REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 96 of 2005

(*From Original Conviction and Sentence in Criminal case NO. 1500 of 2005 of Chief Magistrate's Court at Machakos (T.O OKELL –SRM) on 19.5.05).*

FRANCIS KIOKO WAMBUA…..…….APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

JUDGEMENT

FRANCIS KIOKO WAMBUA was charged with HOUSE BREAKING AND STEALING Contrary to Section 304 (1) and 279 of the Penal Code. He pleaded guilty to the charge and was convicted and sentenced to 2 years imprisonment. He lodged his appeal challenging the sentence.

Mr. O'mirera submitted that the sentence was lenient for the offence charged. However, counsel submitted that the learned trial magistrate misdirected himself in the sentence in that the sentence did not show for which limb of the two charges it was. Counsel further submitted that the charge was defective in that for the second limb, the offence of Stealing contrary to section 279 of Penal Code did not disclose the letter of the section was intended to be charged for the offence. Counsel submitted that the defect was however curable.

I have considered this appeal. What bothers me concerning this plea is the fact that the facts of the case do not disclose an offence.

The facts were as follows:-

"**Prosecution- On the 10/5/2005 at about 10.30 p.m the complainant locked his house and went to visit a neighbour within Wamunyu market. On coming back at midnight she found the lock to her house damaged and the door was broken. She found the items in the charge sheet missing. The following day she reported the matter at Masii and investigations commenced and the accused was arrested as a suspect and after interrogation he admitted the offence and led the police to where he had hidden the place at David Kate where they recovered all the said items the accused was then charged with the offence."**

While the facts clearly show that the appellant was arrested on suspicion, the date of arrest is not disclosed. The facts allege that the appellant led to the recovery of the exhibits. The date and place of recovery are not disclosed. Also not disclosed is whether the said exhibits were first and foremost identified by the complainant as hers and secondly produced in court as exhibits. All these are very material factors. It is not comforting that the appellant admitted the facts as they do not disclose what it is the appellant did which constituted the offence. It is no comfort either that in mitigation the appellant used the words. "I stole the items…" as the word 'steal' is a legal term and the appellant being a layman may not know what action constitutes stealing in law.

The facts of the case do not show that the appellant broke into the complainants house and stole her things from it or that he had the items soon after they were stolen. The facts could not as they stood justify the entering of a plea of guilty. The admission by the appellant was equivocal in the circumstances, I consequently quash the conviction and set aside the sentence.

The appellant has been in prison for just over one year. He has served a substantive part of the sentence imposed. I decline to order a retrial. I direct that the appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Machakos this 31st day of May, 2006.

J.Lesiit

JUDGE