



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 165 OF 2001**  
**(From Original Conviction and Sentence in Criminal Case No. 1467 of 2000  
of the Chief Magistrate's Court at Mombasa – A.W. Ngugi – R.M.)**

**KINYUA KITHEKA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

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

The appellant was charged, convicted and sentenced to 5 years imprisonment and 2 strokes together with 3 others. They were charged with the offence of Breaking into a building and Committing a Felony Contrary to Section 306 (9) of the Penal Code.

The appellant who was the 1st accused in the original trial raised 5 grounds in his appeal which all touch on the evidence adduced. In a nutshell he submitted that no direct evidence was adduced implicating him save that PW2 had seen him and his Co-accused the same night carrying a yellow bag but she didn't know what it contained. The only other evidence is that of a Co-accused who is alleged to have implicated him in his cautionary statement.

The brief facts of the case are that PW1, had on the night of 24.4.2000 closed his bar business at around 1.00 p.m. However the next morning at 10.00 a.m. 2 of his workers reported that the said premises had been broken into. He proceeded to the scene and found a T.V., Video, amplifier, Kshs.2,000/= Video Cassettes, beers and electrical wires missing. He reported to the police who called him after a few days to identify a video ad T.V. which had been recovered.

PW2, Esther Waruhiu a dealer in alcoholic drinks says she was in her house where she sales the drinks from when she was woken up by the appellant and 3 others co-accused who wanted to buy alcohol. She served them with the drink and they asked her if she could keep for them a yellow bag carried by the 4th accused but she declined as she didn't know what it contained. However she noted that they left the bag at her neighbour's house and returned to collect it the next day.

The recovered items are said to have been found having been apparently abandoned by the wayside by the people who stole them but no evidence was adduced connecting the appellant with the offence.

The State Counsel did not support the Conviction on grounds that the evidence fell short of proving the Appellant was among the people who stole the items. On my part, I have read the proceedings and note that the charge facing the appellant is one of simply breaking into a building and committing a felony. The particulars point to stealing having taken place, but particulars of stolen items, is not given. I also agree with the State Counsel's Submission that the trial was started by one Magistrate who handled it to the end of the prosecution case when a second Magistrate took over, she never complied with the requirements of Section 207 of the Penal Code.

In the circumstances and taking all the submissions into consideration I find that the evidence adduced was not adequate to arrive at a safe conviction and consequently the appeal is allowed. Conviction quashed and sentence set aside.

**Dated and Delivered at Mombasa this 28th day of March, 2003.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**