



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL APPEAL NO. 75 OF 2016**

**(Consolidated With Criminal Appeal No. 74 of 2016)**

**(CORAM: J.A. MAKAU – J.)**

**D O O.....1ST APPELLANT**

**O F F.....2ND APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal against both the conviction and the sentence dated 13.7.2016 in Criminal Case No. 662 of 2016 in Siaya Law Court before Hon. H. Wandere-PM)***

**J U D G M E N T**

1. The appellants **D O O** and **F F O** (the 1<sup>st</sup> and the 2<sup>nd</sup> accused) at the Lower Court were charged with four counts of burglary contrary to **Section 304(2)** and stealing contrary to **Section 279(b) of the Penal Code** and with four alternative charges of handling stolen goods contrary to **Section 322(2) of the Penal Code**. The charges were as follows:-

**Count I:** The particulars of the charge are that: on the night of 3<sup>rd</sup> / 4<sup>th</sup> of July 2016 at [particulars withheld] sub-location in Siaya Sub-county within Siaya County, jointly with others not before the court broke and entered the dwelling house of one **EMMANUEL AMOLLO OWUOR** with intent to steal there in and did steal from there in two tuff foam mattresses, one coffee table, three stools, three pillow cases, one electric iron box, one electric kettle, one energizer light, one carpet, one wrist watch, one suit case, one lantern lamp, two pairs of bed sheets, four pairs of socks, one wall watch and other assorted household goods all valued at Kshs. 71,830/= property of the said Emmanuel Amollo Owuor.

**Alternative Charge: Handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code.**

The particulars of the charge are that on 8<sup>th</sup> day of July 2016, at [particulars withheld] sub-location in Siaya Sub-county within Siaya County, otherwise than in the course of stealing dishonestly retained two tuff foam mattresses, one coffee table, three stools, three pillow cases, one electric iron box, one electric kettle, one energizer light, one carpet, one wrist watch, one suit case, one lantern lamp, two pairs of bed sheets, four pairs of socks, one wall watch and other assorted household goods, the property of the said Emmanuel Amollo Owuor, having reasons to believe them to be

stolen goods or unlawfully obtained.

**Count II: Burglary contrary to Section 304(2) and Stealing contrary to Section 279(b) of the Penal Code**

The particulars of the charge are that: on the night of 7<sup>th</sup>/8<sup>th</sup> July 2016, at [particulars withheld] sub-location in Siaya Sub-county within Siaya County, jointly with others not before court broke and entered the dwelling house of Esther Muthini Mbondo with intent to steal there in and did steal from there in one sun shine solar panel, one total gas cylinder, one charcoal jiko, two plastic basins, one suit case, one kerosene stove and one dozen of glasses all valued at Kshs. 22,000/= the property of the said Esther Muthini Mbondo.

***Alternative Charge: Handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code.***

The particulars of the charge are that: on the 8<sup>th</sup> day of July 2016, at [particulars withheld] sub-location in Siaya Sub-county within Siaya County, otherwise than in the course of stealing dishonestly retained one sun shine solar panel, one total gas cylinder, one charcoal jiko, two plastic basins, one suit case, one kerosene stove and one dozen of glasses the property of the said Esther Muthini Mbondo, having reasons to believe them to be stolen goods or unlawfully obtained.

**Count III: House breaking contrary to Section 304(b) and stealing contrary to Section 279(b) of the Penal code.**

The particulars of the charge are that: on the 26<sup>th</sup> day of June 2016, at [particulars withheld] sub-location in Siaya Sub-county within Siaya County, jointly with others not before court broke and entered the dwelling house of one Evans Obewo and stole from there in one mattress, one bed, two plastic jericans, two plastic basins and one charcoal jiko all valued at Kshs. 2,800/= the property of the said Evans Obewo.

***Alternative Charge***

***Handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code.***

The particulars of the charge are that: on the 8<sup>th</sup> day of July 2016, at [particulars withheld] sub-location in Siaya Sub-county within Siaya County, otherwise than in the course of stealing dishonestly retained one mattress, one bed, two plastic jericans, two plastic basins and one charcoal jiko the property of the said Evans Obewo, having reasons to believe them to be stolen goods or unlawfully obtained.

**Count IV: House breaking contrary to Section 304(b) and stealing contrary to Section 279(b) of the Penal code.**

The particulars of the charge are that: on the 30<sup>th</sup> day of June 2016, at [particulars withheld] sub-location in Siaya Sub-county within Siaya County, jointly with others not before court broke and entered the dwelling house of one Nelson Mandela and stole from there in one mobile phone make Techno valued at Kshs. 3,500/= the property of the said Nelson Mandela.

***Alternative Charge: Handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code.***

The particulars of the charge are that: on the 8<sup>th</sup> day of July 2016, at [particulars withheld] sub-location in Siaya Sub-county within Siaya County, otherwise than in the course of stealing dishonestly retained one mobile phone make Techno the property of the said Nelson Mandela,

having reasons to believe them to be stolen goods or unlawfully obtained.

2. After the charge was read and explained to the appellants, they admitted Count I and Count II; however, after facts were given, the appellants admitted facts in respect of Count I and Count 2 and were both convicted of the alternative counts to Count I and 2 only and each sentenced to serve five (5) years in jail on each of the alternative charges to Count I and Count 2.

