



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

CRIMINAL APPEAL NO.466 OF 2001

(From Original Conviction and Sentence in Criminal Case No.2019 of 2001 of the Resident Magistrate's Court at Mombasa – K. Muneeni, Esq., R.M.)

MOHAMMED ADALA MISOLO.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was charged with the offences of Burglary, contrary to Section 304(2) of the Penal Code and Stealing in a dwelling house contrary to S.279(b) of the Penal Code. The second count was Preparation to Commit a Felony contrary to Section 308(1) of the Penal Code. He was convicted on all counts and sentenced to 5 years in prison on Count I together with 6 strokes of the cane and also he would serve 6 years in jail with 6 strokes of the cane on the 2nd Count under S.279(b). On the main 2nd Count of preparing to commit a felony, he was sentenced to 4 years in jail with 2 strokes of the cane. The sentences were to run concurrently. He appealed against conviction and sentence.

When the Appellant started to argue his appeals, the State Counsel indicated he does not support the convictions and he gave his reasons for it.

I have considered the evidence upon which the trial Magistrate convicted the Appellant. I have also considered all the evidence on the record. I am of the view and I so hold, that the conviction was based upon the evidence of the weakest kind and cannot be left to stand.

The only evidence linking the appellant to the crimes is a torch which PW.1, the complainant, purported to identify as hers. She failed to identify the torch during the adducing of her main evidence. The court had to recall her and PW.3 later to purposely come and identify the torch. And even after such recalling PW.1 and PW.3 did not do a good job of it. The identification of the torch ended being poor and unreliable. It is also my view that even had the witnesses, at that stage, have properly identified the torch, the evidence would have remained upon the record as deliberately created by the prosecution, with the aid of the court, to make a case against the Appellant. The State Counsel took a proper and commendable course. The court agrees with his stand.

The upshot is that there was no independent reliable evidence upon which the Appellant would be convicted in respect to all the counts. The appeal must therefore succeed in respect to all the counts. The convictions are quashed. The sentences are set aside.

The Appellant, unless lawfully held in prison, is hereby ordered released forthwith.

It is so ordered. Dated and delivered at Mombasa this 1st day of July, 2002.

D. A. ONYANCHA

JUDGE