



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

**Criminal Appeal 181 of 2007**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**YUSUF SALIM.....  
APPELLANT**

**JUDGMENT**

The appellant, Yusuf Salim, was charged with the offence of house breaking contrary to Section 304 (1) and stealing contrary to Section 279 (b) of the Penal Code. The appellant was convicted on his own plea of guilty and sentenced to five year's imprisonment on the 1<sup>st</sup> limb and 3 years imprisonment on the 2<sup>nd</sup> limb. The sentences were to run concurrently.

The appellant was not satisfied with his conviction and sentences and has moved this court on appeal citing four grounds filed by the firm of Mushelle & Company Advocates. However, the 1<sup>st</sup> two grounds are the primary ones.

In ground one (1) of the grounds, the appellant complains that he was convicted on a plea which was not unequivocal and in ground two (2) the appellant complains that the Learned trial Magistrate erred in law and fact in convicting the appellant on facts which did not prove that the appellant had indeed committed the offence he was charged with.

When the appeal came up for hearing, Mr. Onserio, the Learned State Counsel conceded the appeal on the ground that the plea was not properly recorded and further that the charge of house breaking could not be sustained on the facts given by the prosecutor. Besides, according to the Learned State Counsel, it was unclear as to the limb the appellant pleaded to.

The manner in which pleas of guilty should be recorded and the steps to be followed were stated in the precedent setting case of **Adan – v – Republic [1975] EA 445**. In that case the court held as follows:-

**“(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 with 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 statement of the facts relevant to sentence together with the accused's reply should be recorded."**

In this case, when the appellant first appeared before T. M. Gesora, then a Resident Magistrate, on 26<sup>th</sup> September 2007, it is recorded that he stated "Not true". The Learned Resident Magistrate then entered a plea of not guilty. The record further shows that on 12<sup>th</sup> October 2007 the appellant appeared before R. M. Makungu, then also a Resident Magistrate. He prayed that the charges be read to him afresh. An amended charge was then allegedly read over and explained to the appellant whereupon it is recorded the appellant said "It is true". The Learned Resident Magistrate then entered a plea of guilty and the prosecutor stated the facts he relied upon.

It can be seen right away that the first error of omission made by the Learned Resident Magistrate was not to record the language in which the proceedings were conducted. The second error of omission was not to record the appellant's own words. Those were clearly missteps that contravened the procedure laid down in the Adan case. It is also not clear on what limb the appellant was pleading to. Clarity on this aspect of the plea was crucial because, the facts which were stated by the prosecutor did not prove a breaking into the complainant's house since the appellant was in the complainant's house on invitation.

On the limb of stealing, the facts given by the prosecution did not exclude the possibility of any other person other than the appellant having stolen the items alleged to have been found missing from the complainant's house.

In the premises and on the authority of the decision in the Adan case, the Learned Resident Magistrate did not properly record the appellant's plea. When it is recorded that the appellant said "Yes facts are correct", without recording that those were the accused's own words, the subsequent conviction of the appellant was not safe since it is not certain that the appellant understood the charge. The appellant's plea was therefore not unequivocal. This appeal is therefore for allowing.

The appeal is hereby allowed. The conviction is quashed and the sentences imposed are set aside. The appellant should be released from prison forthwith unless he is held for some other lawful cause.

Judgment accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 7<sup>TH</sup> DAY OF OCTOBER 2008.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Mushelle for the Appellant and Onserio for the Republic.

**F. AZANGALALA**

**JUDGE**

7<sup>TH</sup> OCTOBER 2008