

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 80 OF 2015

(Appeal from original Conviction and Sentence in Murang'a CM Criminal Case No 41 of 2014 – J Wekesa Ag SRM)

PAUL MURIITHI MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **Paul Muriithi Mwangi**, was the 2nd accused before the trial court. He was charged jointly with his co-accused (1st accused Albert Kariira Kibatia) with **shop-breaking** and **stealing** contrary to **section 306(a)** of the **Penal Code**. It was alleged that in the night of 24th and 25th November 2013 at Kangema Travelers M-Pesa Shop at Mukuyu Shopping Centre in Murang'a County, jointly with others not before court, they broke and entered the shop of one **John Thumbi Mwangi** and stole from therein three (3) Nokia 1208 M-Pesa agent phones, Safaricom airtime and cash KShs 441,688/00, all valued at KShs 471,688/00 (sic), the property of the said John Thumbi Mwangi.

2. The first thing to note is that the offence charged has two limbs – shop breaking and stealing. The shop-breaking is contrary to **section 306(a)** of the Penal Code, which is stated in the charge. However the law offended in respect to stealing is not stated. This is contrary to **section 134** of the **Criminal Procedure Code, Cap. 75** which requires that every charge or information shall contain a statement of the specific offence or offences with which the accused is charged. There cannot be that specificity unless the law creating the offence is stated. The charge was thus fatally defective.

3. The charge was never amended to quote the law under which the Appellant was charged with stealing, in this case probably **section 275** of the Penal Code.

4. The trial court also committed a big blunder. The 1st accused was charged in the alternative with handling stolen goods contrary to **section 322 (2)** of the Penal Code. He pleaded guilty to that alternative charge and was sentenced. Despite this, the trial court still went ahead and tried him together with the Appellant (2nd accused) for the main count of shop-breaking and stealing. In its judgment the trial court appears to have realized its mistake and made no finding in respect to the 1st accused. However, he had fully participated in the trial and had cross-examined all the prosecution witnesses. In his own defence he gave sworn evidence.

5. The defenses of the two accused persons were conflicting, and it cannot be said that the Appellant was not prejudiced by the joint trial with him of the 1st accused who should not have been tried for the main offence as he had already pleaded guilty to and had been sentenced for the alternative charge.

6. The trial court found the Appellant guilty as charged in the main count. In sentencing him it meted out a sentence of five (5) years imprisonment. It was not stated whether this sentence was in respect to the first or second limb of the offence. At any rate, the court should have sentenced him in both limbs of the offence.

7. For all the above reasons, the conviction of the Appellant is not safe, and that was why the Appellant's appeal was allowed in its entirety on 31/10/017, his conviction quashed and the sentence awarded against him set aside.

DATED AND SIGNED AT MURANG'A THIS 18TH DAY APRIL 2018

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 20TH DAY OF APRIL 2018