



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 268 OF 2011

ALI MDINGILA APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 25 of 2009 of the Senior Resident Magistrate's Court at Wundanyi – **Hon. Munyi - RM**)

JUDGMENT

The Appellant herein was convicted and Sentenced to Seven (7) years imprisonment on two counts of Breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. The Sentence was to run concurrently.

The particulars are that on the night of 16th day of January, 2009 at Kishushe Bar and Lodging – Wundanyi Taita-Taveta County jointly, with another not before the Court, broke and entered a building namely Lodging room of Wilmont Mwasi Mwasoko and committed therein a felony namely theft and did steal cash Ksh. 2,200/= and one mobile phone make Nokia 1600 valued at Ksh. 7,000/= the property of the said Wilmont Mwasi Mwaseko.

On the second Count it was alleged that on the same night and place he broke into the room of Michael Kichinda Washington and committed therein a felony namely, theft and did steal therein cash Ksh. 800/= and one mobile phone make Nokia 1600 all valued at Ksh. 5,600/= the property of the said Michael Kichinda Washington.

This appeal is largely on Sentence. The appellant seems to think that he was sentenced to fourteen (14) years on account of the two Counts. From the records it is clear that the sentence of seven (7) years on each of the two counts were to run concurrently which means that he would serve seven (7) years.

The prosecution treated the Appellant as a first offender.

The offence he was charged with carries a maximum of seven years imprisonment. It is therefore correct to state that he was Sentenced to the maximum punishment provided for by law.

Bearing in mind that he was a first offender the Sentence meted out on the appellant was harsh and excessive in the circumstances of this case.

He alleges that the Conviction was against the weight of the evidence adduced. The breaking and

theft took place on the night of 16th January, 2009. The following morning the Appellant took a phone to PW 3 Clement Chara and informed him that he wanted to sell it. That evening police went to his place of work and took the phone as exhibit. Heep was also requested to record a statement and he told them that it is the appellant who had taken the phone to him saying that he wanted to sell it. The phone was identified by the complainants. The trial magistrate in her judgment did apply the doctrine of recent possession. I find that it was applicable in this case. The phones went missing on the night of 16th January, 2009 and one was recovered the following day at 7:00 a.m.

The Conviction was safe. However as argued above. The Sentence was harsh and excessive for a first offender.

It is accordingly reduced to (4) (fouryears) imprisonment on each Count. Sentence to run concurrently. In the event that he has already served the Sentence of four (4) years, the appellant to be released forthwith unless otherwise lawfully held.

Judgment delivered dated and signed this **11th** day of **February, 2014**.

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M. MUYA

JUDGE

11TH FEBRUARY, 2014

In the presence of:-

Mr. Tanui Learned State Counsel

The Appellant present

Court Clerk Musundi