



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 27 OF 2010**

*(From the Original Conviction and Sentence in Criminal Case No.232 of 2009 of the Chief Magistrate Court at Kibera)*

**MIKE MZEE MIGESA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

The appellant was charged with three offences. In count one he was charged with the offence of store breaking contrary to section 306 (a) and stealing contrary to section 279 (b) of the Penal Code. In count two he was charged with the offence of preparing to commit a felony contrary to section 308 (2) of the Penal Code. And lastly in count three he was charged with an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code.

After a full trial he was convicted of counts one and two and sentenced to three years jail on each limb of the first count and two years for the offence of preparation to commit a felony. The sentences were ordered to run consecutively.

Being dissatisfied with the said conviction and sentence he lodged this appeal. He complained that the two charges were not proved beyond reasonable doubt and that no exhibits were recovered in his possession. He also alleged that the court was wrong in addressing the circumstantial evidence against him and that he advanced an alibi defence which was not given any consideration. Finally he submitted that the sentence of 5 years was excessive. The state opposes this appeal. As required of me I have evaluated the evidence with a view to arriving at an independent conclusion.

The evidence was brief and to the point. PW1 received a call from his watchman that the store had been broken into and several items stolen. The matter was reported to Hardy Police Station. A week later the appellant attempted to break into the house of PW1 but was ambushed and arrested. He was caught in the act trying to break into the container belonging to PW1. He was in possession of a clipper which was identified as one stolen a week earlier.

This matter was reported to PW 4. The appellant was found at the compound of PW1 armed with a clipper and bolt cutter which were identified and confirmed as items earlier stolen and which had been recorded in the O.B. at the police station. Against that evidence the defence of the appellant was that he was from home at 5 a.m. going to a construction site and when he got to Hardy he was stopped by people and asked where the things he had were. He was beaten and dragged into a compound. This did not amount to any defence at all and considering the evidence adduced by the prosecution witnesses I am

persuaded that the same was consistent and credible. The conviction was therefore well founded.

Section 306 of the Penal Code provides the sentence of 7 years imprisonment while section 279 (2) of the Penal Code provides for 14 years imprisonment. On the other hand Section 308 (2) provides for 5 years imprisonment. With respect, the sentences imposed by the learned trial magistrate were not excessive at all. I have no reason to interfere with the same. Accordingly this appeal is hereby dismissed.

Orders accordingly.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of December 2011.**

**A. MBOGHOLI MSAGHA  
JUDGE**