



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL NO. 85 OF 2012**

PAUL WAMITI MBAO ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE SENIOR RESIDENT MAGISTRATE'S  
COURT AT BARICHO BY J.N. MWANIKI – CRIMINAL CASE NO. 504 OF 2010 ON 20<sup>TH</sup>  
SEPTEMBER 2011)**

**JUDGMENT**

I heard this appeal pursuant to the directions of the Honourable Chief Justice vide Gazette notice No. 13601 dated 4<sup>th</sup> October 2013.

The appellant was convicted for the offence of preparation to commit a felony contrary to Section 308 (2) of the Penal Code the particulars being that on 12<sup>th</sup> June 2010 at Kagio Trading Centre in Kirinyaga West District being not at his place of abode had with him articles for use in the course of or in connection with theft namely a bolt cutter, a pair of pliers, one adjustable spanner and twelve master keys. Following his conviction on 20<sup>th</sup> September 2011, he was sentenced to serve five (5) years imprisonment hence this appeal.

I have considered the appellant's grounds of appeal and the oral submissions by both the appellant and Ms Kabanga on behalf of the state.

This being a first appeal, this Court is mandated to look at the evidence adduced before the trial magistrate afresh, re-evaluate and re-examine the same and reach its own independent conclusion whether or not to up-hold the conviction of the appellant.

In doing so, this Court must put in mind the fact that it did not have the benefit of seeing the witnesses and therefore the findings of the trial Court with respect to the demeanor of witnesses must be respected – **OKENO VS REPUBLIC 1972 E.A 32, NJOROGE VS REPUBLIC 1987 K.L.R 19 and PANDYA VS REPUBLIC 1957 E.A 336.**

I have re-examined the evidence that was brought against the accused and his defence thereon in light of the grounds of appeal. The appeal is opposed. The veracity of the evidence against the appellant as given by P.C ITHIRI (PW1), I.P. NYAKWANYA (PW2) MR. AMBUTO (PW3) and MR. BONDEIT (PW4) was that on the night of 13<sup>th</sup> June 2010 at about 3.30 a.m. the appellant was arrested behind some parked car at Kagio town. He had a bag in which the officers found a bolt cutter, spanner, pair of pliers and twelve master keys. He is not a resident of that area and could not give an

explanation. In his defence, he said he had just arrived from Nairobi and booked himself in a lodging where he was arrested. He denied that he had the items listed above. The witnesses were strangers to him and had no reason to give false evidence against him. The trial magistrate believed them as hearing was entitled to.

The items which the appellant was found with are no doubt such items that are adopted to commit a felony. Further, the fact of his arrest at 3.30 a.m. behind parked vehicles in an area that is not his abode can only show that he was there to commit a felony. He admitted in his defence that he is not a resident of Kagio. With regard to the Ksh. 19,000/= that he withdrew, the trial magistrate believed that the money was to compensate the police officer whose phone was damaged during appellant's arrest. It is un-likely that the officers took the money in return for his release yet they did not release him. And with regard to the fact that the date on the charge sheet mentions the date of the offence as 12<sup>th</sup> June 2010, yet the evidence refers to 13<sup>th</sup> June 2010, the fact is that the offence was committed at night. It was clearly the night of 12<sup>th</sup> – 13<sup>th</sup> June 2010 and that alone did not prejudice the appellant during his trial nor has it caused him any injustice as he was aware all along about the charge facing him and when it was committed – see **Section 382 Criminal Procedure Code**. His defence was considered, found lacking in merit and was rejected. Upon my evaluation of the evidence in its totality, I am satisfied that the appellant's conviction was well founded and I affirm it.

On sentence, the appellant was sentenced to five (5) years imprisonment. The record shows that he was a first offender. In passing sentence, the magistrate observed as follows:-

**“ I do take into account that sentence by law imposed under Section 308 (2) of the Penal Code. The accused person is sentenced to serve five (5) years imprisonment”**

It would seem that the magistrate was under the mistaken belief that the sentence of five years provided for under **Section 308 (4) of the Penal Code** is the minimum sentence. In fact the use of the words “----- liable to imprisonment with hard labour for five years -----“ means that that is the maximum sentence – see **OPOYA VS REPUBLIC 1967 E.A 752**. In imposing a maximum sentence on a first offender, the magistrate was harsh. The appellant has served two (2) years to-date. That in my view is sufficient punishment. I accordingly dismiss the appeal on conviction but reduce the prison sentence to the period already served. The appellant to be released forthwith unless otherwise lawfully held.

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> OCTOBER, 2013**

Judgment dated and delivered this 14<sup>th</sup> day of October 2013 in open Court.

Ms Kabanga State counsel present

Appellant present

Muriithi Court clerk present