



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 128 OF 2013**

*(Being an appeal from the original Conviction and Sentence in Criminal Case No. 199 of 2012, Senior Principal Magistrate's Court Mumias – Hon. H. Wandere – P.M)*

**ISMAEL MARISELA BOYENDE .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

1. The appellant Ismael Marisela Boyende was charged with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code.
2. The particulars of the charge were that on diverse dates between 3<sup>rd</sup> and 6<sup>th</sup> day of March, 2012 at Eshikofu village, Koyonzo location in Mumias District within Kakamega County, broke and entered a building namely a nursery school classroom at St. Cecilia Private School and stole from therein four steel windows and three plastic chairs the property of Francis Ouma all valued at Kshs. 22,250/= (Twenty two Thousand Two Hundred and Fifty).
3. He was charged with the alternative Count of handling stolen goods contrary to section 322(2) of the Penal Code.
4. The particulars were that on the 7<sup>th</sup> day of March, 2012 at Eshikofu village Koyonzo location in Mumias District within Kakamega County otherwise than in the course of stealing dishonestly retained or received two steel windows knowing or having reason to believe them to be stolen goods.
5. The appellant was found guilty and was convicted of the alternative charge of handling stolen goods and was sentenced to serve 7 years imprisonment with hard labour on 22nd May, 2013.

**THE APPEAL**

6. The appellant being dissatisfied with the sentence meted out to him, filed a petition of appeal on 15<sup>th</sup> July, 2013 against sentence only. His grounds of appeal were to the effect that the sentence was harsh and that he was remorseful for having committed the offence. He submitted that his mitigation was not considered.

**SUBMISSIONS**

7. At the time of hearing the appeal, the appellant pleaded with the Court to release him on appeal as he

had served a substantial part of his sentence.

8. Mr. Ng'etich, learned Prosecuting Counsel submitted that the trial Court considered the social inquiry report when sentencing the appellant but the probation report was not favourable to the appellant. Mr. Ng'etich informed the Court that the appellant though a first offender was sentenced to the maximum sentence.

#### **DETERMINATION OF THE APPEAL.**

9. In the case of **Nelson Vs Republic (1970) EA 599**, the Court stated 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 by a trial Judge unless as was said in James Vs Rex (1950) 18 EACA 147, it is evident that the Judge had acted upon some wrong principle or overlooked some material factor. To this we would also add a third contention, namely, that the sentence is manifestly excessive in view of the circumstances of the case”.**

10. In the present case, the learned trial magistrate considered the appellant's mitigation and the fact that he was a first offender. The probation report was however adverse to the appellant which led the learned Magistrate to impose a sentence of 7 years imprisonment.

11. This court notes that the learned Magistrate convicted and sentenced the appellant under the provisions of section 322 (a) of the Penal Code. That provision is non-existent in the Penal Code.

12. The alternative charge with which the appellant was charged with was under the provisions of section 322 (2) of the Penal Code which provides for a maximum sentence of 14 years with hard labour.

13. As a result of the foregoing, I hereby invoke the provisions of section 382 of the Criminal Procedure Code to cure the defect on the section of the law under which the appellant was convicted and sentenced and substitute thereof a conviction and sentence under the provisions of section 322(2) of the Penal Code.

14. It is my finding that the sentence meted out to the appellant was harsh. I therefore set aside the sentence of 7 years imprisonment with hard labour and substitute thereof a sentence of 5 years imprisonment with hard labour.

15. The appellant's appeal succeeds only to that extent.

It is so ordered.

**DATED and SIGNED at MOMBASA on this day of , 2016**

**NJOKI MWANGI**

**JUDGE**

**DELIVERED, DATED and SIGNED at KAKAMEGA on this 14th day of July, 2016**

**E.C. MWITA**

**JUDGE**