



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

**AT SIAYA**

**HIGH COURT CRIMINAL APPEAL NO. 8 OF 2015**

**(CORAM J. A. MAKAU J)**

**JOSEPH OTIENO OLOO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against sentence in Criminal Case No. 513 of 2011 in UKWALA LAW COURTS  
before E. K. Mwaita SRM)**

**JUDGEMENT**

1. The Appellant Joseph Otieno Oloo was charged with an offence of stealing from a person contrary to section 279 (a) of the Penal Code. The particulars of the offence were on the 1st day of November, 2011 at Yiro East sub- location, Sidindi market in Ugunja District within Nyanza Province, jointly with another not before court' stole Ksh. 8,000/=, ID card and NSSF Card from the person of the said KEVIN OCHIENG OPIYO.

**ALTERNATIVE CHARGE: HANDLING STOLEN PROPERTY CONTRARY 322 (1) OF THE PENAL CODE:** On the 2nd day of November, 2011 at Sidindi trading centre Yiro East Sub-location, Ugunja district within Nyanza province, otherwise than in the cause of stealing, dishonestly received or retained one Id Card No. 25417412, an NSSF Card 321175913 and an elector's card No. 179/064/0973359396 the property of KEVIN OCHIENG OPIYO knowing or having reason to believe them to be stolen property.

2. The Appellant pleaded guilty to the main count and when facts were given he admitted the same and specifically stated the facts were true. The trial court then proceeded to sentence the Appellant to serve ten (10) years imprisonment on 3rd November 2011.

3. The Appellant being aggrieved by the sentence preferred this appeal setting out 4 major grounds of appeal as follows:-

1. **That he pleaded to the charge hence praying for leniency.**
2. **That the sentence imposed on him is so manifestly harsh and excessive.**
3. **That the trial Magistrate did not consider his mitigation which was bona fide and severe punishment.**

4. **That he was an HIV/AIDS POSITIVE , person and his wife is left to take care of their three children among them one is also infected with HIV/AIDS.**

4. The Appellant during the hearing of the appeal orally submitted for the sentence to be reduced, urging he has been in prison for 4 years and that he is 26 years old.

5. The learned state counsel Mr. Namasake, opposed the appeal urging that the sentence meted against the accused was within the law.

6. The accused was convicted with an offence under **279 (a) of the Penal Code** which provides:-

“279 if the theft is committed under any of the circumstances following, that is to say:-

(a) **if the thing is stolen from the person of another**

(b) .....

(c) .....

(d) .....

(e) .....

(f) .....

(g) .....

**the offender is liable to imprisonment for fourteen years”**

7. The facts of the Prosecution case are that the Appellant and the complainant were taking chang'aa at Sidindi market and the Appellant decided to escort the complainant to Sidindi Stage. That the complainant was on the way ordered by certain person to sit down and his wallet with Ksh 8,000/= , identity card and NSSF Card were stolen. The Appellant left with the gang. The Appellant admitted the facts and was sentenced to serve (10) years imprisonment.

8. The Sentence provided for under **section 279 (a) of the Penal Code** is for a period of 14 years. The law is well settled that where a mandatory sentence is prescribed in law, the court cannot impose any other sentence other than the prescribed penalty. Further where a mandatory sentence is not prescribed in law, the trial Court has a discretion to consider the sentence to impose exercising its discretion but the discretion must be applied Judiciously taking into account the nature of the offence, facts of the case as well as the mitigating factors. The Appellant herein challenges the sentence of ten (10) years urging it was harsh and excessive in the circumstances of the commission of the offence.

9. I have carefully considered the facts of this case. The Appellant and complainant were taking chang'aa together before the incident and both of them must have been drunk. The amount of money stolen by the appellant and another was Ksh 8,000/=. The Appellant admitted the offence and saved court's valuable time. He was remorseful and a first offender aged 21 years. In view of the mitigating factors and the facts of this offence; the trial court in exercise of it's discretion ought to have given a lighter sentence. The Appellant has to-date served about 4 years. I think the sentence served so far is sufficient in view of the facts of the case and mitigating factors.

10. I shall therefore allow the appeal against the sentence; the sentence of ten (10) years imprisonment is set aside and substituted with a sentence of four years imprisonment, for the period so far served so as to enable or allow the Appellant to be released forthwith. I therefore

order the appellant to be released forthwith as the period served of about 4 years is sufficient for the offence committed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 8<sup>TH</sup> DAY OF OCTOBER, 2015.**

**J. A. MAKAU**

**JUDGE**

**8/10/2015**

Delivered in Open Court in the presence of:

Mr. Namasake State Counsel for the State.

Appellant in person – present

Court Clerk – Vincent Onyango

**J. A. MAKAU**

**JUDGE.**