



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 612 of 2006**

**JOHN WANJOHI GICHIRI..... APPELLANT**

**V E R S U S**

**REPUBLIC..... RESPONDENT**

**J U D G M E N T**

JOHN WANJOHI GICHIRI, the appellant, was charged in the subordinate court with house breaking contrary to Section 304 (1) and stealing contrary to Section 279 of the Penal Code. The particulars of the offence were that on 31<sup>st</sup> March, 2006 at Mikono Area within Garissa District of North Eastern Province, broke and entered the dwelling house of ALI ADEN with intent to steal therein and did steal therein assorted clothes and kitchen utensils the property of the said ALI ADEN all valued at Kshs.400/=. After a full trial, he was convicted and sentenced to serve 4 years imprisonment in respect of the limb of housebreaking, and to serve 6 years imprisonment with respect to the limb of stealing. He has now appealed to this court both against the conviction and the sentence.

At the hearing of the appeal, the appellant submitted that he was arrested in his home without any reason. He submitted that he was not found with anything.

The learned State Counsel, Mr. Makura, opposed the appeal and supported both the conviction and sentence. Counsel submitted that there was direct evidence from P.W.2, who saw the appellant break into a house and steal items therefrom. P.W.1 came and found his house broken into and items stolen. The incident occurred in broad daylight at 11 am. The appellant was arrested on the same day by P.W.3. The appellant chose to say nothing in his defence. Counsel contended that the prosecution evidence was cogent and was not shaken.

I have perused the record and the judgment herein before the subordinate court. Indeed, when the appellant was put on his defence, he said that he did not want to give evidence. Therefore he actually did not defend himself.

Having perused the record, I will have to allow the appeal. Throughout the record, there is no indication as to the language used by the court or language used by witnesses in tendering evidence. The magistrate failed to record the language used, and I am not able to determine what language was used and whether the appellant understood the language used. That was a fatal error as the appellant appears to have been denied his rights under Section 77 (b) (b) and (f) of the Constitution, as well as Section 198 (1) of the Criminal Procedure Code (*Cap. 75*). The consequence of that error was that the whole proceedings and conviction resulting therefrom became a nullity – see SWAHIBU SIMIYU & ANOTHER –Vs- REPUBLIC – CRIMINAL APPEAL NO. 245 of 2005 (Kisumu) C.A. I have to quash the conviction and set aside the sentence on that account.

The second reason why I will allow the appeal, is that the appellant was said to have been seen by two people carrying the stolen items into his house, where he locked himself. This was the evidence of P.W.1 and P.W.2.

While P.W.1, the complainant, stated in evidence that the appellant carried the things in a sack. P.W.2 stated that the appellant ran into his house carrying the things in his hands. There was a contradiction here but which could possibly be cured if any of the stolen items were found in the house. However,

when the appellant was arrested in his house, he was not found with any stolen items. In my view, if the appellant ran into his house with those stolen items, some of the items would have been found either in or around that house. As none of those items were recovered, the credibility of the prosecution witnesses is clearly put in serious doubt. In my view, the prosecution evidence did not establish beyond reasonable doubt that the appellant broke into the house and stole as alleged. On that also, I will allow the appeal.

Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentences imposed. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 12<sup>th</sup> May, 2008.

**George Dulu**

**Judge.**

In the presence of Appellant in person.

Mr. Makura for State

Mwangi court clerk