



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**Criminal Appeal 254 of 2003**

**JAMES WACHIRA GITHIGIA.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the judgment of J. N.  
Nyagah, Senior Resident Magistrate, dated 17  
th  
July 2003, in the Senior Resident Magistrate's  
Court at Karatina, Criminal Case No. 423 of 2003)***

**JUDGMENT**

The Appellant was charged with Burglary and stealing contrary to Section 304(2) and 279(b) of the Penal Code particulars alleging that on the night of 17th/18th of April 2003 at Ragati forest station in Nyeri District the Appellant jointly with another not before court broke and entered the dwelling house of Reuben K. Mararo with intent to steal and did steal therefrom two mattresses, one bed, three blankets, one pair of gumboots, one bag, two radios make National Star and Sonic, a torch, two fork jembes, three pangas, one litre of paint, two watches, one iron box, a tape measure and camphor timbers all valued at Ksh.30,391/= the property of Reuben K. Mararo.

In the alternative the Appellant was charged with handling stolen goods contrary to Section 322(2) of the Penal Code, particulars alleging that he dishonestly or retained one bed and a mattress knowing or having reason to believe them to be stolen goods. The Appellant was convicted of the main charge and sentenced to two and a half years imprisonment plus two strokes of the cane. Hence this appeal.

I have carefully read the Appellant's grounds of appeal, the evidence as recorded by the trial magistrate, what the Appellant and the State Counsel said during the hearing of this appeal. The Appellant was on 27th May 2003 found in possession of a bed and mattress which P.W.1 positively identified as having been among the items stolen from his house when the said house was broken into during the night of 17th/18th April 2004. The identification of the bed by P.W.1, the Complainant Reuben Kande Mararo and P.W.3, David Ngunyo Githinji the carpenter who had made that bed were in my view, satisfactory. Then there was the identification of the mattress by the Complainant. The mattress cover had been removed but the Complainant said was able to identify the mattress because he had cut off a piece of it at a corner. Then there was, in addition, the evidence of P.W.2.

That, in my view, was sufficient evidence to sustain the conviction. The Appellant was found sleeping on the bed and the mattress in his house when he was arrested and the items recovered.

The learned trial magistrate correctly rejected the Appellant's defence to the effect that he had quarreled with the Complainant after the Complainant had engaged him to steal timber from the forest and the Appellant had refused to pay Ksh.32,000/= to the Complainant and that therefore the Complainant had a grudge against the Appellant. The Appellant had failed to advance that kind of defence in his cross-examination of prosecution witnesses and brought it only during his unsworn defence. The learned trial magistrate rightly rejected that defence.

As I hold the view that the conviction of the Appellant was safe and that the sentence imposed was not harsh, bearing in mind that the offence consisted of burglary and stealing, two limbs each attracting

2½ years imprisonment, I will not interfere with that unless only to the extent of stating that the trial magistrate ought to have specifically ordered that the sentences run concurrently. In case there is doubt, I do hereby order that the prison sentences of 2½ years on each limb of the charge run concurrently.

I do add that since by the time the Appellant was sentenced corporal punishment was lawful, in the circumstances of this case I will not interfere with the corporal punishment imposed – two canes on each limb of the charge.

It follows therefore that with the exception of the clarification that the prison sentences on each limb run concurrently, the Appellant's appeal against his conviction and sentence is hereby dismissed.

*Dated this 20th day of December 2005.*

**J. M. KHAMONI**

**JUDGE**

**Present:**

Appellant In Person

M/S Ngalyuka for the Republic

Mr. Gikaria Court Clerk