



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT BUNGOMA

Criminal Appeal 13 of 2005

(From Webuye SRM's Cr. C. No.856 of 2004)

MORRIS LUCHEBELELI KISAMBO.....APPELLANT

VERSUS

STATE.....RESPONDENT

JUDGMENT

The appellant, *Morris Luchebeleli Kisambo* was convicted on a charge of breaking and committing a felony contrary to section 306 (a) of the Penal Code and sentenced to serve three years imprisonment.

The particulars in respect of count 1 are that during the night of 12<sup>th</sup> and 13<sup>th</sup> June, 2004, at Lugari Station Market at Lugari Sub-location in Lugari District within the Western Province, jointly with other not before the court, broke and entered the saloon of *Monica Kalamu* with intent to steal therein and did steal therein one radio cassette make Panasonic S/No.JC 003880, one shaving machine, make Wall and one padlock all valued at Ksh.10,700/= the property of the said *Monica Kalamu*.

The particulars on count two are that, on the 30<sup>th</sup> day of August 2004, at Misikhu Market at Namarambi Location in Bungoma District within Western Province otherwise other than in the course of stealing jointly dishonestly received or retained one radio cassette make Panasonic S/No. JC 003880 and one shaving machine make Wall, the property of *Monica Kalamu* knowing or having reason to believe them to be stolen property or unlawfully obtained. He was tried and convicted by *Mr. Mulwa*, Resident Magistrate, Webuye, on the 10<sup>th</sup> February, 2005 and sentenced to serve three (3) years imprisonment. He has appealed to this court and cited five (5) grounds of appeal.

At the hearing, the appellant dropped the ground of appeal as concerns conviction and argued the ground on sentence. He urged me to find that the sentence imposed was excessive and unreasonable. That he was convicted on three counts yet the trial court imposed a sentence of three(3) years.

*Mr. Onderi*, for the state took the position that the appellant was charged under section 306 ( a )of the Penal Code and alternatively, handling stolen property contrary to section 302 (2) of the Penal Code. The appellant was convicted on the main count but not on the alternative count. The court ought to have sentenced the appellants to:

- (i) *Breaking*
- (ii) *committing a felony upon breaking*

The first count carries a penalty of 10 years imprisonment. The second count carries a penalty of 14 years. The trial court did not clearly indicate the penalty meted on the main Count and proceeded to sentence the appellant to an imprisonment for a period of 3 years. That in the circumstances, the sentence was neither harsh or excessive. I was consequently urged to review the sentence in the manner following:

First, he should be sentenced under the first limb of saloon breaking.

Secondly, he should be sentenced under the second limb of committing a felony therein. That subsequently I should pronounce whether the sentences are to run concurrently or consecutively.

I have considered all the arguments advanced by both parties. I note that I have powers to review a judgment pursuant to the provisions of section 354 of the Criminal Procedure Code.

Having said so, I note that the first count (breaking) attracts a penalty of 10 years, while the second count (committing a felony upon breaking) attracts a penalty of 14 years.

The learned state counsel urged me to enhance the sentence yet he did not apply formally. Although the trial court did not indicate which limb the sentence of 3 years relate to, on the evidence, I now review the sentences as follows:

- (a) *On the first count (breaking) I sentence the appellant to serve 3 years.*
- (b) *On the second count (committing a felony upon breaking) I equally sentence the applicant to 3 years.*

The sentences shall run consecutively.

DATED and DELIVERED at BUNGOMA this 27th day of July 2006.

N.R.O. OMBIJA

JUDGE

Mr. Onderi for the Republic

The accused present in person.