



**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL NO. 21A OF 2013**

**CONSOLIDATED WITH**

**CRIMINAL APPEALS NO. 21B OF 2013, 21C OF 2013, 21D OF 2013, 22A OF 2013, 22B OF 2013, 22C OF 2013, 22D OF 2013 AND 22E OF 2013**

**BETWEEN**

**RICHARD OTIENO AGUNJA ..... 1<sup>ST</sup> APPELLANT**

**NELSON MANDELA AKOTH ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being appeals from the original conviction and sentence in Criminal Cases No. 665, 668, 668B, 669 and 670 of 2013 respectively at Chief Magistrate's Court at Homa Bay, Hon. S. Ongeru, PM dated on 21<sup>st</sup> September 2013)***

**JUDGMENT**

1. Although the appeals arose from separate cases in the subordinate court, the appeals by each of the appellants giving rise to this judgment were consolidated as they raise the same issue regarding sentencing. The accused faced various charges in the subordinate court and were convicted on their own pleas of guilt. They were then sentenced to various terms of imprisonment to run consecutively in some instances.
2. The matters in which the appellants were charged and convicted were as follows;

***HOMA BAY NO. 665 OF 2013***

***SHOP BREAKING CONTRARY TO SECTION 306 (a) OF THE PENAL CODE***

***RICHARD OTIENO AGUNJA, NELSON MANDELA AKOTH alias JAKOSOKO on the night of 22<sup>nd</sup> May 2013 to 23<sup>rd</sup> May 2013 at Junction area in Mbita Township within Homa Bay County in the Republic of Kenya, jointly with others not before court broke and entered a building namely shop of MARGRET AYUGI AGENG'A and committed therein a felony namely theft of 2 singer sewing machine, one traveling bag, assorted clothes, 6 pairs of assorted shoes, all valued at Kshs.80,550/= the property of the said Margaret ayugi ageng'a.***

**HOMA BAY NO. 668A OF 2013**

**STORE BREAKING CONTRARY TO SECTION 306 (a) OF THE PENAL CODE.**

*RICHARD OTIENO AGUNJA, NELSON MANDELA AKOTH alias JAKOSOKO on the night of 10<sup>th</sup> June 2013 to 11<sup>th</sup> June 2013 at Mbita Township in Mbita District within Homa Bay County in the Republic of Kenya, jointly with others not before court broke and entered a building namely store of NOAH OMONDI AKETCH and committed therein a felony namely theft of torches, socks, books, plastic watches, cellotapes, pencils school ruler earrings all valued at Kshs.37,190/=.*

**HOMA BAY NO. 668B OF 2013**

**STORE BREAKING CONTRARY TO SECTION 322(2) OF THE PENAL CODE.**

*RICHARD OTIENO AGUNJA, NELSON MANDELA AKOTH alias JAKOSOKO on the night of 10<sup>th</sup> June 2013 to 11<sup>th</sup> June 2013 at Mbita Township in Mbita District within Homa Bay County in the Republic of Kenya, jointly with others not before court broke and entered a building namely store of LAZARUS ONYANGO OKUKU and committed therein a felony namely theft of two bags, assorted clothes, two blankets, assorted shoes, belts and socks all valued at Kshs.106,640/=.*

**HOMA BAY NO. 670 OF 2013**

**STORE BREAKING AND STEALING CONTRARY TO SECTION 306(a) OF THE PENAL CODE.**

*RICHARD OTIENO AGUNJA, NELSON MANDELA AKOTH alias JAKOSOKO on the night of 11<sup>th</sup> May 2013 to 12<sup>th</sup> May 2013 at Mbita Township in Mbita District within Homa Bay County in the Republic of Kenya, jointly with others not before court broke and entered a building namely store of TERESA AKINYI OBIERO and committed therein a felony namely theft of 8 pieces of clothing, materials, 10 pieces of 6 meters of Vitenge Materials and 5 ready made women dress all valued at Kshs.18,000/=.*

**HOMA BAY NO. 669 OF 2013**

**SALOON BREAKING CONTRARY TO SECTION 306(a) OF THE PENAL CODE.**

*RICHARD OTIENO AGUNJA, NELSON MANDELA AKOTH alias JAKOSOKO on the night of 12<sup>th</sup> June 2013 to 13<sup>th</sup> June 2013 at Junction area in Mbita Township within Homa Bay County in the Republic of Kenya, jointly with others not before court broke and entered a building namely saloon of MILLICENT AUMA NYABANDA and committed therein a felony namely theft of assorted hair lotions, assorted sprays and assorted weaves all valued at Kshs.148,000/=.*

