



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 35 OF 2018**

**(Being an Appeal arising from Conviction and Sentence in Kitale Chief Magistrate's Court**

**Criminal Case No. 3672 of 2017 delivered by Hon. P. Biwott Senior Principal Magistrate on 23/4/2018)**

**JOSEPH NJUGUNA KINYUA.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged and convicted with an offence of **House breaking contrary to Section 304 (1) (b) and Stealing contrary to Section 279(b) of the Penal Code**. The particulars of the charge was that **on the 5<sup>th</sup> day of October 2017 at Doctors plaza within Trans Nzoia County jointly with another not before court broke and entered the building used as a dwelling house by GILBERT CHERUIYOT BII and stole one Television set make Samsung 32 inches ,TV remote control , one Woofer make golden tech, one Modem, one Car battery make top power, one Memory card holder, two Mobile phone charger, one Water tap, one ear phone, one hand bag and assorted clothes all valued at kshs. 70,000 the property of the said GILBERT CHERUIYOT BII.**

2. The alternative charge was **Handling stolen goods contrary to Section 322(2) of the Penal Code**. The particulars of the charge was that **on the 5<sup>th</sup> day of October 2017 at Doctors plaza within Trans Nzoia County otherwise than in the course of stealing dishonestly retained one TV set make Samsung , one Woofer, one Battery, one Modem, one water tap, one TV remote control all valued at kshs. 65,000 knowing them to be stolen goods.**

3. The Appellant was convicted and sentence to 4 years imprisonment in each of the headings hence this appeal. He has appealed on both the conviction and the sentence. Before looking at the same it shall be appropriate to summarise the facts as they were presented during trial.

**4. PW1 the complainant** testified that he was called from his place of work and told to come and identify the stolen items recovered from the appellant. When he arrived he found that his window had been broken into and the assorted items stolen. The Appellant whom he did not know had been arrested by the members of the public. He identified the items as his and the same were photographed.

**5. PW2 Joseph Baraza Wafula** testified that he was at Lions centre when he saw a man alighting and he became suspicious. The man then arrested two people including the Appellant who were carrying suspicious goods. The other man escaped. People identified the items as belonging to the Complainant who was then called immediately.

6. They appeared suspicious and when he interrogated them they said that they were carrying scrap metal. In the process one of them managed to escape into the forest and the Appellant was arrested. The police were called and the Appellant was released to them.

7. He as well led them to the scene where they found the Complainants window broken. The public was baying for his blood but they took him to the chief's home and later handed over to the police.

**8. PW4 CPL Benjamin Wafula** from Kitale Police Station carried out the investigation after the arrest of the appellant by the members of the public. He was taken by the Appellant to the scene where he witnessed the broken window and the damage to the Complainant's goods. He recorded statements from the witnesses and preferred charges against the Appellant.

9. When placed on his defence the Appellant gave unsworn evidence denying the charge. He said that he did not break any house and stole the items. He said that on the material day he was from Kibomet when he met someone carrying items and he was stopped and arrested and taken to the police station.

## **ANALYSIS AND DETERMINATION**

10. The court has perused both submissions on record namely from the Appellant and the learned State Counsel. The duty of this court is to analyse the evidence on record and come up with a fresh findings all together noting that this court did not have the chance to witness the witnesses and their demeanour during trial unlike the trial court. **See OKENO VS. REPUBLIC 1973 E.A .32**

11. The Appellant has raised several grounds of appeal but the substance of the same is an assault on the entire thread of evidence as presented during trial. The state on its part supported both the conviction and the sentence arguing that the same was proved beyond any shadow of doubt.

12. I have perused the evidence of PW2 and PW3 and there is no doubt that the appellant was actually found with the stolen items. There was no suggestion that the appellant was not with the said items. His friend managed to escape into the forest. The only explanation why he was holding the goods was that they were scrap metals, something which was a lie when the same were checked.

13. The Appellant did not offer any plausible defence. He did not extricate himself from the fact that he broke into the Complainant's house through the window. He in fact took PW4 to the scene and the said broken window was seen. If indeed he was not part of those who committed the offence why did he offer to take pw4 to the scene?

14. More importantly, the items were recovered from him, which items had been recently recovered.

15. In agreeing with the Respondent, this appeal is hereby dismissed for being unmeritorious.

16. The only area which merits consideration is the sentencing. It is noted that the appellant was sentenced to 4 years in each limb of the charge. Considering that it was the same transaction it shall be appropriate that the sentencing ought to have run concurrently.

17. In the premises the sentence of 4 years imprisonment is hereby sustained but the same should run concurrently.

18. Orders accordingly.

**Date, signed and delivered in open court at Kitale this 6<sup>th</sup> day of June 2019**

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**H. K. CHEMITEI**

**JUDGE**

**6/6/2019**

**In the presence of:-**

**Appellant – present**

**Mr. Omoria for the Respondent**

**Court Assistant – Emily**

**Court read in open court.**