REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL 47 OF 2000

(Appeal against both conviction and sentence of the Resident Magistrate's court at Kericho, [R. NGETICH ESQ., RM] delivered on 28th June, 2000 in Criminal Case No. 1172 of 2000)

JUMA ALI ABDALLAH …….. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

JUDGMENT

I: Criminal Appeal - background

1. Two accused were originally charged with the offence of Kiosk breaking and stealing contrary to **Section 306(a)** of the penal code namely:-

"***Any person who-***

"***a) breaks and enters a school house, shop warehouse, store office, counting – house, garage pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licenced for the sale of intoxicating logos or a building which is adjacent to a dwelling house and occupied with it but is not part of it or any building used as a place of workshop, and commits a felony therein, or***

b) breaks out of the same having committed any felony therein.

is guilty of a felony and is liable to imprisonment for seven years"

2. The particulars of the charge against the two accused being that

" ***On 18th April, 2000 at Kericho Township in Kericho district with the Rift Valley Province jointly broke and entered a Kiosk of David Mutai and stole beans and a sufuria all valued at Kshs. 2,999/=***"

3. No argument was raised by either the two accused, the trial magistrate or the state as to whether a kiosk constitute a building as entered in **Section 306 (a)** of the penal code.

4. When the charge was read to both accused a plea of not guilty was entered.

II: <u>Trial</u>

5. It was the complainant evidence that the two accused came to his house which was 200 meters away and were totally drunk. They threatened and quarreled him then proceeded to his kiosk where they proceeded to break into the kiosk through the window and steal beans, chapati (a bread) and a sufuria (a pot) container.

6. They left.

7. In the morning the workers found the beans, chapati (a bread) a sufuria (a pot) container had been taken and missing. The window was open.

8. A report was made at the police station. The accused were arrested at 9.00a.m.

9. PW2 a neigbour heard of the quarrel and went out to investigate. He found accused No. 1 and 2 arguing with the complainant stating that they would break into the kiosk at night.

10. The following day they saw the window broken. PW2 stated "*we suspected accused persons because of what they said*".

PW1 stated that "*I did not see you break the hotel*" - when accused No. 2 asked him questions.

11. As to accused No. 1 he stated he met him after the incident.

12. The two accused were beaten by members of the public. PW4 a police officer took them to the police station after arresting them.

13. PW5 the investigating officer visited the scene. The two were suspected as those who may have robbed and broken into the kiosk. That the complainant identified them nothing was recovered.

14. The 1st accused said he was drunk the 2nd accused doesn't have a place of abode.

15. In his defence – the defendant/accused No. 1 stated he never committed the offence. The defendant/accused No. 2 stated that he was arrested taken to the police and charged.

16. Both were sentenced to five years imprisonment and two strokes of the cane.

III: <u>Appeal</u>

17. On appeal, the accused No. 2 failed to file appeal. The accused No. 1 filed an appeal.

18. The petition of appeal was that the trial magistrate failed to accept his unsworn statement and to summon his witnesses. The sentence imposed was harsh. He wished for the proceedings to prepare his appeal well.

IV: <u>Delays</u>

19. The appeal was filed on 11th July, 2000 and sentence passed on 28th June, 2000. Admission of the appeal was on 24th July, 2000. The appellants appeal was not heard. Hearing dates were taken for 30th June, 2003. Hon. Judge was not sitting.

20. The appeal was heard nine years later. By now both appellant had completed serving their sentence of five years imprisonment and two strokes of the cane.

V: Opinion

21. The food kiosk belonging to the accused had been broken into through a window and items removed valued at Kshs. 2,999/=. This fact was established by the prosecution. None of the witnesses saw the two accused break into the kiosk and steal. It is further noted that the two had caused a commotion outside the PW1's house armed with a panga. (cutlass).

22. The two accused were arrested elsewhere and were beaten. They were identified by the complainant.

23. A criminal case must be proved beyond any reasonable doubt. There must be a chain of event. In this case, an identification parade should have been conducted. Finger prints at the scene of the window should have been taken to prove that the two accused were the ones who robbed and broke into the kiosk.

24. Allegations of treats by the complainant against the accused should have been investigated by the trial magistrate and or an inquiry file be opened to confirm that allegations prior trial.

25. The prosecution supports the conviction. This court does not and would accordingly quash the conviction against the appellant 1 and accused No. 2. Proof that the building is part of a dwelling house requires to be given.

26. As to the sentence the offence had caned seven years imprisonment. There is no "*strokes*" of the cane in the offence under penal code.

27. The sentence is set aside accused set at liberty unless unlawfully otherwise held.

DATED this 14th day of July, 2009 at **KERICHO**

M.A.ANG'AWA

JUDGE

Advocates

P. Kiprop state counsel instructed by the Attorney General for the Respondent – present

No appearance for the appellant.