REPUBLIC OF KENYA

IN HE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL 195, 198 & 202 OF 1997

CHARLES ONGUKO..... APPELLANT

Versus

REPUBLIC ..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 122 of1997 of the Chief Magistrate's Court at Mombasa - G. Njuguna Esq.,Senior Resident Magistrate)

CONSOLIDATED WITH

CRIMINAL CASE NO. 198 OF 1997

(From Original Conviction and Sentence in Criminal Case No. 122 of1997 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 of1997 of the Chief Magistrate's Court at Mombasa - G. Njuguna Esq.,Senior Resident Magistrate)

NAMAI KEYA …….....…… APPELLANT

- Versus -

REPUBLIC ..... RESPONDENT

JUDGMENT

Two people were charged before Mombasa Senior ResidentMagistrate and tried for the offence of "Shed Breaking with intentto commit a felony contrary to Section 307 of the Penal Code, inthat on 11.1.97 they unlawfully broke and entered a building namelyKenya Ports Authority Shed No.12 with intent to commit the felonyof theft. NAMAI KEYA (KEYA) was the 1st accused in that trialwhile CHARLES ONGUKO (Onguko) was the 2nd accused.

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

Keya immediately drew up a Petition of Appeal on 1.7.97 andfiled it in person on 2.7.97. He laid out 6 grounds of Appeal. Itwas HCCA No. 198/97. Apparently, unknown to him, M/S Magolo Ochuka& Co. Advocates were also instructed on the same day and filedanother Petition of Appeal containing 4 grounds. That was HCCRA202/97. M/S Magolo Ochuka were also instructed to Appeal on behalfof Onguko and they filed HCCRA No. 195/97 containing identicalgrounds as Keya's.

All the three Appeals were consolidated on application byState Counsel on 1.9.97.

When the Appeals were heard on 29.9.97, Mr. Magolo whoappeared for both Appellants abandoned the grounds laid out in thepetition filed by the Appellant Keya in person. That petition ofAppeal therefore stands dismissed. Both Appeals were thus arguedon 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 prosecutionevidence came from two witnesses, both of them security guardsemployed by the Kenya Ports Authority (KPA) and a Police Officerwho made the arrests.

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

The Police Officer found that the shed door had been pushedopen. The two were arrested before they could take away the itemsfrom the shed.

In his defence, Keya who said he worked for a clearing andforwarding firm made an unsworn statement that he had only sleptnear 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 anunsworn statement said he was a businessman operating a weldingworkshop at Likoni where he resides.

After work on the material day he received a telegram that thefather of his cousin working at the Port had died. So he wentlooking for the cousin at the Port. He found him at 7.30 p.m. Atthat moment Police appeared and asked him for a Port Pass which hedid not have. He was arrested, taken to Port Police and chargedwith the offence.

The trial Magistrate had no difficulty in branding theAppellants defenses as "a sham and laughable". He accepted theprosecution evidence as having proved the case beyond doubt andconvicted the Appellants on that evidence.

The main ground argued by Mr. Magolo was that there was noelement of breaking into the premises. "Breaking", in hissubmission means breaking into and out or using an aperture otherthan the door. Without proving by what means the two Appellantsentered the shed, there was no offence committed. In this case theappellants were only found inside and the door was found open.Evidence should have been tendered to show the state of the doorbefore it was found open. Since such persons were not called, theprosecution case was not proved. He dismissed the evidence of thePolice Officer that the door was pushed open because the officerdid not see this happen. He cited HCCRA 76/96 Mqala -Vs- Republicfor this proposition.

In another ground of appeal which appears to be a paraphrasingof ground one, Mr. Magolo submitted that there was no evidence fromthe complainant itself, that is to say KPA or any of its Officersand therefore, without the evidence of a complainant the Appellantsshould have been acquitted. For this proposition he cited HCCRA358/87 Dingo Simon -Vs- Republic where Bosire J (as he then was)said the conviction of an hotel employee for the offence ofstealing hotel property, on the evidence of a security guard and inthe absence of evidence from the hotel on the ownership of thestolen items, was fatal to the prosecution case.

Finally Mr. Magolo submitted that even if the Appellants wereproperly convicted, the sentence was excessive. They were 1stoffenders. The maximum for the offence is 5 years. There was noevidence to support such harsh sentence.

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

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

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

It is plain that the two appellants were found inside shed No12 on the evening of 11.1.97 removing plumbing items from boxeskept therein. The learned trial Magistrate was right in rejectingthe Appellants evidence in this regard and I did not understandtheir counsel to contend otherwise. His main complaint is thatthere was no proof as to how the two ended up in the position theywere found in.

The charge facing them was only "breaking and entering" andnot stealing from the shed although there was sufficientasportation to charge them with that offence. I take Mr. Magolo'scontention 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 externalor internal, of a building, or opens byunlocking, pulling, pushing, lifting, or anyother means whatever any door, window,shutter, cellar flap or other thing intendedto close or cover an opening in a building oran opening giving passage from one part of abuilding to another, is deemed to break thebuilding.

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

(3) A person who obtains entrance into a buildingby means of any threat or artifice for thatpurpose, or by collusion with any person inthe building or who enters any apartment ofthe building left open for any

purpose, butnot intended to be ordinarily used as a meansof entrance, is deemed to have broken andentered 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 thesame door that was found open by the security personnel. Thelearned trial Magistrate accepted that evidence and I respectfullyagree with him. The offence of breaking and entering as definedwas proved without doubt.

The submission was made that there was no evidence of acomplainant and therefore the omission was fatal to theprosecution case. I agree with the authority cited above, DingoSimon -Vs- Republic and with Bosire J (as he then was) that it wasincumbent in that case where the offence was one of theft, for theHotel to tender evidence that the stolen items belonged to them andthe failure to call evidence from the Hotel was fatal to thatcharge. But the authority is not applicable in this case whichdoes not charge the offence of theft but has tendered evidence fromsecurity personnel employed by the complainant who must be taken tohave knowledge of the sheds placed by the complainant within theirresponsibility. There was no challenge to that responsibility Ifind that they were capable of testifying on behalf of KPA inrespect of offences committed within their area of responsibility.The authority is distinguishable.

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

I agree with the Appellants counsel however, that the sentencewas excessive. No aggravating circumstances were narrated by theprosecution and the Appellants were 1st offenders. There does not seem to have been any particular reason given by the trialMagistrate for meting out close to maximum sentence on these firstoffenders. He had a discretion on sentence but that discretion,like all discretions exercisable by courts, must be exercisedjudicially. As I find no special or any reasons given for suchsentence, I would interfere and reduce it.

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

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

P.N. Waki

JUDGE