



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 127 OF 2015**

**JOHN GATHU NYINGI.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

**(An appeal arising out of the conviction and sentence of Hon. P.O. Ooko PM, delivered on 25<sup>th</sup> May 2015 in Criminal Case No. 1277 of 2013 in the Principal Magistrate's Court at Mavoko)**

**JUDGMENT**

The Appellant was convicted and sentenced to serve 2 years imprisonment for the offence of breaking into a building and committing a felony contrary to section 306(a) as read with section 306(b) of the Penal Code in Count I. The particulars of the offence were that on the night of 30<sup>th</sup> October 2013 at Travellers Building in Athi River district within Machakos County, jointly with others broke and entered the shop of Dennis Muriuki Wairimu and therein stole 13 filled gas cylinders of six kilogrammes each, all valued at Kshs. 58,500/=, the property Dennis Muriuki Wairimu.

In the alternative he was charged with handling stolen goods contrary to section 322(1) as read with 322(2) of the Penal Code, the particulars being that on the night of 30<sup>th</sup> October 2013 at Travellers Building in Athi River district within Machakos County jointly with others than in the course of stealing, using motor vehicle registration number KBJ 745V Toyota Platz metallic silver in colour, dishonestly retained thirteen filled gas cylinders of six kilogrammes each knowing or having reasons to believe them to be stolen goods or unlawfully obtained.

In count II the Appellant was charged with the offence of giving false information to a person employed in the public service contrary to section 129(a) of the Penal Code. The particulars of the offence were that on 1<sup>st</sup> November 2013 at Kenyatta National Hospital within Nairobi County, he informed No. 77506 Cpl David Kibet a public officer attached at Athi River Police station that he was involved in a road accident along Mombasa Road, information he knew and believed to be false, intending thereby to cause No. 77506 Cpl David Kibet to believe that he was not involved in the shop breaking and stealing.

The Appellant was arraigned in the trial court on 13<sup>th</sup> November 2013 when he pleaded not guilty to the charges. He was tried, convicted of the offence and sentenced to 2 years imprisonment for the main charge in Count I. Count II was found not to have been proved.

The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal are stated in his Petition of Appeal dated

2<sup>nd</sup> September 2015 that was filed in Court on 3<sup>rd</sup> September 2015. In summary the grounds are that the burden of proof was placed on the Appellant; the trial magistrate relied on hearsay evidence; there was no evidence connecting this case to the Appellant; and that the magistrate failed to note the Defence's opposition to the marking of the motor vehicle as an exhibit as it was not physically brought to court.

Kanyi Koge & Company Advocates, the Appellant's learned counsel filed written submissions dated 16<sup>th</sup> March 2016, wherein it was urged that none of the witnesses identified the accused person at the scene or saw the accused break and enter, and that it was only insinuated that he was the designated getaway driver. It was pointed out that the owner of the subject motor vehicle was not called to testify neither was medical evidence adduced from Kenyatta National Hospital showing that the Appellant was treated for any gunshot wound as alleged. Further, it was submitted that section 211 of the Criminal Procedure Code was not properly complied with as per the law, as it was not the accused who was asked to respond to the question as to the manner of defence he would like to mount.

Mogoi Lilian, the learned prosecution counsel, filed submissions dated 7<sup>th</sup> June 2016 wherein she conceded the appeal. It was argued that the prosecution did not shift the burden of proof to the Appellant, and that the Appellant had not proved that he had been involved in an accident as he alleged in his defence. It was however conceded that the evidence recorded for Mr. Kathongo was hearsay and the trial magistrate erred in relying on the same to arrive at its decision.

On the issue of whether there was sufficient evidence, it was further submitted that the Appellant was arrested while undergoing treatment at Kenyatta National Hospital after PW3 had relayed to the police that he had shot at a thief, and that there was evidence of blood on the driver's seat of the car shot, whereupon a search for patients seeking medical attention for bullet wounds was undertaken. It was conceded that the prosecution had failed to call a doctor from Kenyatta National Hospital to testify and produce medical records that would have clarified the nature of treatment the Appellant was undergoing at the hospital. The prosecution prayed that the court should order for a mistrial.

I have considered the arguments by the Appellant and Prosecution, and find that the only issue for determination is whether the conviction and sentence of the Appellant was supported by satisfactory evidence.

