



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO.443 OF 2002**

(From Original Conviction and Sentence by the District  
Magistrate's Court at Mombasa in Criminal Case No. 2457 of  
2002 – E.W. King'ori D.M.II)

JOSEPH CHACHA ..... APPELLANT

- VERSUS -

REPUBLIC ..... RESPONDENT

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

The Appellant was charged and Convicted on a charge of Breaking into a building and committing a Felony contrary to Section 306(a) of the Penal Code and Sentenced to 2 years imprisonment and 2 strokes of the cane. He has preferred an appeal against both conviction and sentence on the grounds that evidence as adduced was insufficient to warrant a conviction as the evidence by PW1 as regards the recovery of the cassette was that it was under a stove while that of PW2 was that it was on the table and therefore at variance. From the record it is however clear the two witnesses saw the said cassette at different times of the day and in the opportunity to shift it.

The Appellant submitted that his arrest and subsequently being charged was because he had refused to record a statement with the police concerning the arrest of the first suspect Victor Otieno and the Complainant threatened to teach him a lesson. As for the recovery of the Cassette, he submitted that the same was in possession of PW2 who planted it on him.

The State counsel supported both the Conviction and Sentence. The evidence on record is that PW1, the complainant closed his workshop at around 8.00 p.m. and went to visit his friend the Appellant. He didn't find him home but they met on the way and the Appellant said he was looking for change and they went into a hotel wherein they ordered food and Appellant paid for it. It is PW1's evidence that the Appellant then left him in his house while he went to pay for the food but it is not clear how far the hotel was from Appellant's house or whether the food had been paid for when they bought it and whether they carried the food to Appellant's house. Therefore the evidence of the Appellant having seen the complainant's workshop open and later informed him does not flow. Its not clear whether where they had bought the food was on the pathway to the complainant's workshop. In cross examination the complainant said the Appellant had borrowed the Radio which had been stolen a few weeks before. And that when he found the Cassette under the Appellant's stove, he gave no explanation for the same.

PW2 recounted how the complainant and Appellant on 22.2.02 had gone to report to him as the village security person (Vigilante) that the complainant's workshop was broken into and compact cassettes, Radio Cassette and a Battery were stolen and that Appellant gave a name of a suspect. Then on 24.9.02, the complainant went back to report he had seen one of his Cassettes at the Appellant's house and he arrested him and handed him over to the police.

In his sworn defence the appellant said he met the complainant on 22.9.02 at 7.00 p.m. while the complainant said he closed the workshop at 8.30 p.m. He however denied the cassette was found in his house but planted on him by the complainant for refusing to record a statement against the first suspect Vincent. However the issue of the complainant having threatened the Appellant was not reported to the police or anyone else.

I have considered the evidence on record and note that there are a lot of unfilled gaps such as the location of the complainant's workshop in relation to the Appellant's house and the Hotel they went to buy food from. There is also the issue as to the recovery of the Cassette. In Cross examination by the complainant, it is clear the complainant did ask him why he had the cassette but he got no answer.

I am inclined to agree with the State Counsel that in the absence of a proper explanation as to how and why he came into possession of the Cassette the doctrine of recent possession would apply. It is for this reason and evidence as a whole that I find the conviction was proper.

On the Sentence, however, I note the appellant was a first offender and maximum sentence is 3 years with corporal punishment. I will however reduce the same to 1½ years and community service. The Appeal shall succeed to that extent.

Dated and Delivered at Mombasa this 27th day of August, 2003.

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**