.***

It is so ordered.

Dated and delivered at Nairobi this 10th day of March 2008.

George Dulu

Judge

In the presence of ?

Appellant in person

Mr. Makura for State - absent`

Mwangi – court clerk