



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 150 OF 2013**

*(Being an appeal from the judgment in Criminal Case No. 1339 of 2012 of the Chief Magistrate's Court at Machakos, P. M. Mugure – R. M.)*

WAMBUA MBITHI ..... APPELLANT

**VERSUS**

REPUBLIC ..... RESPONDENT

**JUDGMENT**

1. The Appellant, Wambua Mbithi was charged as follows:

Count I – Breaking into a building and committing a felony contrary to Section 306(A) of the Penal Code.

The particulars of the offence are that on the 7<sup>th</sup> day of September 2012 at Eastleigh Estate, Machakos Town within Machakos County in Eastern Province, broke and entered a building namely kitchen of Anna Kukui Peter and committed therein a felony namely theft and did steal one gas cylinder valued at Ksh 8,000/= the property of the said Anna Kukui Peter.

Count II – Stealing contrary to Section 275 of the Penal Code.

The particulars of the offence are that on the 7<sup>th</sup> day of September 2012 at Eastleigh Estate, Machakos town within Machakos County in Eastern Province, stole 5 trousers, 6 shirts, degree certificate, diploma certificates, KCSE certificates, KCPE certificates and a car radio all valued at Kshs 29,000/= the property of Benard Musau Mailu.

2. In the alternative to Count II the Appellant was charged with the offence of handling stolen goods contrary to Section 322(2) of the Penal Code.

The particulars of offence are that on the 7<sup>th</sup> day of September 2012 at Eastleigh Estate, Machakos Town within Machakos County in Eastern Province, otherwise than in the course of stealing dishonestly received or retained one shirt knowing or having reasons to believe it to be stolen property or unlawfully obtained.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.

4. The case for the prosecution was that on 7<sup>th</sup> September, 2012 at about 1.30 a.m., the complainant in Count I, PW2 Anna Mukui Peter was in the house sleeping. She then heard some noise in the kitchen. A voice from the many people who had entered the house threatened her telling her to go back to sleep or be killed. The intruders left with the gas cylinder.

5. The complainant (PW2) alerted the neighbours among them PW1 Bernard Musau Mailu the complainant in Count II and PW3 Michael Mutunga Nzuma. The neighbours gave chase and caught up with the Appellant. The Appellant was arrested and taken back to the scene. It was then that the complainant in Count II (PW1) identified the shirt that the Appellant was wearing as the one that had been stolen from his motor vehicle the previous week on 30<sup>th</sup> August, 2012. The neighbours threatened to lynch the Appellant. The Appellant took them around in a bid to recover the stolen items but nothing else was recovered. The Appellant was handed over to the police and was subsequently charged with the offence herein.

6. The Appellant in his defence gave unsworn evidence. No witnesses were called. The Appellant stated that he was on his way home at about 12.00 midnight from his miraa selling business at T-Tot Hotel. He took a “*boda boda*” and alighted in Eastleigh area (*of Machakos*). While he was on his way he came across a group of people who were carrying pangas and *rungus*. When the group spotted him they started shouting. The Appellant did not know these people and he took to his heels. The people gave chase and caught up with him. The Appellant was beaten on allegations that he had stolen from their houses.

7. The Appellant was escorted to the scene of theft. Police officers went to search the place where the Appellant lived but nothing was recovered. The shirt the Appellant was wearing was identified by one of the complainants as his. The Appellant explained that he had bought the shirt in town. The Appellant was escorted to Machakos Police Station. The Appellant denied the charge and stated that at the time of the arrest he admitted the offences so that the beating could come to a stop.

8. The trial court convicted the Appellant in the main count in both count I and II. The Appellant was sentenced to 4 years and 2<sup>1</sup>/<sub>2</sub> years imprisonment in both count I and II respectively. The sentence runs consecutively. The Appellant was aggrieved by both the conviction and the sentence and appealed to this court on grounds that can be summarized as follows:

- (a) That the prosecution case was riddled with inconsistencies and contradictions.
- (b) That the prosecution evidence was uncorroborated and unsubstantiated.
- (c) That the prosecution case was not proved beyond reasonable doubts.
- (d) That the defence case was not considered.
- (e) That the trial was conducted by an unqualified prosecutor.
- (f) That the trial court considered irrelevant issues.

9. During the hearing of the appeal, the Appellant opted to rely on written submissions. The learned counsel for the State submitted on the sufficiency of the prosecution witnesses.

10. This being the 1<sup>st</sup> appellate court, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32.**

11. Although PW2’s evidence was that she saw the Appellant in her house and that the

Appellant was the one who took her gas cylinder, her evidence failed to establish the source of light that enabled her to see. PW2 stated during re-examination that there was a bulb in “court 1 and court 2” but it is not clear whether the said lights illuminated her kitchen where the thieves were. PW2’s further evidence was that the thieves had removed the bulbs. Her evidence that the neighbours switched on lights when they heard her screams fails to establish whether the said lights illuminated her house and whether the thieves were still in the house when the lights were switched on. PW2’s evidence was that it was a dark night.

12. PW2 further testified that she also identified the Appellant by his voice. The evidence of PW2 fails to substantiate how she was able to recognize the voice since her evidence reveals that she did not know the Appellant before.

13. The evidence of PW1 was that they switched on the lights after the arrest and it was then that he realized that the Appellant was wearing a shirt that had been stolen from him the previous week. Although PW1’s evidence was that the shirt had a mark on the pocket, his evidence fails to state what kind of a mark it was. It is therefore not possible to tell whether this was a distinctive mark that could not be found on other shirts. PW2 contradicted himself during cross-examination when he went on to state that the shirt was torn at the back and that was the mark he used to identify the shirt with.

14. The evidence of PW3 Michael Mutunga is that he was one of the neighbours who arrested the Appellant. He did not witness the theft. PW4 PC Bernard Mashinga the investigating officer came in after the Appellant had already been arrested.

15. The Appellant denied the offence. His defence that he admitted the offence at the time of arrest due to the beating is plausible. The prosecution evidence established that the Appellant was about 1km from the scene of the offence. The defence that the Appellant was on his way home is also plausible. The Appellant ought to have been given the benefit of doubt.

16. On the issue of unqualified prosecutor, **Section 82 (5) of the Criminal Procedure Code**, was amended by **Legal Notice No. 7 of 2007**. There is no longer any requirement that a case must be prosecuted by a police officer who is not below the rank of an Assistant Inspector of Police.

17. With the foregoing, I find and hold that the appeal has merits. Consequently, I allow the appeal, quash the conviction and set aside the sentence. The Appellant is at liberty unless otherwise lawfully held.

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**B. THURANIRA JADEN**

**Dated and delivered at Machakos this 8<sup>th</sup> day of October, 2015**

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**B. THURANIRA JADEN**

**JUDGE**