

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 282 of 2003

(From Original conviction (s) and Sentence (s) in Criminal Case No. 303 of 2002 of the District Magistrate's Court at Makueni J.K. Kiia on 8/11/02)

EVANS MUYENDI MWANZAU APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant was convicted by District Magistrate I, Makueni Court in Criminal Case 303/02 on two counts of Shop breaking and committing a felony Contrary to Section 306 (a) of the Penal Code. Appellant was sentenced to serve 5 years imprisonment on each count plus 3 strokes of the cane and prison sentences were ordered to run concurrently.

The appellant merely appeals to the court's mercy to reduce the sentence to the period he has already served. He said that he completes his sentence in March 2006. He claims to have been sick since he was in remand and prays for the court's mercy.

The learned state counsel opposed the appeal on sentence for reasons that it is fair and that the prosecutor said that the offence was rampant and a deterrent sentence was called for. He only conceded to the three strokes of the cane since corporal punishment has been done away with.

I do not know if the learned state counsel merely shut his eyes to record of appeal and went on to submit as he did without pointing out about the prosecution of the case by Corporal Kyumbu, may be it was a genuine oversight.

A cursory look at the record of appeal reveals that the prosecutor in the lower court was one Corporal Kyumbu. He is an unqualified prosecutor because he was not a police officer above the rank of acting Inspector of Police when the Attorney General could appoint to prosecute under Section 85 (2) Criminal Procedure Code as read with Section 88 Criminal Procedure Code. Having so prosecuted when he was unqualified, the proceedings in the lower court are defective and a nullity.

Besides, the above finding, the plea was defective in that the court did not disclose in what language the plea was taken. There is no way of knowing whether the appellant understood what went on in court or not. After he pleaded to the charge, no plea of guilty was entered by the court. The plea was defective and could not sustain a conviction.

Consequently, the conviction must be quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

R.V. WENDOH

JUDGE

Dated at Machakos this 12th day of October 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE