



REPUBLIC OF KENYA

HIGH COURT OF AT KISUMU

CRIMINAL APPEAL 140

**MICHAEL OTIENO OKINYO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**[ Appeal from the Conviction and Sentence in Criminal Case of Siaya the Principal Magistrate's Court Dated 25.7.2006 at SIAYA: G.K. MWAURA Esq., - P.M. in P.M.C.C. NO. 659 of 2006]**

**JUDGMENT**

The appellant **MICHAEL OTIENO OKINYO** was charged, convicted and sentenced, on his own plea of guilty, to two (2) concurrent terms of four (4) years and two (2) years respectively for the offences of malicious damage to property contrary to section 339(1) of the Penal Code (count 1) and stealing contrary to section 275 of the Penal Code (count 11).

The facts and particulars of the first count were that on the 11<sup>th</sup> day of July 2006, at Bar-Kalare sub-location, East Gem Location in Siaya District with others not before court, the appellant wilfully and unlawfully destroyed a dwelling house valued at Shs.44,000/=, the property of Richard Ooko Okinyo. The facts and particulars of the 2<sup>nd</sup> count were that on the same date and at the same place and with others not before court, the appellant stole roofing materials, (being 30 irons sheets), wall timbers, two windows and one door all valued at Shs. 44,000/= the property of the said Richard Ooko Okinyo.

The prosecution case at the trial was that on the 11<sup>th</sup> July, 2006, complainant was away from his home. The appellant and others came to the complainant's house and pulled it down and stole the building materials. The appellant was arrested and charged with the offences and admitted having sold the materials for Shs.8,000/=. When the said facts of the offence were read out and explained to the appellant, he admitted the same as being true and correct, consequent upon which he was convicted and sentenced as earlier noted. He now appeals against the sentence on the ground that the same is excessive and that it was influenced by the taking into account of extraneous facts and personal sentiments of the learned trial magistrate.

Mr. Mutai submitted that the appellant, having pleaded guilty to the offences, thus saving the state and the court the rigours of a full trial, and being a first offender, ought to have been given a lighter sentence. Counsel castigated the trial court for finding that the offence of malicious damage was committed due to "greed for money" and that materials stolen were not recovered and wondered where that came from. It is clear to this court that the learned trial magistrate considered the fact that the appellant sold the building materials for Shs.8,000/= leading him to arrive at the findings he made in his judgment. This court finds nothing wrong with those observations and findings.

However, regarding the length of the sentence and considering also the observations and sentiments of the learned state counsel Mr. Mutai to the effect that the offence of malicious damage is a misdemeanour but carrying a maximum sentence of five (5) years, a sentence of four (4) years is clearly on the higher side, compared to the offence of stealing under count 2 where the same is a felony, yet the maximum sentence prescribed therefor is 3 years.

Whilst in my view these observations by and sentiments of the learned state counsel go to challenge the wisdom of the Legislature regarding the sentences prescribed for the two offences, I do agree with the Learned State Counsel that the learned trial magistrate ought to have moderated the sentences given the

circumstances. I see no reason to and am not inclined to interfere with the sentence imposed in regard to the offence of stealing. However, given the circumstances of this case and the two offences that the appellant faced, I am of the view that a sentence of three (3) years is more justifiable in regard to the malicious damage charge, the offence having been compounded by the theft and sale of the complainant's property. I therefore allow the appeal in respect thereof and set aside the four (4) years sentence on the 1<sup>st</sup> count and substitute the same with one of 3 years. The sentences shall run concurrently.

Dated and delivered at Kisumu this 18<sup>th</sup> day of July, 2007.

**M. G. MUGO**

**JUDGE.**

MGM/mo