



**REPUBLIC OF KENYA**

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

**CRA 120 OF 2001**

**GEODREY OMONDI NYANGOR ..... APPELLANT**

**VS**

**REPUBLIC ..... RESPONDENT**

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

Godfrey Omondi Nyangor the appellant herein was tried on a charge containing two counts with on alternative count. The first count relate to the charge of shop breaking and committing a felony contrary to Section 306 (a) of the penal code. The particulars are that on the night of 6th and 7th January 2001 at Bungoma Municipal Market in Bungoma District within western province, jointly with another before court broke and entered the tailoring shop of Peres Nakitumba and stole three sewing machines, three rolls of cloth material, cussion covers, 5 pieces of sponges and a travel bag all valued at Ksh. 143,000/=.

The second count is in respect of a similar offence as in count I save for the fact that the items are two sewing machines, five dresses, five sets of table clothes and a boy's suit all valued at ksh.74,500 the property of Zulfar Bakari.

The alternative charge is in respect of handling stolen properties contrary to Section 322 (2) of the penal code.

The particulars are that on the 28th day of January 2000 at Sio village in Bungoma District within the western province other than in the course of stealing dishonestly retained twenty pieces of table cloth, one skirt, one blouse, women dresses, one boy's suit, five pieces of materials all valued at Ksh.9,050/=.

The appellant was convicted on the main counts and sentenced to serve 4 years imprisonment on each count with four strokes of the cane. He now appeals against both the conviction and the sentence.

The prosecution case before the trial court was supported by the evidence of four witnesses. The appellant gave unsworn statement at his defence.

The facts of this case are that Peres Nakitumba and Zulfar Bakari run shops at the Bungoma Municipal Council market stalls . It is said on the 6th January 2001 both the complainants closed and locked their business stalls (shops) at 6.00 p.m. just like the other traders. When business opened its doors on 9th January 2001 being a Monday the complainant found the doors leading to the stalls forced opened and the padlocks cut and taken away.The items stated in the charge sheet were found to be missing. The complainants reported the matter to the Municipal officials and thereafter to the police station who immediately launched investigations.

On the 28th day of January 2001 P.C. John Wafula who testified as P.W.4 received information that

sewing machines were being transported towards Eldoret in a public transport bus christened Eldoret Express. The bus was stopped and searched at Bukembe and three sewing machines were recovered in the possession of a lady who took the police officers to the home of the appellant at Mjini Estate whom she alleged had sold to her the three heads of sewing machines. The appellant resisted arrest and attempted to run away but he was finally arrested and more items were recovered from his residence. The items recovered from the appellant were identified by the complainants to be their property. The complainants later testified and produced documentary evidence to prove ownership of the items recovered. The appellant even led the police to Mteremko where more goods were recovered and identified by the owners.

The appellant's defence was that he was arrested by the police when he failed to produce an I.D Card and was falsely fixed and tried on fictitious charges. He denied having any connection to the properties recovered. The trial considered his defence but dismissed it as pure lies. The trial magistrate believed that the prosecution witnesses told the truth.

The appellant raised 7 grounds of appeal in his petition of appeal. The grounds can be summarized to two grounds. The first is that he was convicted on the basis of hearsay evidence of the complainant. I have carefully examined the evidence on record. The evidence presented by the four witnesses did not contradict each other. It is not denied that the properties recovered from the Eldoret Express bus and from the accused's house were owned by the two complainants. They produced receipts to show that they purchased the properties. There was no direct evidence linking the appellant with the commission of the offence of shop breaking and committing a felony therein. However the circumstances obtaining in this case only points to the accused guilty. I refer to the case of **SIMONI MUSOKE VS REPUBLIC (1958) E.A 715** where the court of Appeal for East Africa stated *inter alia*.

*“That in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilty.”*

I have already stated that the circumstances obtaining in this case do not leave any doubt existing but only that its the appellant committed the offences. Consequently there was no hearsay evidence in this matter.

The second ground of appeal is that the sentence was harsh and excessive. I find the sentence imposed not to be harsh nor excessive. It is clear that the trial magistrate considered material factors before convicting. He took into account the fact that the appellant was a first offender and the fact that the offences he was charged with were serious and prevalent at the time. The law was amended recently and corporal punishment was done away with. I will order that if corporal punishment has not been executed then the same should be set aside.

In the final analysis I have come to the conclusion that this appeal has no merit. It is dismissed save that the order for corporal punishment is set aside.

**DATED AND DELIVERED THIS 28TH DAY OF MAY 2004.**

**J.K. SERGON**

**JUDGE**