

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.180 OF 2001

(From original conviction and sentence in Criminal
Case No.1270/2000 of the Senior Resident Magistrate's
Court at MOLO - ONGONDO (D.M.II) PROF

JOSEPH KIPROP MENGICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant JOSEPH KIPROP MENGICH was charged with SHOP BREAKING AND COMMITTING A FELONY contrary to Section 306(a) of the Penal Code. He was found guilty convicted and sentenced to 7 years imprisonment and 7 strokes of the cane. He now appeals against both the conviction and sentence. His main contention was that there was no eye witness for the prosecution case and that the prosecution witnesses were related to the Complainant and biased against him. He also submitted that no exhibits were produced in court.

The Learned State Counsel opposed the appeal. He submitted that prosecution proved that the Complainant's shop had been broken into night of 19/6/2000. That the following day the Appellant was found with items 1-11 in the charge which were exhibits 1-11 in evidence. He led the Complainant, and PW2 a Police Officer to his farm where the weighing machine exhibit 12 was recovered.

I did carefully consider this appeal, grounds advanced by the Appellant, submissions by the Respondent and the proceedings of the lower court.

I am satisfied that the prosecution proved its case against the Appellant. Even though the trial magistrate did not mention it the Appellant was found in possession of recently stolen goods. The storebreaking and stealing had taken place on the night of 19/6/2000 and on 20/6/2000 a day later he was found with exhibits 1-11. The recovered items were exhibited in court and the Appellant's submission that they were not was therefore misleading. If there could be doubt about the circumstances of the recovery of exhibits 1-11, there is no doubt that the Appellant led PW1, PW2 and PW3 to his farm where exhibit 12 was recovered. It was a weighing machine. The Complainant positively identified it. Other parts of the machine were also recovered i.e. weighing stones exhibit 6. For a weighing machine, one day can safely be regarded as recent possession of it. In the circumstances I do agree with the Trial Magistrate that the Appellant was more a thief than a handler. The Appellant's defence is a mere denial which did not challenge the prosecution case. I do find the learned trial Magistrate cannot be faulted in his finding. Consequently, I do uphold the conviction.

On sentence, I do find it excessively high in the circumstances. It is the maximum sentence provided for under the section for the offence charged. Even though the Appellant was not a first offender, the Appellant's mitigation and his circumstances justify a reduction of the sentence.

I will set aside sentence of 7 years imprisonment and 7 strokes of the cane and substitute it with a sentence of five years imprisonment and 3 strokes of the cane. To that extent the Appellant's appeal succeeds.

JESSIE LESIIT

JUDGE

Read, signed and delivered this 18th day of June, 2003

In presence of

JESSIE LESIIT

JUDGE