

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 141 OF 2002

JEREMIAH SIKOLIA MASIKA APPELLANT

VS

REPUBLIC RESPONDENT

J U D G M E N T

Jeremiah Sikolia Masika, the appellant herein was convicted on his plea of guilty to a charge containing two counts. The first count relate to a charge of Burglary contrary to Section 304 (2) and stealing to contrary to Section 279 (b) of the Penal code. The particulars are that on the night of 13th – 14th day of June 2002 at Lutonyi village Kimbingei location in Bungoma district within Western Province, broke and entered the dwelling house of George Masafu with intent to steal therein and did steal there in assorted households, namely gas cylinder, one bed, one set of sofa, 3 mobile phones, beddings the property of the said George Masafu valued at Ksh. 30,000/=.

The second count was in respect of the offence of house breaking contrary to section 304 (i) and stealing contrary to section 279 (b) of the penal code. The particulars relating to this charge are that on the 21st day of June 2002 at Lutonyi village Kibingei location in Bungoma district within western province, broke and entered the dwelling house of George Masafu with intent to steal therein and did steal two radios, perfumes, novels, aviation bag and music compacts the property of the said George Masafu, the said property being of the value of Ksh.15,000/=.

The prosecution case before the trial court was conducted by Police constable Nancy. The evidence of three witnesses were taken after which she closed the prosecution's case. The appellant was placed on his defence but at that stage he changed his plea and pleaded guilty. He was then convicted and sentenced to serve 4 years with 2 strokes of the cane in respect of count I and 2 years with 2 strokes of the cane in count 2. The sentences were ordered to run concurrently. Being aggrieved he now appeals to this court. He has put forward 6 grounds of appeal in his petition of appeal. All the six grounds of appeal do not challenge the sentence but relate to grounds against the conviction.

However being the 1st appellate court I am entitled to re-evaluate, assess and analyse the evidence that was tendered before the trial court. The record reveal that the facts were not read to the appellant when he changed his plea upon being placed on his defence. The following passage is reproduced.

“Prosecution: Facts are contained in the evidence adduce d in court.

Court: Facts summarised are from evidence of the prosecution witnesses.

Accused: Facts are true, I admit them.”

Where the facts are not read to the accused person there can never be a competent plea. The trial court relied on the evidence of the prosecution witnesses who were presented to the trial court by P.C. Nancy. It is obvious that P.C. Nancy who conducted the prosecution case was not authorised to do so under section 85 (2) of the criminal procedure code. Consequently there was no competent trial before the trial court. In such a case I am not bound to consider the merits of the appeal.

In my humble view there was no competent conviction and sentence. The appeal is allowed on that ground. In the end the conviction is quashed and sentences set aside. The appellant is set free forthwith

unless lawfully held.

DATED AND DELIVERED THIS 28TH DAY OF MAY 2004

J.K. SERGON

JUDGE