



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CRIMINAL APPEAL NO. 46 OF 2016**

**BERNARD KIOKO MUSYOKA ALIAS KAJANJA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in Mutomo*

*Principal Magistrate's Court Criminal Case No. 176 of 2016*

*by Hon. S. K. Ngii (RM) on 12/08/16)*

**J U D G M E N T**

1. **Bernard Kioko Musyoka alias Kajanja**, the Appellant, was charged as follows:

**Count 1 – Breaking into a Building and Committing a Felony** contrary to **Section 306(a)** of the **Penal Code**. Particulars of the offence were that on the night of 5<sup>th</sup> and 6<sup>th</sup> May, 2016 at unknown time at **Syamati Village, Kanziko Location in Ikutha Sub-County in Mutomo County** with intent to steal jointly with others not before Court broke and entered **Syamatani Pub** and did steal from therein 10 bottles of Tusker beer, 7 bottles Allsopps beer, one carton of Kenya Kane beer, calculator and Keg Pump all valued at **Kshs. 32,950/=** the property of **Mutungu Katili**.

In the alternative he was charged with the offence of **Handling Stolen Goods** contrary to **Section 322(1)** as read with **Section 322(2)** of the **Penal Code**. Particulars of the offence were that on the 11<sup>th</sup> May, 2016 at 5.00 p.m. at **Kyatune Trading Centre, Kyatune Location in Mutomo Sub-County within Kitui County** otherwise than in the course of stealing dishonestly retained one calculator the property of **Mutungu Kitili** knowing or having reason to believe it to be stolen or unlawfully obtained.

**Count 2 – Breaking into a Building and Committing a Felony** contrary to **Section 306(a)** of the **Penal Code**. Particulars of the offence were that on the night of 5<sup>th</sup> and 6<sup>th</sup> May, 2016 at unknown time at **Syamati Village, Kanziko Location in Ikutha Sub-County in Mutomo County** with intent to steal jointly with others not before Court broke and entered the shop of **Mwende Nzuva** and did steal from therein 8 pieces of Golden Lotion, 12 pieces of Minara Coconut Oil, 12 pieces of Body Lux, Baby Powder, 3 pieces of Star Rose Lotion, 3 pieces of Utensil Cleaner, 4 pieces of Motorcycle Tubes, 6 pieces of Shaving Machines, 12 pieces of Tea Leaves, 10 packets of Match Box, 23 pieces of Colgate, 23 pieces of Puncture Stickers and 124 Pens all valued at **Kshs. 7,535/=** the property of **Mwende Nzuva**.

In the alternative he was charged with the offence of **Handling Stolen Goods** contrary to **Section 322(1)** as read with **Section 322(2)** of the **Penal Code**. Particulars of the offence were that on 11<sup>th</sup> May, 2016 at 5.00 p.m. at **Kyatune Trading Centre, Kyatune Location in Mutomo Sub-County within Kitui County** otherwise than in the course of stealing dishonestly retained 7 pieces of Golden Lotion, 8 pieces of Minara Coconut Oil, 8 pieces of Body Lux, Baby Powder, 3 pieces of Star Rose Lotion, 3 pieces of Utensil Cleaner, 4 pieces of Motorcycle Tubes, 6 pieces of Shaving Machines, 8 pieces of Tea Leaves, 5 packets of Match Box, 23 pieces of Colgate, 23 pieces of Puncture Stickers and 124 Pens all property of **Mwende Nzuva** knowing or having reason to believe them to be stolen or unlawfully obtained.

**Count 3 - Breaking into a Building and Committing a Felony** contrary to **Section 306(a)** of the **Penal Code**. Particulars of the offence were that on the night of 5<sup>th</sup> and 6<sup>th</sup> May, 2016 at unknown time at **Syamati Village, Kanziko Location in Ikutha Sub-County in Mutomo County** with intent to steal jointly with others not before Court broke and entered the shop of **Mary Mbisu** and did steal from therein 10 pieces of Tissue Paper, 12 pairs of Dry Cells, 3 pieces of Weigh Scale Stones, 5 packets of Match Box, 48 pieces of Exercise Books, 12 pieces of Tooth Brush, 2 pieces of Steel Wire, 16 Pens, 2 boxes of Razor Blades, 2 dozens of Paper

Bags, one packet of Toffee Sweets, 18 Pencils, 12 pieces of Scouring Pads, 12 pieces of Sanitary Pads and one packet of Parking Paper Bags all valued at **Kshs. ....** the property of **Mary Mbisu**.

In the alternative he was charged with the offence of **Handling Stolen Goods** contrary to **Section 322(1)** as read with **Section 322(2)** of the **Penal Code**. Particulars of the offence were that on **11<sup>th</sup> May, 2016** at **5.00 p.m.** at **Kyatune Trading Centre, Kyatune Location** in **Mutomo Sub-County** within **Kitui County** otherwise than in the course of stealing dishonestly handled 7 pieces of Tissue Paper, 10 pairs of Dry Cells, 5 packets of Match Box, 27 Exercise Books, 2 pieces of Steel Wire, 2 dozens of Paper Bags, 18 Pencils, 10 pieces of Scouring Pads, 7 pieces of Sanitary Pads and one packet of Parking Paper Bags the property of **Mary Mbisu** knowing or having reason to believe them to be stolen or unlawfully obtained.

2. He was taken through full trial, found guilty, convicted on all three Counts and sentenced to **three (3) years imprisonment** on each Count. The sentences were to run concurrently.
3. Aggrieved, he mitigates on sentence. He urged that he has served two (2) years imprisonment therefore sought to be released.
4. The State/Respondent through learned Counsel **Mr. Mamba** argued that there was no proof that the Appellant has been rehabilitated. He called for the dismissal of the Appeal.
5. Following the Application this Court sought a Probation Officer's Report. It was established that the Appellant does not have any professional and technical training and while in prison there has been some intervention as he is undergoing rehabilitation and training which will enable him to acquire technical skills. The Appellant confirmed that he is learning carpentry.
6. In the premises, this is not a suitable case of being placed on a non-custodial sentence.
7. In the result, the Appeal fails and is dismissed.
8. It is so ordered.

**Dated, Signed and Delivered at Kitui this 15<sup>th</sup> day of May, 2019.**

**L. N. MUTENDE**

**JUDGE**