



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION**

CRIMINAL APPEAL 194 of 2004

**(From original conviction(s) and Sentence(s) in Criminal case No. 9098of 2003
of the Chief Magistrate's Court at Kibera (Mr. Oduor –R.M.)**

JOSEPH MALALA OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant, **JOSEPH MALALA OCHIENG** was found guilty and convicted of one count of **SHOP BREAKING AND STEALING** contrary to **Section 306(a)** of the **Penal Code**. It is alleged that on 17th December 2003 at Kibera Ayany the Appellant and another broke and entered into the Complainant's shop and stole materials valued at Kshs.13,700/- from therein. The Appellant was then sentenced to 3 years imprisonment.

The Appellant filed nine grounds of appeal which after perusing them I find can be summarized as only two. One, that the trial magistrate erred in law and fact in basing the conviction on the evidence of a single witness, made under difficult circumstances without warning himself of the dangers of so doing. Secondly that the learned trial magistrate failed to give due consideration to the appellant's defence. The Appellant did not make any submission, oral or written and merely depended on the grounds of appeal as filed.

MRS. GAKOBO, learned counsel for the State conceded to the appeal on the grounds that the evidence of identification was unsafe. **MRS. GAKOBO** submitted that it was difficult to support the conviction since the basis of identification by the single identification witness was torch light. That the said witness was not clear how he was able to identify the Appellant from the far distance he described he was standing at the time he made the identification.

I have perused and re-evaluated the evidence adduced before the trial court. It is true that the Appellant was convicted on the basis of the identification by a single witness, the watchman who was guarding the shop where the offence was committed. From the facts of the case, the watchman, who was PW3, was guarding the Complainant's premises as well as parking lot where cars were parked. He was alone. PW3 said that the lamp which lighted the entrance to the saloon went off at around 4.00 a.m. He then said that some thieves, who were inside the Complainant's Saloon flashed a torch at him and hit him on the head and that he lost consciousness. He then woke up half an hour later and reported the incident. PW3 also said that he flashed and saw the Appellant whom he recognized.

The evidence of PW3 lacks in proper and necessary detail. It needed to be treated with a lot of caution. Whereas PW3 says there were thieves inside the Complainant's premises, he is not clear whether he saw them going in. He is not clear at what time he saw and recognized the Appellant. It is however very clear from his evidence that he flashed once and saw the Appellant. PW3 does not say at what distance he flashed and saw the Appellant. PW3 does not also disclose how he was able to recognize the Appellant. He does not say when he came to know the Appellant neither does he say for how long he knew him. Taking all these insufficient information into consideration, together with the fact that PW3 saw the Appellant only fleetingly, I agree with **MRS. GAKOBO** that the identification was unsafe. The conviction entered on the basis of such evidence was equally unsafe and unsound and should not be allowed to stand. I find merit in this appeal. I allow the same, quash the conviction and set aside the sentence.

The Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 15th day of June 2005.

LESIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

No appearance for the Respondent

Tabitha CC

LESIT, J.

JUDGE