



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Criminal Appeal 35 of 2006

(Being an appeal against the conviction and sentence in Criminal Case No. 3185 of 2005 delivered on 7<sup>th</sup> September 2005 by A. B. Mong'are (Resident Magistrate))

MORRIS ODUOR OTIENO .....APPLICANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGMENT

This appeal emanates from the decision of the learned Resident Magistrate, Eldoret, who on 7/9/2005 convicted Morris Oduor Otieno (“the appellant”) and sentenced him to serve 4 years imprisonment with hard labour.

The particulars of the charges against him in count 1 where he was charged with the offence of house breaking contrary to section 304 of Penal Code, and stealing contrary to section 279 (b) of the same Code, were that on the 11<sup>th</sup> day of May 2005 at Kapsoya Estate in Uasin Gishu District jointly with others not before court within the Rift Valley Province broke and entered the dwelling house of **MUNGAI KIONGERA** with intent to steal and did steal one TV set make LG one DVD player, two CDs a valentine gift one umbrella and cash money Kshs.15,300/= the property of the said **MUNGAI KIONGERA** all valued at Kshs.34,500/=, while in the 2<sup>nd</sup> count, where he was charged with the offences of house breaking contrary to section 304 of Penal Code, and stealing contrary to section 279 (b) of the same Code the particulars were that on the same day at the same estate jointly with others not before court broke and entered the dwelling house of **EVANS KIPKEMOI CHEBWOK** with intent to steal and did steal one TV make Samsung, Wrist watch make Rado and black belt and TV remote control the property of the said **EVANS KIPKEMOI CHEBWOK** all valued at Kshs.18,000/=.

He has now preferred this appeal, on the grounds that the evidence by the State witnesses was not corroborated, that he was not positively identified and that the State did not prove its case against him beyond reasonable doubt.

As expected of me at this stage, it being the first appeal stage, I have re-evaluated the evidence on record with a view to establishing whether the State had actually proven its case to the expected and only standard, beyond reasonable doubt and secondly whether this appeal is meritorious.

The evidence on record reveals that the appellant was detected by the complainant’s neighbour (PW3) who interrogated him after which she raised an alarm, upon which he was arrested at the scene. At no time did she loose sight of him. The stolen items that he had dropped when he was seen and when he was being pursued were also recovered from the scene.

I have also taken the submissions of both counsel into account and I find that the evidence of PW3 was corroborated sufficiently by PW4 and 5 and that the State had proven the case against him to the required standards, and in the circumstances the conviction was proper. It is also on record that though he declined to defend himself when called upon to do so, he technically admitted the charges when he informed the

court that said '*this is my first offence, I am asking for leniency*'. That in my mind told it all.

It is however clear that though the learned trial Magistrate was right in finding him "*guilty as charged*"; she however failed to pass the proper sentence as each count had two limbs of the offences. In order to correct her orders do hereby confirm the conviction in both limbs of each count. I set aside the sentence of 4 years imprisonment and do order that the appellant shall serve 4 years imprisonment for each limb of each of the two counts. The sentences shall run concurrently. Term served shall be taken into account.

Dated and delivered at Eldoret this 12<sup>th</sup> day of October 2006.

**JEANNE GACHECHE**

**JUDGE**

Delivered in the presence of:

Miss Oundo holding brief for Mr. Omutelema for the State

Mr. Kigamwa holding brief for Mr. Misoi for the appellant

Appellant present in court