

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 205 OF 1994

JOHN KOMU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Nanyuki Criminal Case No 1091/92)

JUDGMENT

The appellant together with another were duly convicted for an offence of house breaking contrary to section 304(1) and stealing contrary to section 279(b) of the Penal Code. They were both convicted and referred to probation. It is with utmost surprise that probation officer recommended that the two be placed on probation. The 1st accused is now serving a probation sentence but the 2nd accused and present appellant had been placed on probation for one year on the 11.8.93 in case No 2294/93 at Nanyuki. Despite knowing this a probation officer – one Wahome Gachare of Laikipia recommended that he be placed on probation despite having been already convicted and placed on probation. He knew this was not in order and instead recommended he be discharged but stated that he continue to serve probation in case 2294/93.

This information to the trial magistrate is wholly misleading. The law is very clear – namely that to be placed on probation one must be a 1st offender (as far as possible previous convictions of the offence must be made available to court to determine this). The minute the appellant was convicted it only meant one thing, and that the appellant had contravened the orders under case 2294/93. he ought to have been partnered to jail for the said offence or alternatively fined as it was a misdemeanour.

By informing the court that the appellant could be discharged is misleading the court and the probation officer has failed to uphold his professional integrity. It is as a result of this that this High Court makes orders that a copy of this judgment be brought to the officer's attention through the provincial probation officer. The appellants case is that he appealed because the co-accused was released. This court notes that he had been placed on probation but that this was cancelled when he was subsequently convicted for another 3rd offence, apart from one already mentioned. The court on looking at the merits of this case finds that the appellant and others acted in concert. Their mens rea as to the offence was most definitely clear. They were seen by witnesses in possession of the stolen item, knowingly that the same was stolen. The court hereby dismisses this appeal as to conviction and sentence.

Dated and delivered at Nyeri this 11th day of October, 1995

M.A. Ang'awa

JUDGE