



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL 109 OF 2004**

**(From Original Conviction and Sentence in Criminal Case No. 414 of 2003 of the  
Principal Magistrate's Court at Wundanyi A. Ngugi Resident Magistrate**

**BENSON NYANGE ..... 1ST APPELLANT**

**MARTIN MAGANGA ..... 2ND APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**Coram: Before Hon. Justice J.W. Mwera**

**Appellant 1**

**Appellant 2**

**Ademba for Respondent**

**Court clerk – Kazungu**

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

The decision herein below following concerns two appeals: Benson Nyange Appellant 1, (CR.A 109/2004) was accused 2 in the lower court while his mate Martin Maganga Appellant 2 (CR.A 110/2004) was accused 1.

The main count facing them was that on 17/10/2003 at Ngerenyi village, Kidaya – Ngerenyi, in Taita-Taveta jointly with others not before court they broke into and stole from the dwelling house of Anthony Mwaduka a wall clock (Rewa), 18 bed sheets, 11 blankets, 18 long trousers, 22 shirts, one kettle, 32 pieces of curtains, mosquito nets, a towel, a T-shirt, 2 pillow cases, table clothes etc all valued Sh. 50,000/=. The alternative charge read that on 20/10/2003 at Mkororo village Wundanyi; contrary to section 322 (1) of the Penal Code other than in the course of stealing they:

“..... dishonestly received or retained .....,”

mosquito nets, shorts, blankets etc etc. But the duo was convicted on the main charge (above) of burglary

and theft. However stopping at the handling charge, if it is ever laid, it is pointed out that the ingredients of receiving or retaining or undertaking or assisting while handling goods under section 322 (1) of the Penal Code cannot be lumped together in one charge. Such charge would be duplex. So the police should from evidence gathered charge an offender with the particular ingredient in the section i.e. if one received or retained or undertook or assisted in retaining are of the goods (see Selimia Owuor & Anor. Vs R CR.A 68/1999 C.A. unreported).

After conviction each appellant got 3 years imprisonment on the first limb and 4 years imprisonment on the second limb of the main charge. Sentences were to run concurrently. Both appealed.

On his part appellant 1 (Nyange) complained that he was not seen stealing from the complainant's house because he was in Nairobi; that the stolen goods were never identified and that those goods were in fact found in a house where Elijah Musyoka (P.W.4) and appellant 2 were.

On his part appellant 2 (Maganga) said in his petition that the complainant did identify some goods at the police station but he did not know who stole them. That the complainant had left a person in his house when it was broken into but that person was not called as a witness. That police also arrested Musyoka (P.W.4) in whose house the goods were recovered, along with this appellant but later released Musyoka. That Musyoka and his wife testified that it was their relative appellant 1 (Nyange) who took the stolen goods to their house at 4 a.m. and appellant 2 was not connected. And that his defence was not considered.

After submissions, this court went over the lower court's evidence and came to the following conclusion: It is not in doubt that Mwaduka's (P.W.1) house was broken into on the night before 17/10/2003 when he was away in Mombasa and the many listed items were stolen.

Musyoka (P.W.4) lived with his brother Nyange (appellant 1); he introduced P.W.4 to Maganga (appellant 2). On 16/10/2003 the two went separate ways in the morning but in the evening appellant 1 returned with appellant 2 and another man. They stayed at the house of P.W.4 until 10 p.m. when they all left. Appellant 1 returned alone at about 4 a.m. with many items tied in a blanket, and he told P.W.4 that he intended to open a business. The items were kept in the house. On 20/10/2003 appellant 2 passed past P.W.4's house. They had lunch then police officers arrived; they arrested him with appellant 2 and took away the goods that appellant 1 had left there. Stella Mwachia (P.W.5), Musyoka's wife gave more or less similar evidence.

Sgt. Kimanzi (P.W.6) got a report of burglary and theft in Mwaduka's house. On 20/10/2003 he learnt that the goods were in a house at Ngerenyi and in company of P.C. Songwe they proceeded to a house said to belong to Nyange, (appellant 1) actually where he lived with his brother P.W.4. The goods were found and appellant 2 (Maganga) was in that house. He was arrested. Musyoka was also taken along but he was released and he became a witness in the case. The complainant identified all his goods (Exh.P1 – 16). Nyange was later handed to the police by the village elder and the two were later charged.

The appellants were heard, appellant 2 (Maganga) in an unsworn statement, while Nyange (appellant 1) testified on oath and called one witness.

Maganga said that on 16/10/2003 he was around his residence at a place called Mgange Dawida with his brother and after supper they slept.

On 20/10/2003 when he visited Nyange's brother, police came to the house and arrested them with the goods produced before the lower court. There was nothing found on him or in his house.

On his part Nyange (appellant 1) went about his business on 16/10/2003 at a place called Josa until 21/10/2003, when he went to visit his brother (Musyoka P.W.4) at Wasinyi. His wife told Nyange that Musyoka had been arrested with some clothes in the house.

Then some one by the name of Masden called him out. They joined someone else called Mwatabu and

the latter began to question Nyange about Musyoka's arrest. They were then heading to the local police station. There he found appellant 2 (Maganga) and his brother detained, who was then released.

Appellant 1 was questioned about the burglary; he denied it; he was later charged. He denied knowing Maganga (appellant 2) and that they only met in police cells. He also denied that he lived with his brother (no doubt Musyoka P.W.4) at Wasinyi and he did not bring the bundle of goods to the house.

Joseph Mwakio (D.W.3) told the court that when Nyange went to Wundanyi on 20/10/2003 he did not return and his father told him on 21/10/2003 that he had been arrested and detained at Wundanyi. D.W.3 did not say anything about being with Nyange between 16th and 20th October 2003 or that he was doing timber splitting at Josa over that period at all. He did not even say that Nyange was in Nairobi.

This court is satisfied that Nyange (appellant 1) above is guilty of the offence here. He was at their house (with his brother Musyoka P.W.4) on 16/10/2003 from 5 p.m. to 10 p.m. – with his other friends including Maganga. They left. At 4 a.m. Nyange returned alone with the goods in a bundle, which P.W.4 and his wife (P.W.5) saw and kept them in the house. This court does not believe that Nyange was at Josa at all. His brother and his wife had no reason to tell lies about him being in the locality of the offence and he did not discredit the evidence of P.W.4 and 5 in any way. This court believes that when Nyange (appellant 1) was with those goods, and at an odd hour it was, he had with others gotten them from Mwaduka's house. The police arrested P.W.4 and Maganga from the house where P.W.4 and Nyange lived. P.W.4 told the police, and his wife supported him, that the goods were brought there by Nyange alone saying that he wanted to open a business. Unluckily Maganga was at that house, he with P.W.4 were arrested and taken to the police station with the goods. Nyange was arrested later. When he got to the police station his brother was released.

From all the above Nyange was the burglar. He brought the things and kept them in the house. Maganga had been with Nyange on the evening of the burglary. Then he was found with P.W.4 in the house. This court is of the mind that he was arrested more on suspicion of association with Nyange than on the proven fact that he did take part in the offence. He may have, but there is no evidence to link him to the offence. He did not return with Nyange at 4 a.m. on 16th/17th October 2003 to keep the goods and he was not found with any stolen property. The goods were identified by P.W.1. Conviction of appellant 1 was proven and sentence given is within the law.

In sum the conviction and sentence remain undisturbed.

Maganga's appeal is allowed. He is to be released forthwith unless otherwise lawfully held.

Judgment accordingly.

Delivered on 31/10/2005.

**J.W. MWERA**

**JUDGE**