



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL 195 of 1997**

(From Original Conviction and Sentence in Criminal Case No. 122 of 1997 of the Chief Magistrate's Court at Mombasa - G. Njuguna Esq., Senior Resident Magistrate)

**CHARLES ONGUKO..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH**  
**CRIMINAL CASE NO. 198 OF 1997**

(From Original Conviction and Sentence in Criminal Case No. 122 of 1997 of the Chief Magistrate's Court at Mombasa - G. Njuguna Esq., Senior Resident Magistrate)

**NAMAI KEA ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH**  
**CRIMINAL CASE NO. 202 OF 1997**

(From Original Conviction and Sentence in Criminal Case No. 122 of 1997 of the Chief Magistrate's Court at Mombasa - G. Njuguna Esq., Senior Resident Magistrate)

**NAMAI KEA ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

Two people were charged before Mombasa Senior Resident Magistrate and tried for the offence of "Shed Breaking with intent to commit a felony contrary to Section 307 of the Penal Code, in that on 11.1.97 they

unlawfully broke and entered a building namely Kenya Ports Authority Shed No.12 with intent to commit the felony of theft. NAMAI KEYA (KEYA) was the 1st accused in that trial while CHARLES ONGUKO (Onguko) was the 2nd accused.

Upon their trial, they were both convicted and sentenced to serve 3 years imprisonment on 20.6.97.

Keya immediately drew up a Petition of Appeal on 1.7.97 and filed it in person on 2.7.97. He laid out 6 grounds of Appeal. It was HCCA No. 198/97. Apparently, unknown to him, M/S Magolo Ochuka & Co. Advocates were also instructed on the same day and filed another Petition of Appeal containing 4 grounds. That was HCCRA 202/97. M/S Magolo Ochuka were also instructed to Appeal on behalf of Onguko and they filed HCCRA No. 195/97 containing identical grounds as Keya's.

All the three Appeals were consolidated on application by State Counsel on 1.9.97.

When the Appeals were heard on 29.9.97, Mr. Magolo who appeared for both Appellants abandoned the grounds laid out in the petition filed by the Appellant Keya in person. That petition of Appeal therefore stands dismissed. Both Appeals were thus argued on the basis of the grounds set out by M/S Magolo Ochuka & Co. These were

The learned trial Magistrate erred in law and fact in

- (1) Finding that the offence charged had been proved.
- (2) not appreciating what breaking in law means
- (3) Convicting against the weight of evidence
- (4) The sentence was excessive.

The trial in the lower court was short. The prosecution evidence came from two witnesses, both of them security guards employed by the Kenya Ports Authority (KPA) and a Police Officer who made the arrests.

The two security guards were working in shed No. 12 in KPA premises at 8 p.m. on the day in question. They noticed that the door of the shed was open. On checking inside the shed they saw two people removing plumbing items from boxes which they opened. They summoned the Police and the two people were arrested right inside the shed. The two were the appellants.

The Police Officer found that the shed door had been pushed open. The two were arrested before they could take away the items from the shed.

In his defence, Keya who said he worked for a clearing and forwarding firm made an unsworn statement that he had only slept near shed 12 when he was woken up by a Police Officer and arrested. He was taken to Port Police and charged. On his part Onguko, in an unsworn statement said he was a businessman operating a welding workshop at Likoni where he resides.

After work on the material day he received a telegram that the father of his cousin working at the Port had died. So he went looking for the cousin at the Port. He found him at 7.30 p.m. At that moment Police appeared and asked him for a Port Pass which he did not have. He was arrested, taken to Port Police and charged with the offence.

The trial Magistrate had no difficulty in branding the Appellants' defences as "a sham and laughable". He accepted the prosecution evidence as having proved the case beyond doubt and convicted the Appellants

on that evidence.

The main ground argued by Mr. Magolo was that there was no element of breaking into the premises. "Breaking", in his submission means breaking into and out or using an aperture other than the door. Without proving by what means the two Appellants entered the shed, there was no offence committed. In this case the appellants were only found inside and the door was found open. Evidence should have been tendered to show the state of the door before it was found open. Since such persons were not called, the prosecution case was not proved. He dismissed the evidence of the Police Officer that the door was pushed open because the officer did not see this happen. He cited HCCRA 76/96 Mqala -Vs- Republic for this proposition.

