

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal No. 190 & 194 of 2004

JOHN ELIMLIM..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant John Elimlim was charged with **attempted robbery contrary to Section 297(1) of the Penal Code**. The particulars of the charge were that on the 6th October 2003 at Mithuri area Rumuruti, Laikipia District while armed with bows and arrows the appellant assaulted Tabitha Kathure Marete with the intent to rob her and at or immediately before or immediately after the time of such assault threatened to use actual violence to the said Tabitha Kathure Marete. The appellant was on the same day and in the same court in another criminal case charged with the **offence of store breaking and committing a felony contrary to Section 306(a) of the Penal Code**. The particulars of the offence were that on the 30th of September 2003 at Magomano Primary School, Laikipia District, the appellant jointly with others not before court broke and entered into a building (*a school store*) and committing a felony namely theft of six bags of 25kg flour and four tins of 5kg vegetable cooking oil valued at Kshs 20,000/=, the property of Magomano Primary School. The appellant pleaded guilty to the charges in the two separate criminal cases. In the case of attempted robbery he was sentenced to serve five years imprisonment. In the case of store breaking and stealing, he was sentenced to serve three years imprisonment. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

At the hearing of the appeal however, the appellant abandoned his appeal on conviction and instead pleaded with this court to consolidate the two sentences which were meted out on him in the two criminal cases. He further pleaded for this court to reduce the said sentences imposed. Mr Koech, learned counsel for the State did not oppose the submission for consolidation and reduction of sentence made by the appellant. I have perused the record of the trial magistrate and note that the appellant was charged with two separate criminal offences whose complainants were from Magomano Primary School. The appellant ideally should have been charged with the two offences in one charge sheet so that the two offences would constitute two counts instead of two separate criminal cases. In the circumstances of this case, I agree with the appellant that a miscarriage of justice was occasioned when he was ordered to serve two separate terms of imprisonment arising more or less from similar sets of circumstances. Mr Koech did not oppose the submissions made by the appellant for consolidation and reduction of sentence.

In the circumstances of this case therefore, I will consolidate the two sentences imposed by the trial magistrate. I therefore order that the sentences imposed by the trial magistrate in **Nyahururu PMC Criminal Case No. 4120 of 2003** and **Nyahururu PMC Criminal Case No. 4119 of 2003** are hereby consolidated. I will further set aside the said sentences and substitute it by one sentence of this court.

The appellant is hereby sentenced to serve three years imprisonment in each of the two offences that he was convicted. The said sentences shall run concurrently and shall take effect from the 24th of February 2004 when the appellant was sentenced by the trial magistrate. The appellant's appeal is therefore allowed to that extent. It is so ordered.

DATED at NAKURU this 10th day of March 2006.

L. KIMARU

JUDGE