



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

Criminal Appeal 82, 146, 157, 179, 178, 180 & 181 of 2006

JOHN MUTUA KIMONYE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being appeal against the conviction and sentence by G.P. NGARE Resident Magistrate, in the Resident Magistrate's Court Criminal Case No. 1114 of 2005 at Kangema)

AND

CRIMINAL APPEAL 146 OF 2006

JOHN KINYUA KAMAU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being appeal against the conviction and sentence by G.P. NGARE Resident Magistrate, in the Resident Magistrate's Court Criminal Case No. 1114 of 2005 at Kangema)

AND

CRIMINAL APPEAL 157 OF 2006

PAUL KABUE NDIRANGU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being appeal against the conviction and sentence by G.P. NGARE Resident Magistrate, in the Resident Magistrate's Court Criminal Case No. 1114 of 2005 at Kangema)

AND

CRIMINAL APPEAL 179 OF 2006

SAMUEL KAMAU KAMONYE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being appeal against the conviction and sentence by G.P. NGARE Resident Magistrate, in the Resident Magistrate's Court Criminal Case No. 1114 of 2005 at Kangema)

AND

CRIMINAL APPEAL 178 OF 2006

JAMES MAINA WACHIRA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being appeal against the conviction and sentence by G.P. NGARE Resident Magistrate, in the Resident Magistrate's Court Criminal Case No. 1114 of 2005 at Kangema)

AND

CRIMINAL APPEAL 180 OF 2006

CHARLES MAINA WANDERI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being appeal against the conviction and sentence by G.P. NGARE Resident Magistrate, in the Resident Magistrate's Court Criminal Case No. 1114 of 2005 at Kangema)

AND

CRIMINAL APPEAL 181 OF 2006

STEPHEN MWANGI KAMONYE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being appeal against the conviction and sentence by G.P. NGARE Resident Magistrate, in the Resident Magistrate's Court Criminal Case No. 1114 of 2005 at Kangema)

JUDGEMENT

The seven appellants were jointly charged with shop breaking contrary to Section 306 of the Penal Code. They were all convicted and were sentenced to six years imprisonment each. They were dissatisfied with conviction and sentence and have therefore filed the present appeals. At the hearing of the appeals the court ordered that all the above appeals be consolidated with the lead file being Criminal Appeal No. 82 of 2006. As the first Appellant court, I am expected to submit the whole evidence of the Lower Court to a fresh and exhaustive examination. In so doing I must weigh the conflicting evidence and draw my own conclusion. In so doing I should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. *See the case of Okeno vs R [1972] EA 32.*

Prosecution evidence was started by PW 1 who said that she locked up her shop on the 1st December 2005 and left for Nairobi to buy stock. On the following day whilst she was in Nairobi she was telephoned and informed that her shop had been broken into and goods had been stolen. Recovery was subsequently made of those goods and she was able to identify them. Those goods were marked as MFI 1 – 27 when she identified them.

PW 2 was the daughter of PW 1. She stated that the shop was broken into on 2nd December 2005. On the 3rd December 2005 when she found her mother's shop open she telephoned her mother and informed her of the same. She found that goods had been stolen therein and the door grills had been broken. She noted that the TV and DVD and other merchandise were missing.

PW 3 was the Assistant Chief of Gikoe sub location. He said that he was informed about the breaking in of the shop of PW 2. He went to the shop and was able to confirm the same. Thereafter he said that he gave the police a list of four suspects. He named the four suspects as 7th Appellant 1st appellant, 2nd appellant and 4th appellant. Whilst in the company of police officers they raided the home of Kimonye between 3a.m and 4 a.m. In his evidence he stated, "*and we ordered people in a house there to open and we arrested the accused.*" He said that he conducted a search of the house where they were able to recover flour, radio, speakers, kikuyu traditional basket (ciondo), pair of large scissors, ten master keys and other goods. On their way after arresting the accused they went into the 6th appellant's house where they recovered TV set 21" colour, and three tins of 4kg yellow cooking fat. They also went into the 2nd appellant's house but did not make any recovery there.

PW 4 was a Police Officer. He confirmed that at a meeting with the Assistant Chief the names of certain suspects were raised. He confirmed that recoveries were made at the home of Kimonye where they also recovered high density scissors and master keys. At the home of 6th appellant they recovered a TV and MFI 6 namely a baby blanket. At the home of Kimonye he said that there were many rooms. In that home he was also able to recover some money in small denominations. In total Kshs.920/-. This he confirmed was part of the money stolen from the complainant.