In another ground of appeal which appears to be a paraphrasing of ground one, Mr. Magolo submitted that there was no evidence from the complainant itself, that is to say KPA or any of its Officers and therefore, without the evidence of a complainant the Appellants should have been acquitted. For this proposition he cited HCCRA 358/87 Dingo Simon -Vs- Republic where Bosire J (as he then was) said the conviction of an hotel employee for the offence of stealing hotel property, on the evidence of a security guard and in the absence of evidence from the hotel on the ownership of the stolen items, was fatal to the prosecution case.

Finally Mr. Magolo submitted that even if the Appellants were properly convicted, the sentence was excessive. They were 1st offenders. The maximum for the offence is 5 years. There was no evidence to support such harsh sentence.

On his part Mr. Ng'eno for the State supported both conviction and sentence. He found the evidence overwhelming and consistent. There was evidence; he submitted that the door was broken into by pushing. The officer was at the scene and could testify to that by observation.

As for the necessity of evidence from KPA, he submitted that the evidence was there through the KPA guards. He distinguished the Dingo Simon case in that the security there were not said to be employees of the hotel.

On sentence Mr. Ng'eno supported the trial Magistrate because the appellants were caught in the act and did not run away.

It is plain that the two appellants were found inside shed No 12 on the evening of 11.1.97 removing plumbing items from boxes kept therein. The learned trial Magistrate was right in rejecting the Appellants' evidence in this regard and I did not understand their counsel to contend otherwise. His main complaint is that there was no proof as to how the two ended up in the position they were found in.

The charge facing them was only "breaking and entering" and not stealing from the shed although there was sufficient asportation to charge them with that offence. I take Mr. Magolo's contention to amount to this: Although the door of the shed was

found opened and there was no evidence of physical breaking of a lock or any other part of that shed, then the Appellants' entry in the shed was innocent as it was not accompanied by breaking which is a necessary ingredient of the offence. With respect, I beg to disagree.

Breaking may either be actual (i.e. physical) breaking of something or the opening of some thing by moving the whole or part of it. Breaking and entering are indeed defined under Section 303 of the Penal Code

"303(1) A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting, or any other means whatever any door, window, shutter, cellar flap or other thing intended to close or cover an opening in a building or an opening giving passage from one part of a building to another, is deemed to break the building.

(2) A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.

(3) A person who obtains entrance into a building by means of any threat or artifice for that purpose, or by collusion with any person in the building or who enters any apartment of the building left open for any purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the building."

It is a fairly wide definition. There was evidence from the

Police Officer who made the arrest and observed the premises that

entry was gained by way of pushing the door of the shed. It is the same door that was found open by the security personnel. The learned trial Magistrate accepted that evidence and I respectfully agree with him. The offence of breaking and entering as defined was proved without doubt.

The submission was made that there was no evidence of a complainant and therefore the omission was fatal to the prosecution case. I agree with the authority cited above, Dingo Simon -Vs- Republic and with Bosire J (as he then was) that it was incumbent in that case where the offence was one of theft, for the Hotel to tender evidence that the stolen items belonged to them and the failure to call evidence from the Hotel was fatal to that charge. But the authority is not applicable in this case which does not charge the offence of theft but has tendered evidence from security personnel employed by the complainant who must be taken to have knowledge of the sheds placed by the complainant within their responsibility. There was no challenge to that responsibility. I find that they were capable of testifying on behalf of KPA in respect of offences committed within their area of responsibility. The authority is distinguishable.

On the whole there was overwhelming evidence that the offence was committed and the trial Magistrate was right to convict. The Appeal against conviction is dismissed.

I agree with the Appellants counsel however, that the sentence was excessive. No aggravating circumstances were narrated by the prosecution and the Appellants were 1st offenders. There does not

seem to have been any particular reason given by the trial Magistrate for meting out close to maximum sentence on these first offenders. He had a discretion on sentence but that discretion, like all discretions exercisable by courts, must be exercised judicially. As I find no special or any reasons given for such sentence, I would interfere and reduce it.

The Appellants shall serve a sentence of 2 (two) years imprisonment. To that extent only the Appeal on sentence succeeds.

Dated at Mombasa this 7th day of .November 1997.

**P.N. Waki**

**JUDGE**