



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 163 OF 2009**

***(From Original Conviction and Sentence in Criminal Case No. 1438 of 2008 of the Principal Magistrate's Court at Kwale: A.M. Obura (Mrs.) – R.M.)***

**MOI THOMAS NGUYI ..... APPELLANT**  
**VERSUS**  
**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant **MOI THOMAS NGUYI** has filed this appeal against his conviction and sentence by the learned Resident Magistrate sitting at Kwale Law Courts. The Appellant had been arraigned before the lower court on 29<sup>th</sup> February 2008 on two counts of charge of **HOUSEBREAKING AND STEALING CONTRARY TO SECTION 304(1) AS READ WITH SECTION 279(b) OF THE PENAL CODE**. In addition the Appellant faced two alternative counts of **HANDLING STOLEN PROPERTY CONTRARY TO SECTION 322(2) OF THE PENAL CODE**. The Appellant entered a plea of **'not guilty'** to both charges and his trial commenced on 16<sup>th</sup> April 2009. The prosecution led by **INSPECTOR SIBUDA** called a total of two (2) witnesses in support of their case. **PW1 DAMA MUMBA** told the court that on the material day at about noon she securely locked her house and left for the market. Upon her return she found her door open as well as the door of her neighbour **MBEYU PW2**. **PW1** checked her own house and found a bag containing shawls (lessos) was missing. She then went to check the room of **PW2**. Inside she found the accused holding a bag and 2 mats. **PW1** called out for help. Members of public responded and one Salim managed to chase and catch the Appellant. He was then taken to Kinango Police Station. **PW2** was called to the police station where she identified her 2 mats, 2 lessos and bag. Appellant was then charged.

The Appellant was found to have a case to answer at the close of the prosecution case and was placed on his defence. He gave a sworn defence in which he denied the charges. On 8<sup>th</sup> September 2009 the learned trial magistrate delivered her judgement in which she convicted the Appellant on both counts of Housebreaking and Stealing, and thereafter sentenced him to serve a total of 6 years on the first limb and 4 years on the second limb. It was ordered that the sentences run consecutively. Being aggrieved with both his conviction and sentence the Appellant filed this present appeal.

The Appellant who appeared in person at the hearing of his appeal relied entirely upon his written submissions which had been duly filed with the leave of the court. **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State made oral submissions in which he opposed the appeal and urged the court to uphold both the conviction and sentence rendered by the lower court. I have myself carefully considered the evidence adduced in the lower court and find the same to be wanting in the

following respects. **PW1** told the court that when she raised the alarm members of public responded and came out to help chase the Appellant. **PW1** told the court that one '**SALIM**' caught the Appellant. This '**SALIM**' was a crucial witness since it was he who apprehended the Appellant and was therefore best placed to confirm what if any items were found on the Appellant. Strangely this '**Salim**' was not called as a prosecution witness. In my view this is an omission which severely weakens the prosecution case. No reason or explanation is given by the prosecution for their failure to call this key witness to testify. Likewise the prosecution failed to call either the arresting officer or investigating officer to testify. **PW1** told the court that the Appellant after being arrested by members of public was taken to Kinango Police Station. No officer from Kinango has been called to confirm having re-arrested the appellant at the police station. Once again such evidence would have been crucial to confirm what if any exhibits were taken with the Appellant to the police station. These are police officers who ought to have been readily available to testify in court. The failure to call them amounts to pure laxity on the part of the prosecution. Failure of these two key witnesses to testify in my view places doubt on the prosecution case. The benefit of this doubt must be settled in favour of the Appellant. The prosecution is required to adduce **all** relevant testimony. They failed to do so in this case. To merely call the two complainants and close their case amounts to shoddy work on the part of the prosecution. The evidence adduced did not meet the required legal standard of proof. In my view the convictions were unsafe and I do hereby quash the same. The subsequent sentences also have no basis and are also set aside. The appeal succeeds. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 11<sup>th</sup> day of April 2011.**

**M. ODERO**  
**JUDGE**

In the presence of:  
Mr. Onserio for State  
Appellant in person