REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 219 of 2005

(From original conviction and sentence in Criminal Case No. 9208 of 2003 of the Chief

***Magistrate's Court at Kibera Ms. Muchira SPM*)**

MICHAEL MAUNDU WAMBUA ……..……..……
APPELLANT

VERSUS

REPUBLIC ……..……..……
RESPONDENT

JUDGMENT

The appellant, ***MICHAEL MAUNDU WAMBUA*** was charged with store breaking and committing a felony contrary to Section 306(a) of the Penal Code. The particulars of the charge allege that on 24th December, 2003 at Amboseli road, Lavington within Nairobi area province, the appellant broke and entered a building namely a store of Classic Moulding Ltd, with intent to commit therein a felony namely theft of a generator make Amman valued at Kshs.150,000/=. Upon full trial in which the prosecution marshalled four witnesses, the appellant was duly convicted. On conviction, the appellant was sentenced to six years imprisonment. The appellant was aggrieved by both the conviction and sentence. He instantly lodged the instant appeal.

In his petition of appeal, the appellant faults his conviction on the following grounds: -

(a) That he was convicted on contradictory evidence.

(b) That charge sheet was defective.

(c) That no independent eye witnesses were called to testify.

The brief facts of the case were that on 23rd December, 2003 PW2, a security guard was on duty in the premises owned by PW1. He saw 4 men at the gate. One of them who turned out to be the appellant approached him and offered to buy a generator and wielding machine in PW1's store at Kshs.8,000/=. The appellant stated that he had a master key that could open the store. It was then agreed that the appellant and his accomplices would come for the items the following day. In the meantime PW2 informed his superiors about the plot and an ambush was laid. On 24th December, 2003, the appellant came to the premises and PW2 opened the gate for him. PW2 then demanded to be paid the agreed

amount of Kshs.8000/=. The appellant said he only had Kshs.4000/=. The appellant then proceeded to the store and using a master key that he had, he opened padlock and got inside the store. Once inside the store, PW2 locked him in and pressed an alarm. The rescue team accompanied by 2 policemen rushed to the scene and arrested the appellant from the store. According to PW2 the appellant had pushed the generator towards the door. The appellant was then charged with the instant offence. The generator, the master key and the padlock were tendered in evidence as exhibits.

Put on his defence, the appellant elected to make an unsworn statement of defence. He stated that he had advanced PW2 kshs.1,000/=. PW2 had agreed to refund him on 24th December 2003. On that day he went to demand his money at PW2's place of work. He met PW2. After 30 minutes however, he saw policemen come to the scene. They demanded to know what he was doing there and beat him up. They then took his bag and Kshs.3000/=. He was then arrested and subsequently charged for an offence he did not commit.

During the hearing of the appeal, the appellant tendered written submissions which I have carefully considered. On the other hand, Mr. Kimathi, learned state counsel made oral submissions opposing the appeal. The learned state counsel submitted that the prosecution evidence was overwhelming. That the appellant was arrested at the locus in quo and was found in possession of a master key which he had used to access the store. The learned state counsel further submitted that by using the master key to access the store which was not his, amounted to breaking. Finally, the learned state counsel submitted that the appellant had moved the generator; the intention being to permanently deprive the complainant of her generator.

On sentence, counsel pointed out that the maximum imprisonment term that the offence attracts upon conviction is seven years. That the appellant was sentenced to six years imprisonment which was lawful. In the circumstances this case and considering that the appellant had six previous convictions for similar offences, counsel submitted, the sentence was justifiable. It was neither harsh nor excessive.

It is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions before deciding whether the judgment of the trial court should be upheld or overturned. See ***OKENO VS REPUBLIC (1972) E.A. 32***. In doing so, the court must bear in mind that it did not see witnesses testify as to be able to comment on demeanor of the various witnesses at the trial.

I have set out the background facts of the case, the appellant's defence and respondent's submissions. One point is clear. The appellant was arrested at the locus in quo. Was his presence at the locus in quo in innocent as he wants this court to believe or he was there for some ulterior motives. I have no doubt at all in my mind just as the trial court was that the presence of the appellant at the locus in quo was for no other reason other than to cause mischief and commit a crime.

