REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 1 OF 2019

DENNIS OTIATO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 598B of 2018 of the Chief Magistrate's Court at Busia by Hon. M.A Odhiambo– Resident Magistrate)

JUDGMENT

1. **Dennis Otiato,** 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 26th October 2018 at **Magoe** village in Bunyala sub county of **Busia** County, broke and entered into the dwelling house of **Allan Otieno** and stole from therein one mattress valued at Kshs.6,000/= and cash Kshs.400 the property of **Allan Otieno**.

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 Mr Gacharia, 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. Though the appellant was charged with two counts, it would appear the facts that were read related to count two. He was sentenced in one count. The learned trial magistrate ought to have clearly indicated that the conviction was in respect of both counts and mete out appropriate sentence in each count. Since the state did not raise an issue with this anomaly I will leave it at that.

8. An appellate court would only interfere with the sentence of trial court where some sufficient circumstances exist. These circumstances were spelled out in the case of in the case of **Nelson vs. Republic [1970] E.A. 599** 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 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.

In the instant case I have not come across any circumstances to warrant my interference with the sentence.

9. Count two had two limbs and sentence ought to have been pronounced on each. 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 after factoring in that he was a repeat offender. I will therefore not disturb the sentence, but regularize it. 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 14th Day of June, 2019.

KIARIE WAWERU KIARIE

JUDGE