



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 30 OF 2017**

**JAMES OTIMU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in Traffic case No.12B of 2017 of the Chief Magistrate's Court at Busia by Hon. J.N Maragia– Resident Magistrate)*

**JUDGMENT**

1. The appellant, **JAMES OTIMU**, was convicted for the of the offence of stealing contrary to section 268 (1) as read with section 275 of the Penal code and of the offence of burglary contrary to section 304(a) of the Penal code.

2. The particulars of the offences were that on 12<sup>th</sup> January 2017 at **MARENKA** village, **BUNYALA** Sub County within **BUSIA** County, stole a purse containing Kshs. 1, 800/= the property of **BEATRICE NEKESA**. In count two the facts were that on the night of 12<sup>th</sup> and 13<sup>th</sup> January 2017, at **BUKOMA** village, **BUNYALA** west Location within **BUSIA** County, he broke and entered into the dwelling house of **ROMA GEORGE OKONGO** with intent to steal and did steal from therein a mattress, one school dress, and a pair of black leather shoes all valued at Kshs. 4,600/= the property of **ROMA GEORGE OKONGO**.

3. He was convicted after he had pleaded guilty and sentenced to serve two year's imprisonment in count one and four year's imprisonment in count two. The sentences were ordered to run concurrently.

4. He now appeals against the sentences which he claims was harsh and excessive.

5. The state opposed the appeal through Ms. Ngari, the learned counsel.

6. The facts of the prosecution case were briefly as follows:

On 12<sup>th</sup> January 2017 the appellant found **BEATRICE NEKESA** seated with her purse beside her. The purse contained Kshs.1800/= . He stole the purse. On the night of 12<sup>th</sup> and 13<sup>th</sup> January 2017 he broke into the house of **ROMA GEORGE OKONGO** and stole some items from therein valued at Kshs. 4,600/= . One of the items was recovered from him.

7. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of **NILSSON 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 Vs. 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 Vs. SHERSHEWSITY (1912) C.CA 28 T.LR 364.*

8. I am persuaded that the sentence in the second count was manifestly harsh bearing in mind that the appellant was a first offender. I accordingly set aside the sentence of four years and substitute it with a sentence of two years. The sentence will run concurrently with the one imposed in count one. The appeal succeeds to that extent.

**DELIVERED and SIGNED at BUSIA this 7<sup>th</sup> day of May, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**