



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 36 OF 1995**

**CHARLES KAHINDI NZAI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The Appellant, Charles Kahindi (Original A.1), was convicted after trial by the learned Resident Magistrate, Mombasa of the offence of shop-breaking and stealing contrary to section 306 (a) of the Penal Code. Upon his conviction, he was sentenced to serve 2 years imprisonment and ordered to receive 8 strokes corporal punishment. His appeal to this court is against conviction and sentence.

Briefly, the prosecution case was that the Appellant who was a security guard with Private Guard Limited, was on the night of 18<sup>th</sup> of June, 1994 assigned the duties of guarding the complainant's shop known as Delta Ltd along Haile Selassie Avenue, Mombasa. He reported for duty in the evening of that day and at about midnight when his supervisor, Nocolas Wambua (PW.2) was going round checking the guards he found the Appellant on duty at his place of work and everything were then in order. On the same night, Pc. John Kamau (PW.4) of Central Police Station received a report from the 999 Controller that Delta Shop premises had been broken into and certain items stolen.

This was at 4 a.m. He and other police officers proceeded to the scene and found the shop broken into and several items were scattered but the night guard, the Appellant was then nowhere to be seen. At about 5 a.m the supervisor, Nocolas Wambua (PW.2) in his usual rounds visited Delta Shop and found it having been broken into but the Appellant who was the guard on duty was nowhere to be seen.

The complainant, AZIZ MUSSA (PW.1) confirmed on the morning of 18<sup>th</sup> of June, 1994 when he went to his shop that there had been a break in at the shop and several items valued at Kshs 115,000/- specified in the charge-sheet were missing. On the same morning, PW.2 who was the supervisor of the Appellant spotted him but on seeing him, the Appellant simply took to his heels. An alarm was then raised and members of the public joined in chasing the Appellant. He was arrested and handed over to the police where he was charged. None of the stolen items were recovered.

In his defence, the Appellant testified that he duly reported for duty at the complainant's shop but he was feeling unwell. He therefore talked to another guard from CSS to take after his duties and the said guard agreed. He then left for home at about 10 p.m and took some medicine. He never went back for duty.

The conviction of the Appellant was based on circumstantial evidence. He was the guard on duty at the complainant's shop on the material night. His defence that he went home earlier that night before 10 p.m., was rightly disbelieved by the learned trial Magistrate because when his supervisor was doing the rounds at about 12 min-night, he was found on duty. He made no complaint to the supervisor that he was unwell so that another substitute guard from their company could be brought. By 4 p.m when the police received the theft report at the said shop and went there, the Appellant was nowhere to be seen. He was supposed to be on duty till 6 a.m but by 5 a.m when the supervisor again went around, he was nowhere to be seen. When the supervisor later in the day spotted him, he took to his heels but with the help of members of the public, he was arrested.

I am satisfied as was the court below that the conduct of the Appellant and the circumstances in which the

said theft took place irresistibly points at him to have been party to the theft that had occurred at the complainant's shop. His conviction was quite safe and I find no merit in his appeal against conviction.

The sentence of 2 years imprisonment that was imposed was neither harsh nor excessive. However, the number of strokes that were imposed were quite many. I reduce the number of strokes to 2.

In the result, the appeal against conviction and sentence is dismissed except that the number of strokes is reduced to 2.

**Dated and delivered at Mombasa this 30<sup>th</sup> day of November, 1995**

**S.O OGUK**

**JUDGE**