



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO. 67 OF 2013**  
**DENNIS MUSYA .....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 94 OF 2012*

*IN THE PRINCIPAL MAGISTRATE'S COURT AT KYUSO - B. M. MARARO (PM) ON 2<sup>ND</sup> MAY, 2013)*

**JUDGMENT**

The Appellant, Dennis Musya was the 3<sup>rd</sup> Accused in Kyuso Principal Magistrate's Court Criminal Case No. 94 of 2012. Daniel Mathembe was the 1<sup>st</sup> Accused and Mutya Meru was the 2<sup>nd</sup> Accused. They were charged with breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code; the particulars of the offence being that on the night of 6<sup>th</sup> and 7<sup>th</sup> June, 2012 at Kimu Trading Centre in Kyuso District within Kitui County they jointly broke into a building namely the shop of Jane Mumbwe and committed therein the felony of theft by stealing cash kshs.7,300/= and assorted shop goods all valued at Kshs.9,000/= the property of the said Jane Mumbwe.

The 1<sup>st</sup> and 2<sup>nd</sup> accused persons were each faced with an alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code.

When the matter was placed before the magistrate for plea the 1<sup>st</sup> Accused pleaded guilty and was convicted and sentenced accordingly. In the course of the trial the complainant applied and was allowed to withdraw the complaint against the 2<sup>nd</sup> Accused. The case against the Appellant proceeded to full trial after which he was found guilty and sentenced to serve four years imprisonment.

He now appeals against both conviction and sentence.

In summary, the Appellant attacks the decision of the magistrate on the ground that his conviction was not supported by the evidence adduced by the prosecution witnesses.

When the appeal came up for hearing on 17<sup>th</sup> October, 2013 Mr. Mulama for the state conceded the appeal on the ground that there was indeed no evidence connecting the Appellant with the offence.

I have reviewed the evidence adduced before the trial Court and note that the complainant (Mumbwe Mwendwa) who testified as PW1 told the Court that she did not witness the break-in and the Appellant was arrested because he had been named by the 1<sup>st</sup> Accused.

PW2 James Mutua told the Court that he was present when the complainant's stolen items were recovered from the house of the 1<sup>st</sup> Accused who then informed them that he had committed the crime with the 2<sup>nd</sup> Accused and the Appellant. On cross-examination by the Appellant he stated that nothing stolen from the complainant was recovered from the Appellant at the time of his arrest.

PW3 Peter Musili and PW4 John Mutemi Muthengi gave evidence similar to that of PW2.

PW5 Police Constable Kennedy Kimathi who arrested the Appellant informed the Court that nothing was recovered from the Appellant at the time of his arrest.

The Appellant called the 1<sup>st</sup> Accused as his witness. The 1<sup>st</sup> Accused told the Court that he committed the crime alone.

Looking at the said evidence, I agree with the counsel for the state that there was indeed no evidence to connect the Appellant with the offence with which he was charged. The learned magistrate in his judgment indicated that in pleading guilty the 1<sup>st</sup> Accused had stated that he had committed the offence with the 2<sup>nd</sup> Accused and the Appellant. The learned trial magistrate ought to have considered the fact that at that time the 1<sup>st</sup> Accused was not under oath. In any case whatever the 1<sup>st</sup> Accused told the Court ought to have been treated with caution since his was the evidence of an accomplice.

In short, the conviction of the Appellant was not based on any evidence and was thus erroneous. The appeal therefore succeeds and I set aside the conviction and sentence. The Appellant is therefore set free unless otherwise lawfully held.

Orders are issued accordingly.

Prepared, Dated and signed this 27<sup>th</sup> November 2013

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

Dated and delivered on 2nd day of December, 2013

**S.N.MUTUKU**

**JUDGE OF THE HIGH COURT**