



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 532 of 2004**

**(From Original Conviction and Sentence in Criminal Case No. 1584 of 2003 of the Senior Resident Magistrate's Court at Kikuyu: Mrs. Murage\_SRM).**

**STEPHEN MBUI WILSON.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

***STEPHEN MBUI WILSON***, the appellant was convicted on his own plea of guilty on two counts of housing breaking contrary to Section 304 (1) (a) of the Penal Code and stealing contrary to Section 279 (b) of the Penal Code. He was further charged with the second count of being unlawfully present in Kenya contrary to Section 13 (c) of the Immigration Act.

Upon conviction, the appellant was sentenced to Ksh.5000/= fine in default to serve six months imprisonment in relation to being unlawfully present in Kenya. As for housing breaking and stealing therefrom the appellant was sentenced on the first limb to four years imprisonment and on the second limb to five years. The sentences were ordered to run concurrently. The appellant was aggrieved by the sentences imposed and hence lodged the instant appeal limited only to sentence. In his petition of appeal or what he called "***appeal for leniency***," the appellant laments that he pleaded guilty to the offence, the he was convicted and sentenced to serve nine years in prison, that his prolonged stay in prison has triggered a backache, as a result of injuries sustained in a road accident and finally that he requires better medical attention outside the prison as currently the treatment he is receiving is inadequate.

When the appeal came up for hearing before me on the 19<sup>th</sup> June, 2006. I allowed the appellant to tender his written submission in support of the appeal. I have carefully perused and considered the same.

Mr. Makura learned state counsel appeared for the state. He submitted that the state opposed the appeal on sentence in respect of the 1<sup>st</sup> count but conceded the appeal in respect of the 2<sup>nd</sup> count. Counsel submitted that in respect of count 1 that the offence carries a maximum sentence of seven years. The appellant was sentenced to 4 years in respect of the 1<sup>st</sup> limb and 5 years in respect of the 2<sup>nd</sup> limb. These sentences according to the learned state counsel were neither harsh nor excessive. With regard to the 2<sup>nd</sup> count, the appellant was fined Kshs.5000/= in default to serve 6 months imprisonment. Learned state counsel pointed out that the default sentence was illegal.

The appellate court can only interfere with the sentence imposed by the trial court if it is shown to be unlawful, harsh and excessive. Further it is demonstrated that in imposing the sentence, the trial magistrate took into account irrelevant factors or failed to take into account relevant factors. See generally ***SEYEKO VS. R. (1089) KLR 306 and STEPHEN ONDIEKI NYAKUNDI VS. REPUBLIC CA, NO. 91 OF 2005 (unreported)***. No doubt, the sentence imposed by the trial court on the appellant in respect of the first count was perfectly legal. Under Section 304 (1) (a) of the Penal Code, the maximum jail term that can be imposed upon conviction is seven years. Whereas under Section 279 (b) of the Penal Code, a person convicted thereunder is liable to imprisonment for fourteen years. In the instant case the appellant upon conviction under Section 304(1) was sentenced to four years whereas under Section 279 (b) was sentenced to five years. These sentences cannot by any stretch of imagination be said to be harsh and excessive. I do not discern anything that would remotely suggest that in imposing the sentences aforesaid the trial court acted upon some wrong principle or overlooked some material factor. In fact the learned trial magistrate addressed herself properly on the principles of sentencing. That being my view of

the matter I dismiss the appeal on sentence in respect of the 1<sup>st</sup> count.

With regard to the 2<sup>nd</sup> count, the only unlawfully aspect of the sentence is the default sentence. Under Section 28 of the Penal Code the default sentence ought to have been 3 and not 6 months. I will correct that aspect of the sentence. The appellant in respect of count II is sentenced to a fine of kshs.5000/= in default to serve 3 months imprisonment. Save for the aforesaid minor alteration, the appeal as to sentence is otherwise dismissed.

Dated and delivered at Nairobi this 25<sup>th</sup> July, 2006.

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**MAKHANDIA**

**JUDGE**