3. Mr Nyauke, counsel for the appellants submitted that the issue for consideration in this appeal is whether the sentences imposed should run concurrently or consecutively and whether the sentences were harsh considering the circumstances. Counsel submitted that the offences charged were part of the same or series of transactions concerning house breaking and stealing and as such the sentences should run concurrently.
4. In each case, learned counsel submitted that the sentences were harsh and excessive and that the court failed to consider the fact that the appellants were first offenders and that they pleaded guilty. He urged the court should reduce the sentence to time served. To support the appellants' case, counsel cited several cases among them *Joseph Sudai Tsuma v Republic Msa HCCRA No. 353 of 2002 [2003]eKLR*, *Paul Gitau Ndungu v Republic Nku HCCRA No. 520 of 2003 [2005]eKLR*, *Musesi Robert v Republic Busia HCCRA No. 44 of 2002 [2005]eKLR*, *Anthony Nduhiu Gachai v Republic Nyeri HCCRA No. 307 of 2007 [2009]eKLR*, *Lilian Wangui Kimani v Republic Nku HCCRA No. 27 of 2005 [2005]eKLR* and *Mwangi Kimani Nyanguthia & Anor v Republic Nku HCCRA No. 239 of 2004 [2006]eKLR*.

5. Ms Ongeti, learned counsel for the respondent, opposed the appeal. She submitted that the facts do not form the same transaction hence the sentences were consecutive. She argued that learned magistrate followed the correct principles in imposing the sentences. She denied that the offences were manifestly excessive given that the highest sentence was 6 years when the maximum sentence was 7 years. She submitted that the learned magistrate also took into account the fact that the appellants were not first offenders since they were convicted of different and separate offences. On the whole she urged the court to uphold the sentences.
6. The general principles upon which the first appellate court acts are now well settled. It has jurisdiction to interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the Court should not lose sight of the fact that in sentencing, the trial court exercises discretion and as long as the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion (see **Wanjema v Republic [1971] EA 493**).
7. Before I proceed to consider the issues raised in the appeal, I would like to draw attention to the fact that though the accused were charged with the offence of breaking contrary to **section 306** of the **Penal Code**, the particulars of the charges, as I have set out above, disclose the additional offence of stealing contrary to **section 279(d)** of the **Penal Code**. The learned magistrate ought have to sentenced the accused on the first limb of breaking into the building and the second limb of stealing with both sentences running concurrently (see **Reuben Nyakango Mose and Another v Republic CA Kisumu Civil Appeal No. 606 of 2010 [2013]eKLR**). As the issue was not raised by the parties and the appellants were not prejudiced, I will not take the issue any further.
8. The accused were charged separately for each of the offences. The learned magistrate proceeded to order that the sentences in **Criminal Cases 665 of 2013, 669 of 2013, 668B of 2013 and 670 of 2013** should run consecutively making the total term for each appellant 18 years imprisonment. The learned magistrate erred in making such an order when the charges were instituted separately.
9. A similar situation obtained in **Paul Gitau Ndungu v Republic Nakuru HC Criminal Appeal No. 520 of 2003 [2005]eKLR** where the appellant was charged on the same day with seven separate counts of burglary and theft. Instead of all charges being consolidated in a single charge sheet, seven separate files were opened. The appellant pleaded guilty on all charges. The sentences imposed on him ran consecutively. He appealed. Kimaru J., in setting aside the sentences held, *“Unless there is a compelling reason, the sentences imposes on the appellant ought to have run concurrently instead of consecutively.”* In the circumstances, it was improper to order the sentences to run consecutively. As I stated the total time to be served by each appellant is 18 years which in the circumstances is manifestly excessive.
10. The second issue is whether the sentences imposed were harsh and excessive. It is a cardinal principal of sentencing that the sentence imposed should be fair and proportionate and in so far as possible the same facts should attract the same sentence. Although the cases have almost similar facts, they sentences vary from 2 years to 6 years. The sentencing notes of the learned magistrate do not reflect the reason or grounds for imposing the sentences or showing the reason for the variations in sentence. The maximum sentence under **section 306** of the **Penal Code** is 7 years. In the case where the sentence of 6 years was imposed, it is no clear what aggravating factors were in play in order for the learned magistrate to impose the near maximum sentence.
11. For the reasons I have outlined I find that there sufficient ground for the Court to intervene. The factors weighing in favour of the appellant are that they were first offenders at the time they were charged. They pleaded guilty and showed remorse. The stolen items were recovered. The main aggravating factor was that at the time they were charged they had been involved in a series of series of break-ins and thefts. In these circumstances, I think a sentence of two years imprisonment would be appropriate in each case.

12.I therefore quash the sentences and substitute them with a sentence of 2 years for each of the appellant for each offence to run from the date of conviction. The sentences shall run concurrently. Orders accordingly.

**DATED and DELIVERED at HOMA BAY this 10<sup>th</sup> July 2014**

**D.S. MAJANJA**

**JUDGE**

Mr Nyauke, instructed by Nyauke and Company Advocates for the appellants.

Ms Ongeti, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.