



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO.303 OF 2002**

**(From original conviction and sentence in Criminal  
Case No.400 of 2002, of the Chief Magistrate's  
Court at NAKURU – P. K. SULTANI, R.M.)**

**GEORGE MONARE SESE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The Appellant was convicted for an offence of House Breaking and Stealing contrary to S.304(1) and 279(b) of the Penal Code by the Chief Magistrate's Court at Nakuru. The offence was allegedly committed on the 18.2.2002 at Kaptembwa Estate in Nakuru District. The items stolen were a radio cassette and a chloride oxide battery. These were never recovered.

The Appellant urged the court to disbelieve the Complainant on grounds that there was a grudge existing between him and the Complainant before the date of the alleged offence. The Appellant also urged the court to reduce the sentence imposed against him of 18 months imprisonment and 2 strokes in the first limb and 9 months imprisonment on the second limb on account of his poor health due to epilepsy.

The Learned State Counsel opposed the appeal against conviction. He urged the court to find that the Appellant had both opportunity to commit offence and that he actually seized the opportunity to commit the offence.

On Appellant's medical condition, he submitted that court may consider same. He left it to the court.

The court carefully considered submissions given by the Appellant and the State Counsel. The court also carefully considered the evidence before the lower court. The evidence of PW2, a neighbour of the Complainant is very clear that he saw the Appellant go to the Complainant's house, remove the key and open the door. He entered and went out carrying the radio and the battery. That at the time, PW2 did not consider that any offence was being committed because he regarded the Appellant as a brother of the Complainant due to his frequent visits and their being together often. PW2 was an eye-witness and an independent witness. He was credible.

There was also the evidence of PW3, Complainant's wife that she had agreed with the Complainant in the presence of the Accused where he was to leave the key to the house for her. The Complainant corroborated this.

The Appellant had denied stealing the items. His witnesses could not account for the Appellant's movement at the time PW2 said he saw him enter the Complainant's house and leave with the items. Their evidence was not helpful. All it served was to corroborate PW2's evidence that indeed the Appellant owned white overall and a cap whose description fitted the one PW2 had seen him wearing during the incidence.

The evidence against the Appellant was overwhelming. There was eye-witness evidence who saw the Accused commit the offence but did not realise it until later when he heard the Complainant announce what he had lost. Evidence of PW3, Complainant's wife, and the Complainant confirm that the Appellant knew where to find the key to the Complainant's house. That corroborated PW2's evidence which was that the Appellant had taken the key from the window of Complainant's house and used it to gain entrance into the Complainant's house.

I am satisfied that the Learned Trial Magistrate carefully analysed the evidence adduced before her and that her finding of guilt was sound. The evidence against the Appellant was overwhelming and the conviction safe. I will dismiss his appeal against conviction for lack of merit.

On sentence, it is relevant to consider that the Appellant has shown no remorse for the offence. It is also material that the items were never recovered. His own personal circumstances are relevant I see from his medical record that he goes to hospital often.

Due to that alone, I will reduce his sentence under the powers provided by S.354(3) of the Criminal Procedure Code. I must add here that the Learned Magistrate erred by imposing Corporal Punishment for the House Breaking Limb and imposing none for the Stealing Limb. The Corporal Punishment is only attracted by Section 279(b) of the Penal Code which is the Stealing Limb. I will also correct the Trial Magistrate's error in sentence.

The sentence is reduced from 18 months imprisonment and 2 strokes in first limb and 9 months in the second limb to 12 months imprisonment in the 1st limb of House Breaking and 9 months imprisonment with 2 strokes of the cane in the second limb. Prison terms should run concurrently.

The Appeal against sentence succeeds to such extent,

Orders Accordingly.

Dated and Delivered at Nakuru this 18th day of February, 2003.

**JESSIE LESIIT**

**JUDGE**