

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NO. 53 OF 2003**

MARTIN ETYANG OMUSE APPELLANT

VS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant pleaded guilty to a charge of House breaking C/S 304 (1) and stealing C/S 279 (b) of the Penal Code. The particulars of the charge are that on 27.10.2002 at Machakus area of Malaba town in Teso District within the Western Province broke and entered into a dwelling house of one Jofta Jakait and stole therein one mattress and one sheet valued at Kshs.2,200/= the property of the above mentioned person. He was then convicted and sentenced to serve 2 years imprisonment with 6 strokes of the cane on each limb of the count. The appellant now appeals against conviction complaining that the same was not properly arrived at. The appellant did not appeal against sentence in his oral submissions but only on the written petition of appeal.

The learned senior state counsel opposed the appeal on conviction stating that the same is incompetent. He however pointed out that the appeal was devoid of merit.

On the first limb, the appellant has put forward grounds against conviction. I have examined the record of appeal. It is clear that the charge was read to the appellant in Kiswahili and he admitted. The appellant does not complain that he did not understand the language of the court. He has opted to state other grounds which cannot be invoked to upset a plea of guilty. I am persuaded by the argument of the learned senior state counsel that the appeal on conviction is incompetent. The plea of guilty on the part of the appellant was properly taken by the trial court. Consequently the appeal on conviction is dismissed.

The appellant is of the view that the sentence tendered was arrived at without considering the fact that the appellant was a first offender. The learned senior state counsel concedes that the trial court did not consider that fact and the fact that the subject matter of the offence was recovered. In short the parties herein are saying that the sentence was harsh and excessive.

This court in the case of **WANJEMA VS REPUBLIC (1971) E.A.** Said:

“A sentence must in the end, depend on the fact s of its own particular case. An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked material factors, took into account some immaterial factor, acted on a wrong principle or the sentence is or manifestly excessive in the circumstances of the case.”

In this appeal it is abundantly clear that the trial magistrate did not consider the fact that the subject matter of the offence were recovered and the fact that the appellant was a first offender. These are material factors which were overlooked. This consequently entitles me to interfere with the sentence. The appeal as against sentence is allowed. The resultant order is that the sentence set aside and substituted with a sentence of 1 year imprisonment on each limb and the sentence is to run concurrently. The order on strokes of the cane is set aside since the same has been removed as a penal requirement.

In view of the fact that the appellant has served the whole term then he should be set free forthwith unless lawfully held.

DATED AND DELIVERED THIS 30th DAY OF July 2004

J.K. SERGON

JUDGE