

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLANT SIDE

CRIMINAL APPEAL NO. 389 OF 2002

(From Original Conviction and Sentence in Criminal Case No. 489 of 2002 of the District Magistrate's Court at Taveta – G.M. GOGWE – DM 1).

JIMMY DAVID ORIADHA.....APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

The appellant was convicted of the offence of stealing from a dwelling house contrary to section 279(b) of the Penal Code. The appellant was sentenced to 3 years imprisonment with 3 strokes of the cane. The particulars of the charge were that on the 14th day of July 2002, at Chachwe village in Taita Taveta District of the Coast Province, stole one radio cassette make Artech, a battery and one speaker valued at KSh.7,000/= from the dwelling house of Carlos Kithuka.

The Prosecution case before the trial court was to the effect that on 14.7.2002 the appellant had been given by the complainant house keys in which the appellant was to use to open the complainant's house for his own leisure with his girl friend. This was the second time the appellant had used the complainant's house for such a purpose. At about 11.30 a.m. the same day the appellant and his girlfriend left the complainant's house and left the house keys with one Maria Ngei a neighbour to the complainant. At 7.00 p.m. in the evening the complainant was given his house keys by his neighbour Maria Ngei. When he opened the door to his house he found that the window was open and that his radio cassette and speakers were missing. He then reported the matter to Taveta Police Station where the appellant was arrested and charged.

The appellant's evidence before the trial court was that after he finished his affair, he left the complainant's keys with his neighbour Maria Ngei having locked everywhere.

He also admits having seen the radio and speakers and that he did not steal.

The appellant filed the appeal of seven grounds which can be summarized to one ground of appeal, that the case before the trial court was not proved beyond reasonable doubt.

The Respondent was represented by Gumo who indicated to this court that he was not supporting the conviction on the ground that there was a mistrial in that the trial magistrate did not comply with the mandatory provision of Section 211 of the criminal Procedure Code. Secondly that the prosecution did not prove its case to the required standard of beyond reasonable doubt.

It is obvious from the record that the trial court did not comply with Section 211 of the Criminal Procedure Code.

Section 211 of the Criminal Procedure Code is a mandatory provision. Mr. Gumo rightfully pointed out this misdirection by the trial magistrate. The end result therefore is that the judgment is a nullity.

The second issue touches on the evidence on record. The evidence tendered by the prosecution did not prove the charge facing the appellant. The trial magistrate misdirected himself in believing and presuming that the appellant was guilty even when it was clear that there was no credible evidence. The evidence before the trial court did not prove the charge to the standard of beyond reasonable doubt required in criminal cases.

From the foregoing therefore I have come to the conclusion that this appeal must succeed. The conviction is quashed and sentence set aside. The appellant is hereby set free forthwith unless otherwise lawfully held.

Dated and Delivered this 27th day of February, 2003, In the presence of the State Counsel and the appellant.

J.K. SERGON

J U D G E