



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 238 OF 2001**

(From Original Conviction and Sentence in Criminal Case No. 93 of 2001 of  
the Resident Magistrate’s Court at Mombasa – R. Ndubi Esq., R.M.)

ROBERT CHEGE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**JUDGEMENT**

The appellant was charged and convicted for the offence of breaking and stealing contrary to section 306 (a) of the Penal Code and sentenced to serve 2 years imprisonment. He appealed against both conviction and sentence and raised 6 grounds which he argued together.

The facts of the case according to the evidence are that, on the 26th February 2002 Martin Maina, PW.2 closed his uncles kiosk situated at Shimanzi for business at around 7.00 p.m. and went to his house. Not long after a watchman guarding a nearby property went to his house and informed him that someone had broken into the kiosk. He went to the kiosk and found a window broken and cash amounting to Kshs.3,000/= and assorted shop goods stolen. Since the owner of the kiosk Gabriel Maina Nderitu PW.1 was away they waited until his return on 29.2.2000 when they went and reported the matter to the police. He reported that he had received information from PW.3, Francis Munyoke that he PW.3 and another watchman had seen the appellant whom he knew before going to the back of the kiosk. PW.3 and the other watchman followed them and on reaching they found the kiosk had been broken into and saw the appellant run away. He said there was enough security light. In cross examination by the appellant, PW.3 was firm that It was the appellant he had seen going to the back of the kiosk and tried to apprehend him together with members of the public who were in nearby kiosk but he ran away. PW3, told the police that he used to see the appellant and knew him by his nickname of “Tonyi”. The appellant was apprehended on 28.12.2000 which is 10 months later in connection with another offence and he was identified by the witness.

Appellant gave an unsworn defence and said he was arrested while constructing another kiosk near that of PW1.

In his grounds of appeal, he attacks identification in that, it was not shown that there was sufficient light to warrant positive identification. The evidence by PW3 was that he was guarding a yard near the kiosk. He then saw a person go round the kiosk but the distance is not given. By the time he got to the broken widow the person had run away. On the security lights he says “There was security lights” but does not describe the intensity. The police received a report that it was the appellant who broke into the kiosk. The Trial court did not caution itself on the issue of positive identification and the intensity of the lights and in the absence of any other evidence to show that the person PW3 saw that night cannot be any other than the appellant then it is difficult to conclude he was positively identified. Again on his arrest, no identification parade was carried out and what we see is dock identification which is not sufficient to sustain a conviction.

The other ground raised is that the evidence of PW3 lacked any corroboration. I have examined the evidence on record and note that the appellant was not found with any of the stolen items and there is no other evidence to link him with the theft. The ground that the court failed to take into account the existing grudge between PW1 and appellant cannot be entertained at this point as it was never put to PW1 at the

trial. The State Counsel supported both conviction and sentence.

However, considering the evidence in total, although there is a chance Appellant was involved, but as shown, there was no other independent evidence to corroborate that of PW3 and further that identification was not shown to be beyond any doubt. In the circumstances the appeal is allowed. The appellant is to be set free unless held for other lawful reasons.

Dated and Delivered at Mombasa this 20th day of September, 2002.

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**