



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 450 OF 2018**

**PATRICK OWINY OPUNYO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Patrick Owiny Opunyo was convicted of the offence of **breaking into a building with the intent to commit a felony** contrary to **Section 307** of the **Penal Code**. The particulars of the offence were that on 30<sup>th</sup> September 2016 at about 11.38 hours at Nairobi University, School of Medicine, the Applicant broke and entered the Administrator's office at Kenyatta National Hospital Campus with the intent to steal therefrom. After full trial, he was convicted and sentenced to serve two (2) years imprisonment. The sentence was meted out on 13<sup>th</sup> September 2017. This was in **Kibera Chief Magistrate's Court Criminal Case No. 3872 of 2016**. The Appellant was also tried and convicted in **Kibera Chief Magistrate's Court Criminal Case No.2013 of 2017** of **stealing** contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code**. The particulars of the offence were that on 2<sup>nd</sup> August 2017 at AMREF Kenya Country Office in Langata, the Appellant stole one laptop make HP Pro-book 430, the property of Happiness Rebecca Oruko. He was sentenced to pay a fine of Kshs.100,000/- or in default serve one (1) year imprisonment. He is serving the default sentence. The sentence was pronounced on the same day of 13<sup>th</sup> September 2017.

The Applicant has applied to this court to have the two sentences consolidated so that they would run concurrently instead of consecutively. During the hearing of the application, the Applicant pleaded with the court to grant his application taking into consideration the nature of the charges that he was convicted of. Ms. Atina for the State opposed the application. She submitted that the Applicant was a repeat offender having committed another offence while he was out on bail on the first charge that he was convicted. She reiterated that there was no basis in law upon which this court can grant the Applicant's application for consolidation of sentence. She urged the court to dismiss the application. She was of the view that the sentences imposed were lenient.

This court has carefully considered the rival submission made by the parties to this application. When the trial court sentenced the Applicant to serve the custodial sentence, it was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal.

In the present application, it was clear to the court that the sentences imposed upon the Applicant were legal. However, taking into consideration the cumulative effect of the two sentences which will be served consecutively instead of concurrently, the Applicant will suffer double punishment than a convict charged with similar offences in one charge sheet. This court has also taken into account the nature of the offences that the Applicant was convicted of. It has also taken into account that the Applicant has been in prison for more than one year. This court formed the view that the period the Applicant has been in prison is sufficient punishment. He has learnt his lesson.

In the premises therefore, the custodial sentence imposed upon the Appellant in **Kibera Chief Magistrate's Court Criminal Case No. 3872 of 2016** and the default custodial sentence imposed upon the Applicant in **Kibera Chief Magistrate's Court Criminal Case No.2013 of 2017** are hereby consolidated and commuted to the period served. The Applicant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 14 DAY OF NOVEMBER 2018**

**L. KIMARU**

**JUDGE**