



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 3 OF 2018

FREDRICK OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.431B of 2017 of the Chief Magistrate's Court at Busia by Hon. G.N Wakahiu- Chief Magistrate)

JUDGMENT

1. **FREDRICK OMONDI**, the appellant herein, were convicted after pleading guilty to a charge of house breaking contrary to section 304(1) (b) of the Penal Code and stealing contrary to section 279 (b) of the Penal Code.
2. The particulars of the offence were that on the 10th October 2017 at **Port Victoria** town in **Busia** County, broke and entered into the dwelling house of **Lilian Madara** and stole from therein cash Kshs.50,000/=, two mobile phones all valued at Kshs.55,000/= the property of **Lilian Madara**.
3. The appellant was sentenced to serve four years imprisonment. He has appealed against the sentence which he has described as excessive.
4. The appellant was in person.
5. The state opposed the appeal through Ms. Ngari, learned counsel.
6. Section 304 (1) (b) of the Penal Code provides as follows:

1) Any person who—

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

(b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

On the other hand, section 279 (b) of the Penal Code states:

(b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house the offender is liable to imprisonment for fourteen years.

7. The learned trial magistrate's record was untidy, legally speaking. He ought to have convicted after the appellant had confirmed that the facts were true. His record however, shows that he convicted after the appellant pleaded guilty. The learned trial magistrate did not sign the record at the end of the proceedings. Although no prejudice was occasioned to the appellant, this practice is undesirable for it can raise very many legal issues.

8. This is the only charge which is allowed to be charged with two limbs. When sentencing after a plea of guilty or after trial, the court is expected to pronounce the sentence on each limb and the sentence is ordered to run concurrently. The learned trial magistrate erred in this case for failure to do so. I however note that the appellant was not prejudiced.

9. The offence of house breaking has a maximum penalty of seven years imprisonment and that of stealing under section 279 (b) of the Penal Code has a maximum of fourteen years imprisonment. The four years he was sentenced to serve cannot be said to be excessive. I will not disturb the duration, but to regularize the sentence, I set aside the sentence by the learned trial magistrate and substitute it with a sentence of four (4) years imprisonment on each limb. The sentence to run concurrently. For avoidance of any doubts, the sentence will run from when he was sentenced by the lower court.

10. The upshot of the foregoing is that the appeal is dismissed.

DELIVERED and SIGNED at BUSIA this 5th Day of March, 2019

KIARIE WAWERU KIARIE

JUDGE