



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 125 OF 1993**

**JAMES ANGAGA AYIEMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case No 128 of 1992 of the District Magistrate's Court at Tamu: A Kosambo, Esq DM1)**

**JUDGMENT**

Appellant was convicted for the offence of shopbreaking and stealing contrary to section 306 (a) of the Penal Code and sentenced to 3 years imprisonment and 4 strokes of the cane. He appeals against conviction and sentence.

The shop of the complainant was broken into on the night of 15th May, 1992 and goods worth about 6,705/= stolen. Joanes Okelo Owando (PW2) whose house is adjacent to the shop heard the complainant's shop being broken. He came out from his house. He was in the company of George Owino Ochere (PW3). A person came out of the shop and ran away. Another person who is the appellant came out of the shop carrying two rims and two tyres. He was arrested in possession of those items and taken to the police station.

Appellant claimed that he was coming from a disco in the company of his girl friend when he was stopped and arrested.

The evidence of PW2 and PW3 is not precise. They do not say how far away they arrested the appellant from the complainant's shop. It was dark. They do not also say how the appellant was carrying the items. They do not describe terrain over which they were chasing the appellant PW2 says that appellant was carrying two tyres and two tubes while PW3 says that appellant was carrying a pump, a wheel and a rim. Without a clear description of the circumstances under which appellant was arrested, there is no evidence upon which the Court can safely conclude that appellant was one of the people who broke into the shop and that appellant was not merely an innocent passer by. It is surprising that although PW2 and PW3 went to the scene at the time the shop was being broken into and properties have stolen many of the stolen things were not recovered. It is unlikely that the person who ran away carried all the stolen things.

I find that there is a reasonable doubt as to whether appellant was one of the thieves. Consequently, I allow the appeal, quash the conviction and set aside the sentence. Appellant to be released forthwith unless lawfully held for another offence.

**Dated and Delivered at Kisumu this 15th day of June 1994.**

**E.M.GITHINJI**

**JUDGE**

