REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 223 OF 2001

(From the Judgement of A. Ngugi – Resident Magistrate Mombasa in Criminal Case No. 1557 OF 2001)

ROY MWITI ………………………………………………… APPELLANT

=VERSUS=

REPUBLIC …………………………………………….. RESPONDENT

JUDGEMENT OF COURT

The Appellant was charged with the offence of kiosk breaking and committing a felony therein contrary to S. 306 (a) of the Penal Code. He pleaded guilty and was convicted and sentenced to 4 years imprisonment with 3 strokes of the cane. He appeals on sentence only.

The facts of the case are that on 6.5.2001 at 7.00 pm the complainant Caroline Atieno securely locked her kiosk at Mbaraki in Mombasa and went home. When she woke up the next day she found that her kiosk had been broken into in the night before and one container of ground nuts and her 15/= all valued Kshs. 85/= had been stolen. She got information from Mombasa Central Police Station that the stolen property was at the police station and that the appellant had been arrested by the police in the act of stealing.

The appellant was then charged with kiosk breaking and stealing there from contrary to S. 306 (a) of the Penal Code on 10.5.2001. The record shows that the plea was first taken by F. N. Muchemi, Chief Magistrate. The appellant was unrepresented by counsel. When the charge as framed was read by the Magistrate the appellant replied as follows:-

“It is true”.

The Chief Magistrate then sent the case to Court No. 10 for facts to be recorded and be put to the accused to confirm he understood the charge and whether he accepts or admits the facts behind the charge before the final plea of guilty or not guilty would be entered against or for the accused. The record confirms that on the same day the appellant appeared before A. Ngugi – Resident Magistrate. The Prosecutor, Inspector of Police Ouma then gave the following facts to the court in the presence and hearing of the accused/appellant:-

“Facts are that on 6.5.2001 at 7 p.m. the complainant securely locked her kiosk and went

home. When she woke up the next day she found her kiosk had been broken into and goods as per charge sheet stolen. She was informed that on same date at 12.00 p.m. the Police on night -out spot ted someone breaking -in and same had been arrested. The complainant went to the Station. She was informed of the same. She identified her property. After investigations accused was charged."

When these above facts were translated into Swahili and put to the appellant, he said:-

"Facts are correct"

The court then stated:-

"Accused is convicted in his own plea of guilty."

And the learned Magistrate proceeded to hear mitigation from the appellant after the Prosecutor indicated that he was a first offender. The appellant pleaded for leniency whereupon the court stated:-

"Mitigation considered – the accused is sentenced to serve 4 years and 3 strokes of the cane."

Before this court the appellant once more prayed for leniency and pointed out that the sentence was harsh and excessive.

Miss Kwena for the State invited us to examine the record of the lower court. She stated that although the appeal was on sentence only, she was of the opinion that the plea was not properly taken. She argued that the record does not indicate that the charge was read and explained to the appellant and the record did not show that the appellant really pleaded.She pointed out that although the facts quoted above were indeed given ut and put to the appellant, the plea could not be complete unless it had been read and explained to him. Since the record, according to her, did not confirm that the charge had been properly put to the appellant and explained, the response coming from the appellant could not make an unequivocal plea of guilty. She could not support the conviction therefore and left it to this court to quash it and decide whether a retrial would be ordered or the appellant who had been serving sentence since 10.5.2001 should be set free.

I have carefully examined the lower court record. I am satisfied that the appellant first appeared before the Chief Magistrate F.N. Muchemi who having stated the substance of the charge and every element thereof to the accused/appellant, the latter stated:- *"It is true"*. The Chief Magistrate then forwarded the file to the Resident Magistrate A. Ngugi to record facts and put them to the accused before entering the full plea. This the Resident Magistrate A. Ngugi did immediately after and the appellant still admitted the facts whereupon A. Ngugi recorded a conviction on appellant's guilt and proceeded to sentence him.

It is my view that the plea as taken was complete and Miss Kwena must have taken the course she took because her records – the typed record, was incomplete. The original record confirms that F.N. Muchemi, Chief Magistrate properly read and explained the charge as it was drawn which was not the best possible way of drafting but which was nevertheless complete as all the elements of the offence charged were included. The Magistrate, at that stage recorded in the appellant's own words his response to the charge which was read to him. There is no indication anywhere on the said record that the appellant did not hear or understand the charge or any element or some elements of the charge. When the facts were recorded from the Prosecutor later before A. Ngugi, the facts were apparently put to the appellant who again answered that the facts were correct. It is only then the conviction on appellant's plea of guilty was entered. This was rightly so.

Under these circumstances this court is unable to accede to the course taken by Miss Kwena and hereby confirms the conviction.

This court, however, frowns at the method used by the Chief Magistrate in taking this particular

plea. Although the method used here of splitting the taking of a plea between two courts may not have resulted into any prejudice against the appellant, nevertheless such a method is not without risks to the accused and should be avoided. It could not have taken the Chief Magistrate more than a few minutes to complete the taking of the said plea and it was clearly unnecessary to fling the file to another court. This court suggests that future taking of any given plea should be done by one magistrate to its logical end to avoid risks of the accused being prejudiced.

Turning to the sentence in in this appeal, the learned Resident Magistrate gave the appellant 4 years and 3 srokes of the cane. The appellant was a first offender. He pleaded guilty at the onset thus saving the court's time and mitigating on the costs the State would have spent on the trial that would have followed if the appellant had not pleaded guilty. The value of the goods stolen from the kiosk broken into was only Kshs.85/- which was in any case salvaged by the Police. All these factors together with what the appellant said before this court in further mitigation, that he had just married and has only one child with a new wife, this court is of the view that the convicting Magistrate should have considered a lesser sentence.

It is the view of this court that the ends of justice will be served with lessened term of imprisonment of seven months together with 3 strokes of the cane. The term to run from the date of conviction i.e. 10.5.2001. It is so ordered.

Dated and Delivered at Mombasa this 22nd day of November, 2001.

D. A. ONYANCHA

J U D G E