

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII**

Criminal Appeal 93 of 2006

WILLIAM OKONGO KONGERE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence of the Senior Resident Magistrate's Court at Homa Bay in Criminal Case No.470 of 2005 – B. J. NDEDA ESQ., AG. R.M)

JUDGMENT

The appellant was convicted by the Resident Magistrate Homa Bay for the offence of store breaking and stealing contrary to s.306(a) Penal Code, in that on 21/3/03 at Radiro Primary School he and another broke and entered into the schools store and stole 15 iron sheets. He was sentenced to four years imprisonment.

Mr. Kemo the State Counsel conceded to the appeal and stated the evidence was not enough. He said court relied on evidence of Ass. Chief (PW4) who said he received information that the appellant stole the iron sheets. He too confessed to him.

I have considered the appeal and concur with the state counsel that there was no evidence to warrant conviction.

The whole conviction was based on evidence of PW4 who said he recovered the 15 iron sheets from the home of the appellant. The offence however took place on 21st March 2003. Though PW4 did not say when he recovered the iron sheets, the alternative charge of handling stolen property states he was found with the iron sheets on 10th April 2004. Those were over 20 days after the said theft. That was such a long period that even the doctrine of recent possession cannot apply. It cannot therefore be said the appellant participated in the commission of the offence. Perhaps the court should have considered the alternative charge of handling stolen property but it did not do so and neither did the state counsel request this court to consider it.

PW4 also said that appellant told him that he stole the iron sheets.

This was a confusion and should not have been allowed as no proper steps to record it were taken.

In the circumstances I find the appeal is well merited. I find the appeal is well warranted. I quash the conviction and set aside the sentence imposed on the appellant. He be set at liberty forthwith unless otherwise lawfully held.

Dated 7th November 2006.

KABURU BAUNI

JUDGE

Delivered in presence of:

cc. Mobisa

Appellant P.I.P