



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

**Criminal Appeal 103 of 2008**

**GIBSON MULWA NYAMU .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the sentence and conviction in Kangundo Principal Magistrate's Court  
Criminal Case No. 629/2007 by Hon G.L.Nzioka- PM . on 23.11.2007)***

**JUDGMENT**

1. Gibson Mulwa Nyamu was charged with the offence of breaking into a building with intent to commit a felony contrary to section 306 (a) of the Penal Code. It was alleged that on 11.9.2007 at Nguluni Market in Matungulu Division of Kangundo District within the Eastern Province, he broke into a shop belonging to Catherine Nyange Philip with intent to steal therefrom. He denied the charge.
2. PW1, Catherine Nyange Philip, in her evidence said that she received information on 11.9.2007 that her salon had been broken into and a suspect apprehended. She went there and found that one of the two padlocks securing the salon door had been removed but nothing had been stolen. At Tala Police Post, she found the Appellant and she was shown the missing padlock, a sack and three keys.
3. PW2, Andrew Kipsanai Kipkemboi stated that on the night of 11.9.2007 at about 2.15 a.m his phone alarm went off and when he woke up he heard noises from a shop in front of his rented house. He informed one Maurice Mwendwa and another, Mutunga, about the disturbance and

when they approached the shop, they found a man attempting to open it. When the man saw them, he tried to run but on being threatened with stoning, he stopped and then he was forcefully marched to Tala Police Post. On being searched, a torch, sack, keys and money were recovered from him.

4. PW3, Maurice Waita Mwendwa was one of those who with PW2 apprehended the Appellant.
5. PW4, Cpl Samuel Mutiso received the initial report at 2.30am while at Chief's Camp, Ngulunu, and he also re-arrested the Appellant and upon searching him recovered all the items listed above and then took the suspect to Tala Police Post.
6. PW5, PC Paul Kurui took custody of the Appellant at Tala Police Post, took possession of all the items recovered, visited the scene, tried the keys on the two padlocks and found that one key could open one padlock (*a fact he demonstrated in open court*). He produced all the items recovered as exhibits and charged the Appellant with the offence and the Appellant in his defence denied the offence and stated that he was apprehended by three men at Nguluni Market on his way to sleep and they took his wallet with Kshs. 750/= and then marched him to the Chief's Office and the charges he faced were later preferred.
7. The learned trial magistrate found the accused guilty of the offence and sentenced him to serve five (5) years imprisonment.
8. The Appeal is against both conviction and sentence and having considered the evidence on record alongside the preferred grounds of appeal, the evidence of PW2 and PW3 as well as the evidence in defence, places the accused at Nguluni market on the material night. The question is, whether indeed he was found while breaking into a building with intent to steal therefrom. He was clearly found red-handed having unlocked the first padlock and struggling to open the second. Does that amount to breaking into a building?
9. In Black's Law Dictionary, Eighth, Edition, "**breaking a house**" is defined as "**to violently and feloniously remove or remove any part of a house or its locks**" and "**breaking**" as the "**act of entering a building without permission**" while "**break**" is defined as "**to open ( a door, gate etc) and step through illegally**".
10. These definitions fit the Appellant's case and his actions amounted to breaking, the moment he

managed to illegally open the first padlock with a master key which PW5 showed could open the padlock. PW1 had the original keys and the Appellant had no lawful reason to be where he was found.

10. As to the intent to commit a felony, the Appellant by having master keys and a sack around his waist and having been found unlawfully trying to open the salon door had no other intent other than to commit a felony therein.

11. All the elements of the charge were proved beyond reasonable doubt and the conviction was safe.

12. As to sentence, the Appellant had four previous convictions and three were related to the present one Although HIV positive and elderly, he is safer in prison than elsewhere and so I will not interfere with the sentence imposed.

13. In the end, his Appeal has no merit and is dismissed.

14. Orders accordingly.

Dated this.....day of ..... **2010.**

**ISAAC LENAOLA**

**JUDGE**

Countersigned and delivered at **Machakos** this 5<sup>th</sup> day of March **2010.**

**H.P.G. WAWERU**

**JUDGE**