The offence with which the appellant was charged was store breaking and committing a felony therein. For the prosecution to sustain a conviction, it must lead evidence first to establish that the premises were a store, two that the said store was broken into and thirdly that a felony was committed therein.

From the evidence on record, it is quite clear that the prosecution was able to successfully establish by evidence that the building that gave rise the charge was a store. Both PW1 and PW2 stated as much. It was a store owned by Classic Moulding Ltd, a company associated with PW1 and in which they kept a generator as well as a wielding machine.

Was the store broken into? Accordingly to the appellant there was no evidence of a break in. The appellant is of the view that "breaking" connotes physically breaking the door or any other part of the store so as to gain entry. That in the circumstances of this case there was no damage caused to the door and even the padlock. The appellant pointed out that the evidence of PW3 supported his case. PW3 testified that

"……***I found the store wasn't broken into, it had been locked with a tri-circle padlock…..***"

With respect I do not buy the appellant's interpretation of what amounts to "breaking". The breaking must not necessarily result into some sought of damage. What is critical is gaining access into a store against the wish of the owner and or without his permission. In the instant case, the appellant gained entry into the store using a master key. By using the master key to access the store which was not his and without having sought or obtained the permission of the owner (PW1) to my mind amounts to breaking in. Simply put the appellant by his own machinations gained unauthorized access to the store. That act amounted to "breaking in." In my view therefore the prosecution led sufficient evidence to show that the appellant broke into the store.

How about committing a felony therein! It does appear to me that the prosecution were unable to prove this vital ingredient of the offence. From the charge sheet the felony to alleged to have been committed by the appellant once in the store was theft. To my understanding theft connotes the dishonest taking of property belonging to another person with the intention of depriving the owner permanently of it. The evidence of PW2 was to the effect that once the appellant got into the store, he immediately locked the appellant inside, pressed the alarm whereupon the rescue team came to the scene and arrested the appellant whilst still in the store. If this be the scenario then at what time did he steal the generator. The prosecutor and indeed the trial court relied on the piece of evidence to the effect that the generator had been moved as evidence of the appellant's intention to permanently deprive the complainant of the generator. That this was an act of theft. It is not clear on the recorded evidence how the witnesses came to the conclusion that the generator had been moved and that it had been moved by the appellant. Once the appellant gained entry into the store, PW2 immediately locked him therein and reactivated the alarm. He never saw where the generator was initially. He could therefore have not been in a position to positively state that the generator had been moved. The other witnesses PW1, PW3 and PW4 could not as well positively confirm that the generator had been moved as they came to the scene after the alleged movement of the generator.

In my view, this evidence was so tenuous that it should not have found a conviction. To that extent the learned Magistrate erred in relying on this evidence to convict the appellant.

That being my view of the matter, I hold that on the evidence I do not think that the offence of store breaking and committing a felony therein was proved. However as I have already stated the appellant's presence at the locus in quo was for no other reason other than to commit mischief. He had clearly demonstrated his intention by attempting to recruit PW2 to go along with his plans. However his plans were foiled. He was arrested before he could steal. So what offence did the appellant commit?

From the evidence it would appear that the offence committed was breaking into a store with intent to commit a felony contrary to Section 307 of the penal code. Accordingly, I would substitute the appellant's conviction for the offence of store breaking and committing a felony contrary to Section 306(a) of the penal code with that of store breaking with intent to commit a felony contrary to Section 307 of the penal code. Upon conviction of the later offence, the maximum term of imprisonment that can be imposed is five years. I note that the appellant was convicted and sentenced on 4th January 2005. He has so far been in prison for close to 1½ years. Taking that into account and the mitigation proffered, I would sentence the appellant to 2½ year imprisonment effective from the date of conviction and sentence aforesaid.

Orders accordingly.

Dated at Nairobi this 2nd day of October, 2006

……..

MAKHANDIA

JUDGE