

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 158 OF 2013

STEPHEN KIMOTHO MACHARIA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

**(Being an appeal against sentence in Kangema Senior Resident Magistrate's Court Criminal Case
No. 10 of 2011 (Hon. D. Orimba) on 10th February, 2011)**

JUDGMENT

The appellant was charged with the offence of bar breaking and stealing contrary to section 304 (1) as read with section 279(b) of the Penal Code. According to the particulars of the offence, on the night of 23rd and 24th December, 2010 at unknown time and on the night of 30th and 31st December, 2010 at unknown time at Gitui trading centre in Murang'a east district within Murang'a county, jointly with others not before court, the appellant broke and entered a building namely a bar belonging to Jacinta Wairimu and therein stole one crate of beer, thirty packets of cigarettes, twenty sodas among other items all valued at Kshs. 6,000/- the property of the said Jacinta Wairimu Mugo.

The appellant was alternatively charged with the offence of handling stolen goods contrary to section 322(2) of the Penal Code. In this alternative charge, it was alleged that on the 5th day of January, 2011 at Gitui village in Murang'a East district within Murang'a county otherwise in the course of stealing, the appellant dishonestly received or retained 18 empty bottles of beer and seven bottles of sodas knowing or having reason to believe them to be stolen goods.

The learned magistrate found the appellant guilty and convicted him of the principle count of breaking and stealing contrary to section 304(1) as read with section 279(b) of the Penal Code. He was sentenced to serve three years and five years' imprisonment respectively, both sentences running concurrently.

Being dissatisfied with the decision, the appellant appealed against both the conviction and the sentence. Amongst his grounds of appeal is that there was no corroboration of evidence amongst the prosecution witnesses and that the learned magistrate failed to consider the long held grudge between the appellant and the complainant though they were family members.

When the appeal came up for hearing on 17th October, 2013 the state conceded to the appeal on the ground that the evidence was insufficient to convict the appellant with the offence of which he was charged and convicted. According to the state counsel, the recovery of empty bottles from the appellant was not sufficient evidence to prove that the appellant had broken into the complainant's bar and stolen her beer. It was not also proof of handling stolen property.

The states concession to the appeal seems to have stemmed from the complainant's evidence that though the appellant was found in possession of some empty bottles of beer and soda, there was nothing peculiar on those items that could identify them with the complainant. In the circumstances there was no proof that that the appellant broke and entered the complainant's bar with intent to commit a felony as contemplated under section 304(1) of the Penal Code.

Without any evidence of the appellant breaking into the complainant's bar and stealing from there the items itemised in the charge sheet, there was no basis for his conviction. I agree with the state counsel that

it was not proved beyond reasonable doubt that the bottles with which the appellant was found in possession of were stolen from the complainant's bar. The items were found almost two weeks after the complainant's bar is alleged to have been broken into. In the midst of this doubt it was unsafe to convict. Accordingly I allow the appellant's appeal and the appellant is forthwith set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 17th day of February, 2014

Ngaah Jairus

JUDGE