



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO.23 OF 2001**

**(From Original Conviction and Sentence in Criminal Case No.2826 of 2001 of the Chief Magistrate's Court at Mombasa – R.H. Ndubi, Esq., - R.M.)**

**ALI HUSSEIN SWALEH.....APPELLANT**

**=V E R S U S=**

**REPUBLIC.....RESPONDENT**

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

The Appellant was charged with House-Breaking and Stealing contrary to Sections 304(1) and 279(b) of the Penal Code. He was tried, convicted and sentenced to 2 years imprisonment for each limb of the offence, sentence to run concurrently. He was also ordered to receive one stroke of the cane. His appeal to this court is against both conviction and sentence.

Briefly the prosecution case was that on the 17th August, 2000 the complainant Peter Kagua locked his house at Changamwe and went on duty. This was at about 7 a.m. At about 8.30 a.m. a group of about 4 people came and entered the complainant's compound. They were seen by PW.2 a watchman who was on guard in the neighbourhood and who alerted PW.4 another watchman. A few moments later they saw the Appellant being handed over a carton while at the gate to the compound of the complainant. PW.2 and PW.4 raised an alarm. The Appellant tried to escape but they chased him and arrested him. When the said carton which was recovered from the Appellant was opened, it was found to contain a T.V. set, a radio which were later identified by the complainant as his. He produced permits to prove the same. PW.2 and PW.4 never lost sight of the Appellant from the scene of the crime to the time he was arrested. The other men who were with the Appellant jumped through the fence at the rear of the compound of the complainant when the alarm was raised and managed to escape.

The defence by the Appellant that he was mistaken for his brother was rejected by the Trial Magistrate and rightly so. The appellant was chased from the scene of the crime and was arrested and PW.2 and PW.4 never lost sight of him until he was arrested and the stolen items recovered. The appeal against conviction is dismissed.

On sentence, the Appellant was a first offender and he never benefited from the stolen goods as the same were all recovered at sight. In the circumstances I consider the sentence of 2 years imprisonment for each limb of the offence on the higher side.

Accordingly the same is reduced to 18 months. The sentence of one stroke of the cane is not disturbed.

To that extent the appeal is allowed

. Otherwise the appeal is dismissed.

**Dated and delivered at Mombasa this 14th day of September, 2001.**

**J.L.A. OSIEMO**

**JUDGE**