



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.216 OF 2000

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.3026 of 1999 of the Chief Magistrate's Court at Mombasa)

NAVAS MWAMBISHI APPELLANT

Versus

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with kiosk breaking contrary to Section 306(a) Penal Code and of stealing contrary to Section 279(b) of the same Act. Later his case was consolidated with another 3026 of 1999. The particulars are that on 19/9/1999 he broke into a kiosk of Saitoti Ole Charles and stole cash Shs.28,000/- and other items. There was an alternative charge of handling stolen goods. This appeal is filed by NAVAS MAMBISH one of the accused.

The prosecution evidence is that one Saitoti Ole Charles a hawker in Magogoni Mombasa had a kiosk where he was carrying on business the kind the hawkers engage in selling small items. On 18.9.99 he traveled from Kajiado to Mombasa where he had left his kiosk at the care of a friend. He came and found his kiosk was broken into. Several items (stock) he had left inside was stolen. He suspected one Yusuf and another Daniel who reside in Mwandoni. Some items were found. Mohamed Ole Nivas was found having a radio speaker and bag in his house.

PW.2 who was left in charge of kiosk when PW.1 traveled to Kajiado he went to kiosk to open at 05 a.m. on 18/9/99. He found it open and the key was missing. He said it was open with a screw. This is also breaking into, and some items missing.

On 21/9/899 some things were recovered by PW.3 PC Anthony Wanjau in the house of first accused Yusuf. Some items were also found in the house of this appellant.

PW.5 visited the kiosk and saw that it was broken into – the padlock was cut.

To prove that those things were stolen the appellant did not lay claim to them but said they agreed that they be released to the owner – the complainant. When the appellant was called upon to defend himself he only talked of how he was arrested by police. This was not a defence to the matters complained of.

Considering the evidence of prosecution I am convinced that the appellant was found with some stolen items belonging to the complainant. It is to be concluded therefore that he was either the thief or the receiver.

There was no evidence that he broke into the kiosk. The items involved are small items which can pass hands very fast. Furthermore the trial magistrate did not convict under Sec.279(b). In the circumstances the conviction is on second count under Section 322(2) of Penal Code. I therefore confirm the conviction.

On the issue of sentence I consider in the circumstances imprisonment of 4 years to be excessive and harsh. This is a petty offence involving small items. In my view as the accused is a first offender will benefit by punishment under Community Service Act. I therefore set aside the imprisonment sentence of 4 years and substitute one for 2 ½ years to be served under Community Service Act.

Dated at Mombasa this 17th Day of July, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE