



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HC MISC APPL NO. 187 OF 2017**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**MUSYOKI NOAH NDOLA.....ACCUSED**

**JUDGEMENT**

**INTRODUCTION**

1. The Accused/Appellant was along with others charged with offence of shop breaking and committing a felony contrary to Section 306(a) Penal Code.
2. Particulars being that on 21<sup>st</sup> and 22<sup>nd</sup> July, 2014 at Uvete Market Kitaingo Sub-location, Kitaingo Location, in Mukaa Sub-county within Makueni County jointly with others not before court broke into a shop of Elizabeth Muthoki Ndeki and committed a felony namely stealing and therein stole assorted goods as per list valued Kshs.50,000/= the property of Elizabeth Muthoki Ndeti.
3. **Count II: SHOP BREAKING AND COMMITTING A FELONY CONTRARY TO SECTION 306 (a) OF THE PENAL CODE.**
  1. Immaculate Kamene Mwangangi, 2. Musyoki Noah Ndola, 3. Fredrick Ndei Mathias: On the night of 23<sup>rd</sup> and 24<sup>th</sup> of August, 2014 at Kithithini village, Wautu Location in Kilungu Sub-county within Makueni County, jointly with others not before court broke into a shop of Beatrice Mwendu Mutuku and committed a felony namely stealing and therein stole assorted shop goods as per attached list valued at Kshs.60,000/= the property of the said Beatrice Mwendu Mutuku.
4. **Alternative charge is HANDLING STOLEN GOODS CONTRARY TO SECTION 322(1) OF THE PENAL CODE.** Immaculate Kamene Mwangangi on the 2<sup>nd</sup> day of October 2014 at Kativoi shop, Kasikeu Market, Kasikeu Location, Mukaa Sub-county within Makueni County, otherwise than in the course of stealing jointly with another not before court dishonestly received one manila bag containing assorted dresses, under wears and hair pieces having reasons to believe them to be stolen goods or unlawfully obtained.
5. The Appellant pleaded not guilty and the case proceeded to full trial whereof the Appellant was convicted and sentenced to serve: Count I, five years and Count II, five years imprisonment.
6. The parties agreed to canvass the appeal via written submissions. The Appellant filed written submissions and served but the Respondent opted to oral submissions.
7. The Respondent conceded appeal and justified concession on the basis of noted irregularities in handling of the case and the lapse in the prosecution case.
8. The Appellant was generally challenging the insufficiency of the prosecution case to warrant conviction as he alleged also the prosecution evidence was contradictory and un- corroborated.
9. The duty of a first appellate Court as aptly put in the case of **OKENO V. REPUBLIC (1972) E.A. 32** is to scrutinize the evidence on record, make it's own findings and draw it's own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.
10. The prosecution called four (4) witnesses.
11. PW1 testified that on 22/07/2014 at 6.00 a.m., she received call informing her and her husband that the generator was outside the shop. She went to the shop and found same generator outside shop. When she entered the shop, she found the following items missing: - hair drier,

blow drier, assorted clothes and other items.

12. She went to Uvete Police Post to report but she was referred to Kilome Police Station where she made the report on 02/10/2014. Two (2) accused persons were arrested and she got the report to that effect.

13. The two were brought at Uvete chief's office and officers from Kilome came.

14. The two confessed they had stolen in her shop and led the police to the shop in Kasikeu market where they had put stolen goods.

15. The shop belonged to Kativoi. They were allowed in by the lady who was selling therein. They went to the lady's house and found hair piece, pony tails, gunny bag and other items.

16. She said she had sold most of the items. Her name was Immaculate Kamene. PW1 identified the items.

17. On cross examination by the Appellant, PW1 stated she made report on 22/07/2014 and she never gave suspect name. She said Appellant led her and others to the shop where the items were.

18. PW2 Beatrice Mwendu Mutuku stated that she was also used to sell assorted clothes. On 24/08/2014 one Musembi Waita called her and told her that the back door of her shop had been broken and padlock cut. She went and entered in the shop and found several items missing.

19. These are such as female clothes, 72 pairs of plastic and rubber shoes, children underpants, female pants, socks etc. She called and informed area Chief Robert. He came to the shop and saw what had happened. After several days Angeline Kituku called her to go to Uvete where some people had been arrested by the community.

20. She saw Fredrick Ndei, Musyoki and Katungu at Chief's camp. Ndei was telling people how he came to the shop and took her property and he knew where same was. He said the same items were at Kasikeu in Kativoi's shop. They went to Kilome Police to make report and then to Kativoi shop which was open.

21. Ndei gave direction to Kativoi's shop in Kasikeu. In the shop, children's underpants were displayed on the counter. She (PW2) said the same items were hers. The lady at the shop was told to surrender the items which were not hers.

22. She (namely Immaculate Kamene) placed same items aside and said they were not hers such as underpants and shoes. She said they had been given to her by Ndei. Ndei told her to get PW2 property but she said she had sold some. Accused 2 and PW1 plus her (PW1) husband were present among other people.

