



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: TUNOI, O’KUBASU & AGANYANYA, JJ.A.)**

**CRIMINAL APPEAL NO. 283 OF 2010**

**BETWEEN**

**EVEREST OCHIENG WERE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Kisumu (A. Aroni, J.) dated 14<sup>th</sup> June, 2010*

**in**

**H.C.CR.A. NO. 162 OF 2009)**

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**JUDGMENT OF THE COURT**

The appellant herein, **EVEREST OCHIENG WERE**, was arraigned before the Chief Magistrate’s Court at Kisumu in Criminal Case No. 55 of 2009, on 9<sup>th</sup> November, 2009 charged on two counts of burglary and stealing contrary to **sections 304(2) and 279(b)** of the Penal Code. The particulars of the offence in the first count were as follows:-

***“EVEREST OCHIENG WERE: On unknown date between the nights of 8<sup>th</sup> September, 2009 and 2<sup>nd</sup> October, 2009 at Kisumu Industrial training centre staff quarters in Kisumu city within Nyanza province, jointly with others not before court broke and entered the dwelling house of JOHN MARITIM with intent to steal therein and did steal therein one Television set make Sony, Sony DVD player, LG music system techno sat Digital receiver and a DSTV smart card all valued at K.shs.50,000/= the property of the said JOHN MARITIM.***

And the particulars of the offence in respect of the second count were as follows:-

***“EVEREST OCHIENG WERE: On the 18<sup>th</sup> day of October, 2009 at Kisumu Industrial training centre staff quarters in Kisumu city, within Nyanza province, broke and entered the dwelling house of WASILWA LUVISIA with intent to steal therein and did steal therein one Television set make Sony, a Radio cassette make Sanyo, two DVD, two bed sheets and cash Kshs.6,000/= all valued at Kshs.35,650/= the property of the said WASILWA LUVISIA.”***

When the charges were read and explained to the appellant, he readily admitted committing the offences.

The prosecutor (Chief Inspector Osiemo) narrated the facts to the learned Chief Magistrate (Mr. B. Olao) that on 8<sup>th</sup> September, 2009 the complainant in the first count locked his house and went on leave leaving various goods in his house but upon return on 2<sup>nd</sup> October, 2009 he found the house having been broken into and the various goods specified in the particulars of the first count stolen. The goods were worth 50,000/=. On 4<sup>th</sup> October the complainant was called to the Police Station where he identified his stolen music system and T.V. which formed part of the stolen goods.

As regards the second count, the complainant locked his house on 18<sup>th</sup> October, 2009 at about 9:00 p.m. and went on duty but when he returned the following morning he found his house broken into and the goods listed in the second count stolen. He reported the matter to the police. Later he was called to the police station where he identified a radio cassette which formed part of the stolen property.

Investigations led to the arrest of the appellant who had sold the recovered goods and others. He was charged and admitted the offences as already stated.

The record shows that the appellant was sentenced as follows:-

**“Sentence:**

**Count 1: 1<sup>st</sup> limb – 18 months**

**2<sup>nd</sup> limb – 18 months**

**Count 2: 1<sup>st</sup> limb – 18 months**

**2<sup>nd</sup> limb – 18 months. Consecutive.”**

Being dissatisfied by the foregoing, the appellant filed an appeal to the High Court, which appeal was dismissed and hence this appeal before us. In a short judgment delivered on 14<sup>th</sup> June, 2010, Ali-Aroni, J. dismissed the appellant’s appeal by stating inter alia:-

**“Having considered the sentence and plea by the appellant and submissions by learned State Counsel, I agree with the State that the sentence is appropriate. It is neither harsh nor excessive. I see no reason to interfere with the sentence given by learned trial magistrate. In the circumstances, I dismiss the appeal.”**

When the appeal came up for hearing before us on 15<sup>th</sup> March, 2011, the appellant appeared in person while the State was represented by Mr. P.M. Gumo, (Assistant Deputy Public Prosecutor).

The appellant simply told us that he had admitted the charges and that he had been imprisoned to **72 months**.

On his part, Mr. Gumo submitted that this Court should intervene on the issue of consecutive sentences, as the appellant is under the impression that he was sentenced to 72 months.

Our reading of the record clearly indicates that the appellant was convicted on his own plea of guilt on two counts of burglary and stealing contrary to **sections 304(2) and 279(b)** of the Penal Code. He was sentenced to eighteen months imprisonment on each limb. That means on the first count he was to serve a total of 18 months in prison. Since the offences in respect of the two counts were committed on different dates, the learned trial magistrate ordered the sentences on both counts to run consecutively. That means the appellant would serve a total of 36 months in prison. It is therefore incorrect for the appellant to think that he will serve 72 months in prison.

In the result, we direct and confirm that the appellant will serve a prison sentence of 18 months in prison on each count and as the sentences on both counts are to run consecutively the appellant will serve a prison term of 36 months from the date of his conviction and sentence i.e. **9<sup>th</sup> November, 2009**. Save for that clarification, this appeal is dismissed.

*Dated and delivered at Kisumu this 17<sup>th</sup> day of March, 2011.*

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**