

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 254 of 2007

SAMUEL MWEREGI WANJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of **burglary** contrary to **section 304(2) and stealing contrary to section 279(b)** of the Penal Code. The particulars of the offence state that on the 4th day of July 2007 at around 4.20 a. m. at Kikopey Trading Centre Gilgil in Naivasha District within the Rift Valley Province broke and entered the hotel of Peter Maina with intent to steal and did steal from therein one radio make Mario valued at Kshs 1,500/=, 3 packets of unga valued at Kshs 285/=, 2 kgs of cooking fat valued at Kshs 160/=, 2 kgs of sugar valued at 180/= and one bag of charcoal valued at Kshs 400/= all valued at 5,625/= the property of Peter Maina Githinji. The appellant pleaded guilty to the charge. On conviction he was sentenced to four years imprisonment for the first and second parts of the charge. The appellant has appealed against the sentence.

During the hearing of this appeal the State conceded to this appeal. The learned State Counsel submitted that when the appellant changed the plea on 2nd November 2007 the language used by the court to explain the charge to the appellant was not indicated. The court also failed to ask the prosecution to restate the facts and indeed the court did not record the facts, thus the plea of guilt was not unequivocal.

I have gone through the record of proceedings before the learned trial magistrate. The appellant changed his plea on 2nd November 2007 before N. N. Njagi. The language used by the court to explain the charge is not indicated. Since the appellant pleaded guilty to the charge, it is not clear whether he understood the ingredients of the charge that he faced because the court did not record the facts of the matter nor did the court ask the appellant to confirm whether the facts were correct.

The Court of Appeal has held in numerous decisions especially the case of **Swahibu Simbauni Simiyu & Anor. vs. Republic CA Criminal Appeal No. 243 of 2005 (Kisumu)** that the fundamental principles contained in the Constitution of Kenya Section 77(2) and Section 198(1) of the Criminal Procedure Code must be adhered to all the time when a charge is read to an accused person. Moreover in the celebrated case of **Adan vs. Republic [1973] E. A .445** the Court of Appeal had the following to say:

“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) If the accused does not agree the facts or raises any question of his guilt his reply must be

recorded and change of plea entered;

(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

In view of this anomaly, the conviction and sentence imposed by the trial court is hereby set aside. Unless the appellant is otherwise lawfully held he is to be set at liberty.

Judgment read and signed on 29th day of January 2009

M. KOOME

JUDGE