I believe that this question will be sufficiently answered if the evidence adduced in the trial court is set out in sufficient detail. The prosecution called four witnesses. PW1 was the complainant, Denis Muriuki Wairimu, who testified that on 30.10.2013 at 2.00 a.m. he was sleeping in his house when John Njenga (PW2) called him to inform him that his shop had been broken into, and his properties were being loaded into a vehicle registration no. KBJ 745B Toyota Platz.

He immediately rushed to the scene using a motor cycle, and upon arrival found the said motor vehicle having been impounded by police officers. He also found PW2 at the scene. He stated that the car had been loaded the 13 gas cylinders of 6 kgs each filled with gas. The cylinders were produced as evidence. He said that the vehicle was before court as evidence.

John Njenga Mbugua who was PW2 stated that on 30.10.13 at 2.00 a.m., he was guarding his bar after closing it. He decided to sleep in his vehicle registration number KAR 006H outside the said bar. Before sleeping, a vehicle registration no. KABJ 745 V arrived at the scene and a man got out and started checking the padlocks of his bar and left. He then slept and later woke up to the noise of gas cylinders being loaded in the said motor vehicle. Three people came to him and shone a torch on his face and ordered him to lie down. He managed to escape and raised alarm. The police who were nearby shot at the air and the thieves entered into the car and attempted to escape. Further, that some of the bullets had shot the car and it stalled. The police then went to the scene and commenced investigations.

Francis Kinuthia (PW3) testified on the night of 29.10.13 at 2.00 a.m. while on duty at Athi River police station, he heard a noise of someone shouting 'thieves'. On peeping outside he saw PW2 and then saw 3 people. He also overheard PW2 saying people were loading gas cylinders in a vehicle registration no. KBJ 745V. Further, that the gas was being stolen from a gas shop. During the incident he saw the three

people shine a torch on PW2 , who in turn beat them with stones.

PW3 testified that he fired twelve rounds of ammunition towards the said vehicle which deflated the right frontal tyre, and the thieves abandoned the vehicle and fled on foot. PW3 then called the OCS and they both proceeded to the scene where they found the vehicle loaded with the 13 gas cylinders. They also noted that there were some blood stains on the driver's seat.

PW4, P.C Letoye Kaparo, on his part testified that on 30.10.2013 he received a call from PW3 confirming that a burglary was committed near the place he was guarding. PW3 told him he had shot one of the burglars. He rushed to the scene and found a vehicle parked adjacent to the shop that had been broken into. The registration no. of the car was KBJ 745V Toyota platz. The tyres of the car were also deflated. He opened the car and found the 13 gas cylinders and blood stains on the driver's door. They then conducted a further search on the scene and gas shop.

PW4 testified that after sometime one of the suspects was arrested at Kenyatta National Hospital while undergoing treatment, after a search had been mounted on hospitals. He also stated that a statement recorded by the Appellant's employer, a Mr. Kathogo, confirmed that the Appellant was the person driving the said vehicle at the time of the burglary. Further, that when the accused was interrogated at the hospital he lied that he been involved in a road traffic accident, and yet the treatment contradicted this allegation as he was suffering from bullet wounds.

The trial court found that the Appellant had case to answer and he was put on his defence. The Appellant gave unsworn testimony and did not call any witness. He stated that on 30.9.2013 he had an accident on Mombasa road and was taken to Kenyatta Hospital for treatment. That he was arrested while undergoing treatment on 13.11.2013, and was arraigned in court for an offence he knew nothing about.

It is evident that the only evidence that connected the Appellant with the crime that was committed, was the alleged statement by a Mr. Kathogo that the Appellant was the driver of the vehicle recovered at the scene. This evidence is hearsay and inadmissible. In addition there was no form of identification made of the Appellant, neither was any medical evidence brought to show he had suffered bullet wounds as alleged by the prosecution. In a nutshell, there was no evidence that put the Appellant at the scene of crime. The evidence relied on to convict the Appellant therefore fell short of the required threshold of beyond reasonable doubt by a considerable margin, and it would manifestly unjust to sustain the Appellant's conviction and sentence.

I accordingly allow the Appellant's appeal and quash his conviction for the offence of breaking into a building and committing a felony contrary to section 306(a) as read with section 306(b) of the Penal Code. I also set aside the sentence imposed upon him for the said conviction and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**DATED AT MACHAKOS THIS 27<sup>TH</sup> DAY OF JULY 2016.**

**P. NYAMWEYA**

**JUDGE**