All the appellants were found to have a case to answer. 1st appellant in his defence said that he was a seller of shoes at Gikomba market. On the 3rd December 2005 he was informed that his mother was ailing at home. He telephoned his brother the 7th appellant and they both agreed to travel together. On the same day when they arrived at their home they were informed that their mother had travelled to Nairobi when her illness became severe. He said that at 4a.m. people came and hit the door of their house and arrested him and his two other brothers one of them being the 7th appellant. He said that nothing was recovered at their home.

Appellant No. 7 in his defence said that he resides at Thika. He said that he was called by the 1st appellant and was told that their mother was unwell. They agreed to travel together to check on their mother. On arrival to their home they were told that their mother on getting worse had travelled to Nairobi. At a 4a.m. they heard the door being hit and people entered into the house. They were arrested with appellant No. 1 together with another brother. That other brother was later released. He and the appellant No. 1 were charged with the present offence. On being cross examined he stated that the other appellants were not arrested in their home. He said that they were not their friends.

2nd appellant said that he works in the farm. On the 3rd December 2005 as he was sleeping at 3a.m. he heard people asking him to open the door. On opening police officers entered in the company of the Assistant Chief. On entering into his house he said nothing was recovered but he was charged with the present offence. He called his mother as a witness but in the evidence that she tendered the same did not relate to the charge he faced.

3rd appellant said that he resides in Nairobi. He said that he was a milk vendor. That he had travelled with a vehicle to get to his customers. When he alighted some people came to him identified themselves as police officers and although he explained to them where he was coming from and even showed them a receipt of the place where he had lodged over night he was arrested and as he was arrested the police took his money Kshs1200/-. On the following day at noon he was put together in the same room with other people whom he did not know and were charged with the present offence.

4th appellant is a brother to appellant No. 1 and 7. He described himself as farmer. On the 3rd December 2005 the 1st and 7th appellant came to their home to check on their mother. They were

informed that the mother had travelled to Nairobi. They slept that night and at 4a.m. people entered their home and arrested him together with his brothers. He said that he did not know his co-accused.

5th appellant denied the charge. He said that he was arrested at the bus stage where he had gone to visit his brother.

6th appellant said that he is a resident of Huruma. That he had attended a get-together at Gacharageini. Later he went home to sleep. At 5a.m. he heard a knock at the door. On opening he saw the Assistant Chief and police officers. They arrested him. His mother whom he called as a witness confirmed his line of evidence. She confirmed that they were at their in laws and later she told this appellant to go to sleep. She later learned that he was arrested.

The prosecution evidence was that on a report being made that a theft had taken place of PW 1's shop the Assistant Chief noted down names of the likely suspects. On 3rd December 2005 from 3a.m. to 4a.m. they arrested all the appellants from the home of Kimonye. It should be noted that there are three appellants who are brothers and who share the name of Kimonye. We are not told in the prosecution's evidence whether the home of Kimonye was their parents' home or whether it was the home of one of the Kimonyes. That as it may be the time of the raid was between 3a.m. and 4a.m. The prosecution did not explain whether all the seven appellants were sleeping or were awake at that hour. All the Assistant Chief said was that they arrested the accused there. In my view there was need to state by name the appellants that were arrested at that home. It was not enough to say that the appellants were arrested there. This becomes important because even in the prosecution's evidence it was apparent that the appellants particularly appellant No. 2 and 6 lived very close to the house of Kimonye. Then one wonders whether they would have been sleeping in Kimonye's house when their own homes were close by. If indeed the appellants were asleep when the raid took place it was necessary for the prosecution to say where the goods were recovered. Were they recovered in one room? And if so were the appellants found in that one room? The other problem that arises with the prosecution's evidence is that the list given did not tally with the goods identified by PW 1, the complainant. The list of recovered goods given by the complainant did not tally with the list of recovered goods given by the Assistant Chief and the police. The complainant's list is much longer. There are some items that were recovered from Kimonye's home which can be found in almost every home in this country. For example, flour and cooking fat. The other items which were recovered were radio and TV. PW 3 did not indicate the make of these items. PW 3 also said that he recovered speakers which were not indicated by the complainant as items that were stolen. The misgivings one gets from reconsidering the Lower Court evidence of the prosecution leads one to doubt whether all the appellants were arrested at the same time. The prosecution's case is dented by the defence of the appellant where they each gave evidence stating that they were at different residence when they were arrested. That was the case in all of them except the Kimonye brothers appellant 1, 4 and 7. In the whole in reconsidering the prosecution's evidence, I find that I entertain doubt whether the appellants were arrested in the same home and whether the goods recovered were so recovered where the appellants were. The evidence of PW 3 and 4 was not believable. Having that in mind and the doubt I entertain, I do find that the appellants appeal against conviction and sentence must and does succeed. The conviction against all appellant is quashed and their sentence is set aside. I accordingly order that all appellants be set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 20th February 2008.

MARY KASANGO

JUDGE