

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 3 OF 2019

BETWEEN

EZEKIEL MOKUA OBACHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. K. Mutai, RM dated 19th October 2018 at the Magistrate's Court at Ogembo in Criminal Case No. 1679 of 2018)

JUDGMENT

1. The appellant **EZEKIEL MOKUA OBACHI** and his co-accused were charged and convicted of the offence of burglary and stealing contrary to **section 304(2)** as read with **section 279(b)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence were that on 11th July 2018 at Magenche Sub-location at Gucha South Sub-County within Kisii County they jointly broke and entered the Matiero SDA Church with intent to steal therein and did steal therefrom one amplifier, five white table cloths and one microphone valued at Kshs. 24,450/-, the property of the said church.

2. The appellant was sentenced to 5 years' imprisonment and has now lodged this appeal. Counsel for the respondent readily conceded the appeal on the ground that there was no evidence connecting the appellant to the offence. I also note that the appellant's co-accused, **CHARLES MAJUMA OYONDI** lodged an appeal against the same conviction and sentence in **Kisii Criminal Appeal No. 7 of 2019**. I allowed that appeal by a judgment dated 27th February 2019 and after reviewing the evidence, I concluded as follows:

*[11] The circumstances in which PW 4 found the appellant and his co-accused was that he was under arrest in a house. It is not clear under what circumstances he was arrested and indeed whose house he was arrested. Was the appellant found with the items elsewhere then arrested. PW 4's role was to go and arrest the appellant. It is my finding that the prosecution did not prove that the appellant was in actual possession of the stolen property or even constructive possession as contemplated in **section 4** of the **Penal Code**. My conclusion is fortified by the fact that on 15th July 2018, the Commanding Officer received a call informing him that the amplifier and a battery had been found in the house where they arrested the appellant. This begs the question, how did the police fail to recover the amplifier and battery on the day they had gone to arrest the appellant and his co-accused. Could the items have been delivered from elsewhere to the house to implicate the appellant? To my mind, these issues raise reasonable doubt as to the appellant's complicity.*

3. I therefore allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held on a separate warrant.

DATED and DELIVERED at KISII this 3rd day of APRIL 2019

D.S MAJANJA

JUDGE

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.