



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 25 OF 2015**

**MOSES KINYUA NJIRU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in CR. 72/2015 at Runyenjes Principal Magistrate's Court by Hon. J P Nandi - SRM on 27<sup>th</sup> March 2015)*

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence of 5 years imprisonment in respect of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code (Cap 63) Laws of Kenya, which was imposed upon him by the court of the Senior Resident Magistrate at Runyenjes on 27<sup>th</sup> March 2015.
2. The state through Ms Mbae supported both the conviction and sentence.
3. The appellant was convicted for being in possession of recently stolen goods of the complainant, Millicent Wanjuki Njagi (PW 1). PW 1 testified that she is a business lady, who sells cereals and green groceries. She testified as follows. She had closed her store on 31<sup>st</sup> January 2015 and opened it in the morning of 1<sup>st</sup> February 2015. She then sent her son to go and collect a bicycle from the store. Upon arrival, the son, Felix Mukundi Wanjuki (PW 2) found that her mother's store had been broken into and a number of items stolen. Amongst the items that stolen were 70 Kgs of green grams, 50 Kgs of beans, 13 kgs of sorghum, 20 Kgs of millet, 10 Kgs of pishori rice, 90 Kgs of Irish potatoes, 25 Kgs of tomatoes, 70 Kgs of onions, 1 kikoi, ½ Kgs of peas, all valued at Kshs 31,850/-. She reported the matter to the police station. Additionally, she alerted her business colleagues in Runyenjes town about the breaking and stealing from her store.
4. Thereafter, she was called by her fellow business colleague, Felix Muriithi (PW 3) to go and identify the green peas, which the appellant was selling to him. As a result, she went to PW 3's shop and identified her green peas and when the appellant saw her, he escaped without being paid by PW 3 in respect of what the appellant had sold to PW 3. All these items were recovered and put in evidence as exhibit 1 to 6. It is important to mention that the bicycle which was also stolen from her shop was put in evidence as exhibit No. 7.
5. The complainant was able to identify the property as hers. In respect of the kikoi (shawl), she was able to identify it by a nail and a yellow spot mark.
6. The police through No. 58292 Sgt Nelson Tausi investigated this case after receiving a report on 1<sup>st</sup>

February 2014. They traced the business premises of the appellant, wherein her further stolen goods were recovered, which she positively identified. The appellant was arrested and charged with this offence.

7. Upon put on his defence, the appellant gave sworn testimony. He testified that he is a business man in Runyenjes selling cereals and general shop items. His further evidence was that the items that the complainant claimed to be hers were actually his. He further testified that the bicycle was also his having been given to him by his grandfather. He denied breaking and stealing the items of the complainant and thereafter he closed his case.

8. Appellant has raised 7 grounds of appeal. In ground 1 he has stated the unchallengeable fact that he did not plead guilty. In ground 2, he has faulted the trial court in finding that the stolen items belonged to the complainant, because they did not have any special marks. In this regard, I find that he had gone to sell some of the stolen items of the complainant to Felix Muriithi, PW 3. When PW 3 alerted the complainant concerning the sale by the appellant, the complainant rushed there and saw him. Upon seeing her, the appellant escaped without waiting to be paid the money by PW 3. In the circumstances, I find that the identification of the stolen items taken together with the appellant's escape when he saw the complainant as conclusive evidence that the items did not belong to the appellant.

9. In ground 3 he has faulted the trial court for failing to find that the person who supplied the stolen goods was the boda boda rider who had an injured leg and had escaped. I find that the appellant was found in possession of large quantities of the stolen items of the complainant, which had been recently stolen. In the circumstances, I find that the boda boda rider was his accomplice and that does not absolve him from this theft. In other words, the appellant is a co- perpetrator or joint offender with the boda boda rider (motor cycle rider) in terms of section 21 of the Penal Code (Cap 63) Laws of Kenya. Both of them had a common intention in stealing the goods of the complainant

10. In ground 4, the appellant has faulted the trial court for failing to consider that the stolen goods were his personal properties. I have already dealt with this ground. I have already found that the complainant identified the stolen goods as her properties and in the light of the appellant's escape from the shop of PW 3 as conclusive proof that these goods were not that of the appellant.

11. In ground 5, the appellant has faulted the trial court for rejecting his plausible defence. I find that the appellant's defence was fully considered and rightly rejected by the trial court. I have re-assessed the entire evidence as I am required to do as a first appeal according to *Peters v. Sundays Post Ltd (1958) EA 424* and I find that he was properly convicted on ample evidence.

12. In ground 6, the appellant has faulted the trial court for failing to find that he was convicted on an incurable charge. I find that the charge was properly framed for it contains the statement of the offence and the particulars in support of the statement of the offence.

13. It is important to point out that it was not proper for the trial court to order for the release of the exhibits (restitution of the stolen goods) to the complainant, although restitution is authorized by **section 178 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya**. The reason is that the stolen goods may be required in the appellate proceedings as in the instant case, where the issue of identification of the goods in respect of ownership has been raised by the appellant. The appeal court may require to examine and scrutinize them to satisfy itself that they were properly identified as the property of the complainant. The trial court should have suspended the restitution order until the time for appeal had elapsed. And in a case where an appeal has been lodged, restitution should not be ordered until the appeal has been heard and determined in terms of **section 178 (4) (a) and (b) of the Criminal Procedure Code**. However, there was no prejudice caused to the appellant in the instant case as I was satisfied that the stolen goods (the exhibits) belonged to the complainant.

14. In ground 7, the appellant has complained that the sentence is harsh as he is the sole breadwinner of his family and siblings. The trial court took into account that the appellant was not remorseful. The appellant did not offer any mitigation. I also find that he had one recent and relevant previous conviction of bar breaking and stealing. In other words, he is a repeat offender. After considering all these matters I

find that the sentence of 5 years imprisonment was merited.

15. In the light of the foregoing, I hereby dismiss the appellant's appeal in its entirety.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **12<sup>th</sup>** day  
**OCTOBER 2016**

In the presence of the appellant and Ms Mbae for the Respondent

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**12.10.16**