REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.173 OF 2001

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.1467 of 2000 of the Chief Magistrate's Court at Mombasa – A. Ngugi, RM)

JAMES MURIUNGA alias NJENGA ……. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

JUDGMENT

The Appellant, James Muriunga alias Njenga was together with three others charged with the offence of Breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code. The particulars of the same charge were that on 25th day of April 2000 at about 3.00 a.m. at Bombolulu village in Mombasa District within Coast Province they jointly with others not before court, broke and entered a building namely a Bar of Alexia Daniel Mbuti, and committed a felony namely stealing. After full hearing, they were convicted and each was sentenced to serve a term of 5 years in prison plus 2 strokes of the cane. He appealed against conviction and sentence but on the hearing of his appeal he abandoned the appeal against conviction and proceeded with the appeal against sentence only. The learned State Counsel, Mr. Ogoti, did not support conviction and sentence on grounds that the trial of the entire case started before G. Katasi R.M. who however went on transfer after hearing the Prosecutions case only and after putting all the accused to their defence. The hearing then proceeded before A. Ngugi, RM who unfortunately did not comply with the requirements of Section 200(3) of the Criminal Procedure Act and thus failed to give the accused persons opportunity to have witnesses recalled if they so wanted.

I have perused the proceedings in the subordinate court. In my mind that point raised by Mr. Ogoti is valid. Further I do also note that the charge sheet does not state the particulars of stealing allegedly committed by the Appellant. All it says is that they broke and entered a building namely a bar of Alexis Daniel Mbuti and committed therein a felony namely stealing. It did not state what was stolen neither did it give the value of what was stolen. A charge sheet needs to give such particulars of the offence as would enable the accused person to know what specific charges are preferred against him so as to enable him adequately prepare himself. Mere allegation that an accused broke and entered a building and committed a felony therein namely stealing is not specific as none can properly prepare his defence without knowing specifically what he is alleged to have stolen (if it is case of Breaking into a building and committing a felony therein).

I thus agree with the learned State Counsel and although in his observation of non-compliance with Section 200(3) only, this appeal should be allowed, it is allowed on further grounds that the charge sheet was not proper.

Further and even more important as far as this particular Appellant is concerned, what evidence is there against him? There are as far as I can see two pieces of evidence. The evidence of PW.2 who said that Accused 1, 2, and 3 i.e. Kinyua, Mugo and Njenga went to her bar at 1.00 a.m. on 24th April 2000 and that Njenga was carrying a yellow nylon paper bag which the witness identified as MFI.5. Njenga

was in Court accused No.4 and not accused 3. The witness never saw what was in that paper bag. PW.3 never gave any evidence against the Appellant. He recovered the allegedly stolen video but as to who actually threw it down and ran away the evidence was no more than hearsay and only covered the first three accused and not this Appellant who was accused No.4. He said as follows concerning the video allegedly recovered:

> *"At 8.00 p.m. I arrested 3 suspects. The video was recovered. It was identified by PW.1. It was found in Bombolulu on 25. 4.2000 at night. They said all 3 suspects threw it down and ran away. This is the video S/No.156563. ------ After investigations, 1 st accused led us to the houses of accused 2 and accused 3. The video was in a yellow nylon bag, MFI.4. I later charged them."*

Thus so far there is no evidence that Accused 4 who is now the Appellant is the one who dropped the video as no person who told PW.3 the story as to who dropped the video was called to give evidence. The next piece of evidence is in the alleged Inquiry Statement of acused2. That statement, read together with answers in cross examination to Accused 2's questions to PW.4 (wrongly recorded at PW.3 in the proceedings) and with Accused 2's defence, was clearly retracted. He clearly says he was beaten by the police. Further that statement was unsworn and was a statement of a co-accused. It could not be taken as strong evidence against this Appellant. See the case of ***Anyangu vs. Republic (1968) EA 239.***

It is then clear to me that as far as this Appellant is concerned, apart from the technical error made by the second trial magistrate in failure to comply with Section 200(3) of the Criminal Procedure Act, and the defective charge sheet, there was not in law proper evidence to convict him. He has served now one year three months imprisonment and I do not see the need to order a retrial in his case as in any event no acceptable evidence in law was adduced against him to validify any further hearing of this case.

Appeal allowed, conviction quashed and sentence set aside. He is released and set free forthwith unless otherwise legally held. Judgment accordingly.

Dated and Delivered at Mombasa this 22nd Day of August, 2002.

J.W. ONYANGO OTIENO

JUDGE