



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

CRIMINAL APPEAL NO. 420 OF 2006

BETWEEN

ADAN GAMO OSMAN..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from sentence imposed by Resident Magistrate D.A. Orimba on 10th August, 2006 in Criminal Case No. 753 of 2006 at Garissa Law Courts)

JUDGEMENT

The appellant was charged with the offence of breaking into a building with intent to commit a felony contrary to s.304C of the Penal Code (Cap.63, Laws of Kenya). The charge specified that the appellant, on 9th August, 2006 at about 3.00 a.m., at Madogo Village, Madogo Location in Tana River District, in Coast Province, broke into and entered a building, being the dwelling house of one **Abdi Somo Huko**, with intent to commit a felony therein.

When the charge was read over to the accused in Kiswahili, and interpreted for him in the Somali language, a language that he understands, he pleaded guilty and, after a record had been taken of this fact, the prosecutor read out the pertinent facts; and the same went as follows.

On 8th August, 2006 at about 3.00 pm., the complainant was asleep at his residence in Muroro Village, when he was awakened by the noise accompanying a commotion. The complainant noticed that his door was open, and the security lock was no longer in place. When he checked the house, his eyes fell upon the appellant, who was right inside the complainant's house. He raised the alarm, and members of the public came, and arrested the appellant herein. The devices used in corrupting the complainant's security lock, were found in the appellant's pocket, and they were now produced in Court as exhibits. The appellant was taken to the Police station, and a charge preferred against him.

To the foregoing facts, the appellant responded: "The facts are correct." The Court convicted him on his own plea of guilty; the prosecutor asked that he be treated as a first offender; the appellant herein prayed for mercy. The learned Magistrate thus rendered sentence:

"Accused pleaded guilty to the charge. He is a first offender. I have considered the mitigation

offered by [the] accused. I have also considered the nature of the offence before the Court. Accused is ...sentenced to serve 10 years' imprisonment."

The appellant comes on appeal contending as follows:

- i. that, his "guilty" plea was the result of torture by the arresting officers;
- ii. that, he pleaded guilty simply because he was sick and tired;
- iii. that, the sentence imposed was "too harsh";
- iv. that, the appellant is the sole bread-winner of his family and for his aged parents who would suffer while he is away in prison.

All the applicant said, in prosecution of his appeal, was that this was the first time he was found guilty of an offence; and he prayed for forgiveness.

Learned State Counsel ***Mrs. Gakobo*** submitted that though the appellant had been charged with the offence of breaking into a building, with intent to commit a felony contrary to s.304 C of the Penal Code (Cap.63), the particulars as specified disclosed instead, the offence of burglary contrary to s.304(2) of the Penal Code.

Counsel urged that while the appellant was not prejudiced, as he pleaded guilty, the sentence awarded, which is the maximum for burglary, would have been inappropriate for a first offender. No reason had been given for such an extreme sentence, and so, counsel urged, it was improper to impose the same. Counsel invoked s.354 of the Criminal Procedure Code as empowering this Court to vary the sentence and impose a more fitting penalty.

I am in agreement with learned counsel, that a maximum sentence was improper for a first offender. I will set aside the said sentence, and substitute it with a sentence of three years' imprisonment, as from the date when the original sentence was imposed. To that extent, the appeal is allowed.

Orders accordingly.

DATED and DELIVERED at Nairobi this 16th day of April, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mrs. Gakobo

Appellant in person