REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 100 of 2005

(From original conviction and sentence in Criminal, Case No.1102 of 2004

of the Principal Magistrates Court at Garissa (D. Orimba – RM)

ABDI KADIR ABDI ALI.....……..……..APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

J U D G M E N T

ABDI KADIR ABDI ALI was convicted for the offence of **HOUSE BREAKING and STEALING** contrary to **Section 304(1)** and **279(b)** of the **Penal Code.** It was alleged that on 25th November 2004 at Garissa, he broke into the Complainant's house and stole personal properties worth 19,300/-. He was sentenced to 5 years imprisonment on the first limb and 8 years imprisonment on the second limb. He was dissatisfied by the conviction and sentence and so lodged this appeal**.**

The Appellant was unrepresented in this appeal. **Mrs. Kagiri**, learned State Counsel represented the State.

The Appellant has cited seven grounds of appeal but upon considering them, they can be summarized into four as follows: -

One the proceedings were conducted in a language the Appellant did not understand.

Two, charge was duplex.

Three, the doctrine of recent possession did not apply since the items recovered were not properly identified.

Four the Appellants' defence was not given due consideration.

The facts of the prosecution case was that PW2, a friend of the Complainant found the door to the Complainant's house ajar at 8.00 a.m. on the material day. He reported to the Complainant at 9.00 a.m. and both proceeded to the Complainant's house. The Complainant found clothing and electricals missing. They then together found the Appellant selling and apprehended him over a shirt the Complainant said was among the items stolen from his home.

Counsel for the State submitted that the Appellant was arrested wearing the Complainant's suit and that the Complainant identified it in court. Counsel submitted that the Appellant had possession of the stolen shirt few hours after the theft was committed and that in the circumstances the offence was proved and conviction was therefore safe.

On the Appellant's ground that he did not understand the language used during the proceedings., I have carefully perused the entire records of proceedings of the trial court. Nowhere did the learned trial magistrate indicate the language of the Court or the language used by any of the witnesses in their testimony in court. This is a fatal omission as it is a violation of the Appellant's constitutional right under **Section 77(2) (b)** and **(f)** which provide as follows: -

"***77(2) every person who is charged with a criminal offence –***

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge."

As per the 2005 Court of appeal judgment No. 313, Nairobi, in the case of **Jackson Leskei vs. Republic**, on that ground alone, the conviction entered in similar circumstances was found to be unsafe and quashed. Similarly in this case, on that ground alone, the conviction ought not to stand.

That is not the only ground on which the conviction is unsafe. The learned trial magistrate misdirected himself in his findings thereby falling into error when he found that PW2 found the Appellant breaking into the Complainant's house. PW2 did not make any such a claim in his evidence. PW2 said he found the house ajar and went to call the Complainant.

The Complainant did however contradict PW2's evidence when he said that PW2 told him that he had seen somebody breaking into his house. There was no such evidence from PW2. The conviction was partly based on the misdirection that there was an eyewitness of the breaking into the Complainant's house by the Appellant, which was materially wrong.

I also wish to comment on the evidence of identification of the shirt allegedly found with the Appellant. The Complainant merely stated concerning the shirt "**This is the shirt which was stolen from my house**." With due respect to the learned trial magistrate, the Complainant's evidence did not amount to identification of the shirt as his. The Complainant should have given a basis of claiming the shirt was his which should have been cogent to prove ownership. To merely say "**this is the shirt stolen from my house**" fell far short of proving ownership. The conviction was partly based on the court's judgment that the shirt belonged to the Complainant. The conviction was unsafe for this reason also.

I find for the three grounds given in this judgment that the conviction was unsafe and ought not to stand. I allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set free unless otherwise lawfully held.

Dated at Nairobi 29th day of November 2006

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LESIIT. J.

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mrs. Kagiri for State

Ann CC

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LESIIT, J.

JUDGE