



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO 937 OF 1994**

**JOHN KASH MAROGNO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant John Kash Marongo, was convicted after trial by the learned senior resident magistrate, Kiambu of the offence of Burglary and Stealing contrary to section 304 (2) and 279 (b) of the Penal Code. Upon his conviction, he was sentenced to serve 3 ½ years imprisonment with 4 strokes of the cane in respect of each limb. The sentence was to run concurrently. His appeal to this court is against both conviction and sentence.

There was no dispute that on the material night, 7<sup>th</sup> of June 1993, the house of the complainant which he had securely locked and left unguarded, was broken into and his bicycle and some clothing were stolen from therein. During the same night at about 4 a.m P.C. Joseph Munyao (PW2) and CPL Stephen Njuguna (PW3) who were on patrol duties met with the Appellant and another (who was separately convicted) while pushing a bicycle on which there was a bag containing several items. The police officers stopped them for interrogation but as they were not satisfied with the explanation given by the appellant and his co-accused, they decided to take them to the police station for further enquiries. It was then that the Appellant decided to run away and managed to escape despite the fact that the police officers had threatened to shoot him. They proceeded to the police station with the Appellant's co-accused and soon thereafter the complainant came to the station to report the burglary at his house. When shown the bicycle which the police had recovered he identified the same as belonging to him. Later the appellant was arrested by the police for another offence and when brought to the police station, PW 2 &PW 3 recognised him as the man who had escaped from them the other day when found with a stolen bicycle. He was charged.

The defence of the Appellant was that he had been innocently arrested and charged in connection with this case and that he knew nothing about the alleged offence.

It is clear from the testimony of both PW2 and PW 3 that after they had stopped the Appellant and his co-accused, they questioned them for about 15 minutes before he decided to escape and run away. They had plenty of time with him in which to see him and mark his appearance and features. The alibi defence raised by the Appellant does not convince me to be true. I find that the identification of the Appellant by these police officers was free from any possibility of mistake or error. His conviction was safe.

I dismiss the appeal against conviction.

As regards the sentence that was imposed, even though the Appellant had four previous convictions, he had not benefited from the theft in this particular case. The sentence imposed, in my view was in the circumstances, manifestly harsh and excessive. I allow the appeal against sentence, which I hereby set aside and substitute, with a sentence for 2 ½ years imprisonment with 1 stroke in respect of each limb of the offence to run concurrently. It is so ordered.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of February, 1995**

**S.O. OGUK**

**JUDGE**