



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

Criminal Appeal 102 of 2006

JOHN MURIITHI EZEKIEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of Bar breaking and stealing contrary to section 306 (a) of the Penal Code. He was tried and convicted and sentenced to 3 years imprisonment. He has filed two (2) grounds of appeal.

1. That the Trial Magistrate erred in law and facts when convicting and sentencing to 3 years imprisonment and rejecting the accused defence and relying on prosecution evidence.
2. That the Trial Magistrate erred for convicting on contradictory evidence of prosecution witness.

I have perused the evidence before the court. It is clear and it is not disputed that the appellant was employed as a watchman in the complainant's premises which was a bar club and butchery. PW2 was the manager of the business. He had noticed that loss had occurred in the bar and items were missing. He decided to lay an ambush in the bar on 28/5/2006. He was with John Nyaga who worked in the kitchen. They were hiding in a butchery in the bar. He saw the appellant in the premises he flashed his torch and saw it was the appellant checking the door. Appellant tried to run away but was prevented. He was found with 2 bottles of allsops beer 1 bottle of Keroche wine, 1 bottle of mantena wine, sportman cigarettes, 1 container.

PW3 heard a neighbour whistle and went to check what was happening he went to complainant's premises and on entering through the gate found the appellant tied up sitting down and there were stolen items which were marked MF 1 – MF1 5. Later the appellant was arrested and taken to police station.

PW4 was a police constable Zachary Momanyi who rushed to the scene on 28/5/2006 at 8 a.m. found appellant already arrested and tied with a rope. He rearrested him and took exhibit items and took with him to police station. He produced the exhibits and he testified that he was shown how the appellant gained entrance to the premises. The appellant gave sworn evidence and confirmed that he was at the place of work where he worked as a watch man. It was at 2 a.m. when he heard people talking in the premises, he blew whistle. However he was not found with any whistle by the witness when he was arrested. His evidence places him at the scene. He tried to lay the theft on the manager but this can not be true. The stolen items were found in his pockets. He had a long coat. He alleged that he was assaulted with a panga but there was no evidence that there was a panga involved.

I have also perused the Judgment of Trial Magistrate. The Trial Magistrate considered the appellants

defence and found that the allegation that appellant was assaulted were not true. There was no evidence that the appellant was framed.

I find that the prosecution evidence was firm and consistent and the offence was proved beyond reasonable doubt. I do not find any reason to interfere with conviction. The imprisonment of 3 years is quite lenient considering the maximum is 7 years and the Appellant had breached the trust placed on him by his employer (PW1). I therefore do not find any reason to interfere with the sentence.

The grounds of appeal are not with merit. The upshot is that the appeal is dismissed.

Dated this 16th July, 2007.

J. N. KHAMINWA

JUDGE

16/7/2007

Khaminwa – Judgre

Njue – Clerk

Mr Kimathi for State

Appellant present in person

Judgment read in his presence in open court.

J. N. KHAMINWA

JUDGE