23. On cross examination by the Appellant, she said police can confirm that her property was stolen as Fredrick Ndei directed them to where items were.

24. On cross examination by Fredrick Ndei (Accused 3), she said she made report after arrest of accused person and that police had gone to her shop. The 3<sup>rd</sup> accused Ndei led them to where items were. Ndei told them that the shoes he was wearing was from her shop.

25. PW3 Corporal Terer of Mtito Andei SGR stated that in October he was attached to Kilome Police Station. On 02/10/2014 at 3.00 p.m. while with A.P Maina of Uvete Police Post, Maina got a call saying that some people had been arrested by the community and mob wanted to lynch them at Uvete.

26. They went to the scene with other officers and found the suspects at chief's camp. Two ladies were complaining of loss of their items. These were PW1 and PW2.

27. Accused 3 Fredrick Ndei had stated where the stolen items were. They took them to Kilome Police station and found PW1 had made a report. On 22/07/2014, PW2 said she had made report to the chief. They interrogated the suspects who told them that the items were at Kasikeu market.

28. Fredrick Ndei told officers the stolen goods were at Kasikeu. His statement stating above had been recorded and produced in court. Same was Exhibit-6.

29. Accused 3 said accused 2 took items to him and property was at Kativoi's shop Kasikeu. Fredrick Ndei led officers to the same shop. They found a lady therein.

30. The PW1 and PW2 identified their items. Identified items were produced as exhibits. The accused persons were booked in and subsequently charged in court.

31. On cross examination by the Appellant PW3 stated that it was the members of public who told him Appellant was a suspect in breaking shops and houses.

32. Nothing was recovered from him. 2<sup>nd</sup> Accused/Appellant was mentioned in Accused 3 statement that he took items to Accused 3.

33. On cross examination by Accused 3, PW3 said accused 3 took them to the Kativoi's shop where stolen items were.

34. PW4 IP Daniel Kituku Muhuhi of crime Kilome police station was the investigating officer. He recorded statements of the witnesses and arrested accused persons.
35. The accused had been arrested by members of public for the alleged offence. Items were recovered in Kasikeu courtesy of Accused 3 who led people and officers to shop stolen items had been taken.
36. On cross examination by Accused 2/Appellant, he stated that he did not go where accused 2 was arrested. The prosecution closed the case at this stage.
37. The Accused No. 3 moved High Court on application to transfer his case from the trial court thus only accused 2 proceeded as he insisted on same proceeding.
38. The court found he had a case to answer and he was put on his defence. He gave unsworn statement and did not call any witnesses.
39. In his defence, he narrated how on 02/01/2014 people went to his home and arrested him. His home was searched and nothing was recovered.
40. He was taken to chief's camp at Upete. He was interrogated. Other suspects were arrested. One of them confessed stealing.
41. They were taken to Kilome police station. Then to a shop at Kasikeu. At the shop, a lady therein pointed at the suspect who was taking items to the shop. The lady in the shop said that her husband and Ndei Accused 3 supply stolen items. She was arrested. He was then charged in court.
42. The Appellant submits that there was no corroboration and that none of the witnesses saw him break shop. Secondly he was not caught with any stolen items.
43. The prosecution never proved that he committed offence under section 306 (a) of the Penal Code.
44. PW1 allegation that Appellant led them to shops where stolen items were found was uncorroborated by any other witness.
45. PW2 and PW3 talked of Accused 3 leading them to the shop where items were recovered.

**ISSUES, ANALYSIS AND DETERMINATION**

46. The accused was convicted on Count 1 and 2 of the charge sheet which were offences under Section 306 (a) of the Penal Code which is to the effect that:-

**Any person who breaks and enters.....a shop.....with intent to commit a felony therein is guilty of a felony and is liable to imprisonment for 5 years.**

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47. The entire prosecution case does not point as to who broke the PW1 and PW2 shops on the material night. Thus the issue shifted to recovery of the stolen items.
48. PW1 says Accused 2/Appellant led to recovery of items at Kativoi's shop in Kasikeu which evidence contradicts PW2 and PW3 who say it was Accused 3 Fredrick Ndei who led the officers and members of public to Kativoi's shop.
49. The attendant of the shop is said to have informed officers and members of public that it was Accused 3 and her husband who used to supply the stolen items in the shop. She was not called to testify. She never mentioned Accused 2/Appellant. On arrest of Appellant, nothing was recovered from him.
50. The entire prosecution case does not implicate the Appellant and as prosecution conceded the entire prosecution case as against Appellant leaves a yawning gap and massive doubt to warrant a conviction.
51. Thus the court holds that the appeal has merit and makes the following orders:-

- 1) The conviction is quashed and evidence set aside.**
- 2) The Appellant is to be set at liberty unless otherwise legally held.**

**SIGNED, DELIVERED THIS 5<sup>TH</sup> DAY JUNE OF 2018, IN OPEN COURT.**

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**C. KARIUKI**

**JUDGE**