



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO.345 OF 2002**  
**(From Original Conviction and Sentence in Criminal Case No.2683 of 2001 of the Senior Resident Magistrate’s Court at Kwale – L. N. Mbatia, Ms – S.R.M.)**

LAZARO MUSILI MAINGI.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

**CONSOLIDATED WITH CRIMINAL APPEAL NO.346 OF 2002**

AGGREY MANGO KAKAI.....APPELLANT

=V E R S U S=

REPUBLIC.....RESPONDENT

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

The Appellants were charged, tried and convicted of : Count I: breaking in a store and committing a felony c/s 306(a) Penal Code.

Count II: preparation to commit a felony c/s 308(1). They were sentenced to 4 years imprisonment and 3 strokes of the cane on each count and hard labour in count 2.

They have filed identical grounds of appeal namely:-

- (1) That there are several police irregularities in release and retrial of their cases.
- (2) They were not arrested with stolen goods.
- (3) Charge of breaking and committing felony was not proved since the lock was opened with a key.
- (4) That the only person with access is the pool attendant.
- (5) The implements they were carrying were for work not for committing a felony.
- (6) That the presence of head caps with two of them did not mean they were together.
- (7) That conviction was on the evidence of a single witness.

I have perused the prosecution evidence carefully. The facts are straightforward. One Kurt Bawuette was residing in Diani Beach. On the night of 7th/8th November, 2001 his employee, Juma Ayule Parma (PW.2) had locked up the store and had left them on the swimming pool pump and a solartek. On the morning of 8th day he was informed by PW.2 that the swimming pool pump and solartek were missing. He advised that the employee should look around and inquire among the neighbours but if he does not find the items to report to the police.

PW.2 later visited the police station and reported the matter. The police said there were some such items at the Station recovered and he could check if they were the ones. Both PW.1 & PW.2 properly identified the items as belonging to PW.1. On investigation it was found that the store which was fastened with a padlock was not broken open but was opened with a master key.

Going back to the night of 7th/8th November, 2001 policemen PW.3, PW.4 and another Sgt. Ojwang left their Police Station on patrol at about 10 p.m. They met 3 persons, 2 of whom are the Appellants here. They searched them and found them with items specified under the charge-sheet.

One of the suspects was carrying a bag in which several items were found and a swimming pool pump and a solatek. The suspects and the items were taken to Police Station. It is these two items which were identified as the property of PW.1.

The suspects were thereafter taken to court and charged with the two offences. There is no sign of any irregularity in the manner the trial was conducted. The two Appellants were walking together when arrested. They were all carrying some offensive weapon. The third suspect was carrying a bag in which the stolen items were kept. The circumstances of being together walking fast and talking in law tones indicate that these people were together for common purpose. In the bag was found among those other things a master key. The conclusion to be drawn is that these people used a key to open up the complainant's store and to take therefrom the two items stolen. The pool attendant did what he always did, locked up the store, kept the key and left for his house for the night. He came up in the morning to find the items gone. His evidence is clear and credible. Regarding the issue of the caps the Trial Magistrate commented that they were meant for disguise. Her judgment was not based solely on that point.

In the circumstances I find the Trial Magistrate proceeded to convict on proper evidence and the case was proved beyond any reasonable doubt. The sentence of 4 years on two charges to run concurrently is not excessive – both offences are serious offences.

I therefore dismiss the appeal. However, the punishment by corporal strokes is now out-lawed and the same are hereby set aside. The appeal succeeds only to that extent.

**Dated this 16th day of December, 2003.**

**JOYCE KHAMINWA**

**J U D G E**

**Read in open Court in presence of: Appellants**

**State Counsel – Mr. Gumo.**

**JOYCE KHAMINWA**

**J U D G E**

**16/12/2003**