REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 13 OF 2018

JOHN MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.1347 of 2018 of the Chief Magistrate's Court at Busia by Hon. M. A Nanzushi–Senior Resident Magistrate)

JUDGMENT

1. **John Mwangi,** the appellant herein, was convicted for the offence of house breaking contrary to section 304 (1) (a) of the Penal Code.

2. The particulars of the offence were that on 15th August 2018 at **Airstrip** area, in **Busia** Township location of **Busia** County, broke and entered into the dwelling house of **Salome Nge'ndo Wamboi** with intent to commit a felony and did steal from therein one TV make LED, one computer CPU make EVO. One Dell computer monitor and one keyboard make Lenovo all valued at Kshs.35,000/= the property of **Salome Nge'ndo Wamboi.**

3. The appellant pleaded guilty to the offence and was sentenced to serve three years imprisonment. He now appeals against the sentence which he claims was harsh in the circumstances.

4. The appeal was opposed by the state through Ms. Ngari, learned counsel who contended that the sentence was lenient.

5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

6. An appellate court can only interfere with the sentence by the trial court where there are sufficient circumstances. These circumstances were illustrated in the case of **Ogalo Son of Owuora vs. Republic (1954) 21 EACA 270** as follows:

> **The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364.**

7. Section 304 (1) (a) of the Penal Code provides:

> **(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**
>
> **……**
>
> **is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.**

8. The appellant volunteered to the court that he had two previous convictions. He cannot therefore, with two previous convictions claim that the sentence was harsh. His appeal lacks merit. I accordingly dismiss it.

DELIVERED and SIGNED at BUSIA this 7th day of March, 2019

KIARIE WAWERU KIARIE

JUDGE