



**REPUBLIC OF KENYA**

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

**Criminal Appeal 247 of 2003**

**ABEL GITHAIGA MUTHONI.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

***(Appeal from original conviction and sentence in the Chief Magistrate's Court at Nyeri in***

***Criminal Case Number 2337 of 2002 by C.D. Nyamweya S.R.M. dated 19<sup>th</sup> November 2002)***

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

Abel Githaiga Muthoni hereinafter referred to as the Appellant is dissatisfied with the judgment of the Senior Resident Magistrate Nyeri in which He convicted the Appellant of the offence of Burglary contrary to section 304 (2) and Stealing contrary to section 279 (b) and sentenced him to serve 3 years imprisonment.

He has filed grounds of appeal the gist of which is that the trial magistrate erred in relying on the evidence of P.W.1 which was *hotch – potch*, and also in relying on the evidence of recovery in respect of which no search warrant was produced; that no one claimed to have seen the Appellant breaking into the house and stealing and that his defence was wrongly rejected.

I have carefully reconsidered and evaluated the evidence. It is apparent that the evidence implicating the Appellant was that of possession of the alleged stolen items. Whilst the Appellant did not deny being in possession of the items He claimed that the items belonged to him and not to the Complainant. The trial magistrate who had the advantage of seeing and assessing the demeanour of the witnesses chose to believe the Complainant rather than the Appellant. I have no reason to depart from the finding of the trial magistrate. The Appellant's possession of the stolen items so shortly after the Burglary was sufficient to lead to the presumption that He was one of the persons who broke into the house of the Complainant and stole therefrom.

I find that there was sufficient evidence to support the conviction. The sentence of 3 years imprisonment was not excessive except that the trial magistrate failed to impose a sentence on each limb of the charge. I therefore order that the sentence of 3 years imprisonment imposed on the Appellant shall be on each limb of the charge and that the same shall run concurrently. The appeal is otherwise dismissed.

***Dated, signed and delivered this 24<sup>th</sup> day of May 2006.***

**H. M. OKWENGU**

**JUDGE**