3. Aggrieved by the sentence, each of the appellant preferred an appeal. The appellants ground of appeal are similar and each of the appellant set out (5) grounds of appeal as follows: -

*(a) That the appellant was a minor by the time the alleged offence was committed.*

*(b) That the sentence imposed are running consecutively hence considered harsh.*

*(c) That the learned trial magistrate erred in law and fact to consider my mitigation.*

*(d) That the appellant prays for leniency and a non-custodial sentence.*

*(e) That the learned trial magistrate did not consider my sincere mitigation.*

4. The trial court before sentencing the appellants called for an age assessment in respect of each of the appellant. The Ministry of Health through the Medical Superintendent, Siaya Referral Hospital filled age assessment for D O O on 03/08/2016 stated: -

*“the bearer is seventeen and a half years old. This is according to the dental examination done.”*

Age assessment for O F F stating as follows: -

*“the above patient is 16 years old. This is due to the half way eruption of some of the last molars in the mouth.”*

5. The appellants in their appeal urged that the trial court erred in law in failing to consider that both of them were minors at the time of the commission of the offence and a custodial sentence meted against them was harsh and the mitigation was not considered as they ought not to have been given custodial sentence.

6. M/S Maurine Odumba, Learned State Counsel, urged the appellants were at the time of the commission of the offence minors and still are and ought to have been treated as such as provided for under **Section 191(1)(g) of the Children Act (Cap 145) Laws of Kenya.**

7. I have very carefully considered the age assessment report filed at the Lower Court and find indeed at the time of the commission of the offence and even at the time of sentencing, the appellants were minors. The trial court erred in failing to treat the appellants as children and sentence them as provided for under **Section 191(a)-(g) of the Children Act** which provides:-

*“191. (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways –*

*a) by discharging the offender under section 35 (1) of the Penal Code;*

*b) by discharging the offender on his entering into a recognisance, with or without sureties;*

*c) (c) by making a probation order against the offender under the provisions of the Probation of Offenders Act;*

*d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;*

*(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;*

*(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;*

*(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions”*

**8. Section 191(1) of the Children Act** is very specific that in spite of the provisions of any other law and subject to the Children's Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the ways set out under **Section 191 of the Children Act**. Further **Section 190(1)** provides no child shall be ordered to imprisonment or to be placed in a detention camp.

**9. Article 53(1)(f)(i) and (ii) and (2) of the Constitution of Kenya 2010** provides:-

*“53. (1) Every child has the right—*

*(f) not to be detained, except as a measure of last resort, and when detained, to be held—*

*(i). for the shortest appropriate period of time; and*

*(ii). separate from adults and in conditions that take account of the child's sex and age.*

*(2) A child's best interests are of paramount importance in every matter concerning the child.”*

**10.** Having considered the submission by both the State Counsel and the appellants and in view of **Sections 190 and 191 of the Children Act** and **Article 53 of the Constitution of Kenya 2010**, and in view of the fact that the appellants at the time of the commission of the offence and at the time of hearing this appeal were and are minors, I find the trial court erred when it invoked the provisions of the Penal Code to sentence the appellants to 10 years imprisonment instead of treating the appellants as provided for under the Children Act and the Constitution, I find the sentencing of the appellants and committing them to prison and not separating them from the adults and under conditions that did not take into account of the child's age, to have not only been illegal but unconstitutional. The sentence was and is illegal and ought not to be allowed to stand at all.

**11.** The appellants urged that the sentence of 5 years, on each count ordered to run consecutively was wrong. The trial court in its sentence stated as follows:-

*“Each accused person will serve (5) years in jail on each of the alternative charges to Count 1 and 2 respectively.”*

**12.** In **Robert Njogu Mburu V Republic, Criminal Appeal No. 553 of 2010**, the Court of Appeal stated as follows: -

*“the two charges had arisen out of the same offence and the same facts and the proper way to have sentenced the appellant would have been to make the sentences concurrent. It was trite that where a person committed more than one offence at the time and in the same transaction, the practice was save in very exceptional circumstances to impose concurrent sentences.”*

**13.** I have perused the charges, the appellants faced and have noted the same charges had arisen out of the

same offence of burglary and stealing and almost at the same time and same facts as given by the prosecution. I find the trial court did order the sentence to run consecutively but state did not what was the exceptional circumstances which made it to order the sentence to run consecutively contrary to the practice of ordering the sentences to run concurrently when the charges had come out of the same offence and where facts of the case are the same and the person committed the offence at the time and in the same transaction. In view of the above, I find that there is no exceptional circumstance stated in this case to warrant the sentence meted to run consecutively. The sentence meted should have been ordered to run concurrently rather than consecutively.

**14. The upshot is that the conviction is upheld, the appeals against sentence are allowed, the sentences are set aside and substituted with three (3) years' probation period as the appellants are minors and school going students. The appellants shall be under the supervision of Probation Office, Siaya County.**

**DATED AND SIGNED AT SIAYA THIS 9TH DAY OF MARCH 2017.**

**J.A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 9TH DAY OF MARCH 2017.**

**In the presence of:**

**Appellant In person - Present**

**M/S Odumba:** for the State

**Court Assistants:**

1. George Ngayo
2. Patience B. Ochieng
3. Sarah Ooro

**J.A. MAKAU**

**JUDGE**