



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

**Criminal Appeal 159 of 2007 & 150 of 2007 (Consolidated)**

**JOHN MAINA KANYI ..... APPELLANT**

*Versus*

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence by P. NGARE GESORA, Ag Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 3127 of 2006 at KANGEMA)*

**CONSOLIDATED WITH**

**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 150 OF 2007**

**STEPHEN IRUNGU KARIUKI ..... APPELLANT**

*Versus*

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence by P. NGARE GESORA, Ag Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 3127 of 2006 at KANGEMA)*

## JUDGMENT

Both appellants were charged in the lower court of *Breaking into building and committing a felony contrary to Section 306 (a) of the Penal Code*. The alternative charge in count 1, the appellants were charged with *Handling stolen goods contrary to Section 322 (1) of the Penal Code*. On the second count they were again charged with *Breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code* and in the alternative *Handling stolen goods contrary to Section 322 (1) of the Penal Code*. They pleaded not guilty but after trial they were convicted and sentenced to 6 years for each appellant on each count. They have appealed against the conviction and sentence.

This court is duty bound to reevaluate the evidence of the lower court. That duty is susitanly set out in the case of *OKENO vs REP (1972) EA 32* in that case the court of appeal had the following to say:-

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958)E.A. 424.”*

The evidence of PW 1 and 2 was that they suffered a break-in into their shop. They both gave a list of the items that were recovered and had been stolen from their respective shop. In respect of PW 1 he stated that the following was stolen from his shop.

- Radio cassette,
- 6-2kg wheat flour (Chef),
- 2kg of sugar and
- 3 packets 100 G, tealeaves.

In respect of PW 2 she listed the following items that were stolen and had been recovered.

- 2 pairs of rubber shoes,
- 4 dresses for girls,
- 4 Kitenge material,
- 2 boys suits,
- 2 headscarfs,
- one pullover and
- one curtain.

On the issue of recovery of those items the pertinent evidence is of PW 3. PW 3 was a Police Officer. He said that he got information on 31<sup>st</sup> November 2006 that five shops at Karuri Trading Centre had been broken into. In his evidence he further stated as follows:-

*“We searched the accuseds and I recovered a radio cassette hidden in a bush. I took it to the Police Post. Later I received a call from Muranga Police Station and I was informed that there were people who had been arrested by AP officers in Maragi area carrying shop goods. The people were placed in cells on my request. I went and found accused herein in the cells and I saw the goods. Accused told me that they had broken into the shop in Karuri (sic). I took them away together with the goods, which are before court today.”*

It will be noted that this witness did not itemize the goods recovered. Note that the radio cassette which presumably is the one mentioned by PW 1 was found to be in possession of other people other than the appellants herein. PW 5 Administration Police Officer was in the company of his colleague APC Mbugua. While they were walking they noticed two men who they thought looked suspicious. These were the two appellants. They were carrying a yellow paper bag. Because of their suspicious look this witness and his colleague stopped them. In the testimony of this witness he stated;-

*“ .....what was inside the paper bag, and noticed that they were assorted food items inside the paper bag. I suspected the goods to be stolen. I took back to the camp and placed them in cells and I called OCS Muranga Police Station and told him of the occurrence. I was informed that there was some break in and theft that had occurred in the night and I was not to leave them. The OCS came and collected the two suspects together with the exhibits. .... The goods that we recovered are the ones we recorded.”*

It is noteworthy that this witness also did not itemize just like PW 3 the items of property that were recovered from the appellant. He merely stated that they were food items. PW 1 in his evidence had stated that the food items that were stolen from his shop were ‘*identical to any other*’. PW 5 did not according to his testimony identify any items of clothing as itemized by PW 2, the second complainant. Although PW 3 said that he recovered the radio cassette. He did not state that it was the one that had been stolen from PW 1.

Having considered the prosecution case in its entirety I find the conviction of both appellants on basis of that evidence was very unsafe. Since the APs and the OCS Muranga failed to itemize the goods that had been recovered from the appellants, it is not possible to state that the goods that were identified by PW 1 and 2 in court were the same goods that were recovered. I therefore beg to disagree with the learned magistrate’s considered judgement when he stated;-

*“The said goods were recovered after hours after the break in and theft had occurred and the said goods were positively identified by the complainants. They produced receipts from their wholesalers and the same were not challenged. The doctrine of recent possession is aptly applicable in the present case and this provides a clear link to the accused having committed the offence.”*

The appellants in their defence stated that they were going to work when they were asked by PW 5 and his colleague to carry the bag which was said to contain the items of goods recovered. I do agree with the learned State Counsel Ms. Ngalyuka that the line of defence offered by the appellants was a weak one, but bearing in mind that it is not for the defence to prove their innocence but rather it is for the prosecution to prove their case beyond reasonable doubt, I do find that the resultant conviction by the lower court was not safe. On that basis the conviction by the lower court is hereby quashed and the sentence against the appellants is hereby set aside.

Above all this, the appellants constitutional rights were violated because they were arrested on 31<sup>st</sup> October 2006 and detained in custody until the day they were presented in court on 6<sup>th</sup> November 2006. In total the appellants were detained in custody for five days in contravention of *Section 72(3)(b)* of the Constitution. The jurisprudence of the following cases:-

- *Criminal Appeal No. 35 of 2006 Paul Mwangi Murungu v Republic*
- *Criminal Appeal No. 120 of 2004 Albanus Mwasia Mutua Vs. Republic*

· *Criminal Appeal No. 119 of 2004 Gerald Macharia Githuku Vs. Republic*

Clearly shows that the violation of a person constitutional rights will lead to the acquittal or the quashing of a conviction of that person. I do hereby quash appellant's conviction and set aside their sentence. I do hereby order that the appellants be released from custody unless otherwise lawfully held.

***DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF JULY 2008***

**MARY KASANGO**

**JUDGE**