REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL NO 188 OF 1988

WAMBUA KILOME ……………………………APPELLANT

VERSUS

REPUBLIC…………………………………....RESPONDENT

(From original conviction and sentence of the District Magistrate's Court at Kaloleni, JC Nyunde, Esq, RM in Criminal Case No 773 of 1987)

JUDGMENT

The appellant Wambua Kilome was convicted upon a trial for an offence which was described as *Kiosk* breaking and stealing contrary to section 306(a) and 279(b) of the Penal Code. He was thereafter sentenced to serve 2 years imprisonment with 3 strokes of the cane on "the 1st limb" and 12 months imprisonment with 2 strokes of the cane "on 2nd limb". He now appeals against the whole judgment of the lower court and the order on sentence.

The particulars of the charge read as follows:

"Wambua Kilome: On the nights of 27th/28th July 1987, at Mariakani Trading Centre in Kilifi District of the Coast Province, jointly with others not before the court

broke and entered the *kiosk* of Florence Tabu with intent to steal therein, and did steal one sewing machine make Singer Serial No 60670848, two pieces of geoget materials, three shirts, all valued Kshs 7400/- the property of Florence Tabu."

Those particulars support a charge under S 306(a) of the Penal Code in so far as it states that the premises broken into were used for business purposes. Under that section however there is no provision made for a break into a "*Kiosk*". The offence was therefore improperly stated to be "*Kiosk* breaking". The police who drafted the charge should have chosen language employed in the penal provision to frame the charge. Responsibility for the correctness of a charge lies squarely on the prosecution, not the court. The trial magistrate however, seemed not to have noticed that shortcoming.

Is the discrepancy fatal to the charge? The court takes judicial notice of the fact that a "*Kiosk*" is in Kenya actually a place of business. It may be a shop, an eating house, a place for hairdresssing or hair cutting for reward; a form of grocery, or a store. In short it can be described as a shop or store. The employment of language to describe premises catered for in penal provision will not of itself without more render the defect in the charge incurable. The paramount consideration is whether there was prejudice occasioned to the accused in putting up his defence because of the words used. The appellant understood the charge he

faced. He put a defence to it. He was clear in his mind that he did not break into any form of premises. He was therefore not prejudiced.

There was another defect. The statement of the offence alleged that the *Kiosk* was a dwelling place, not a shop, store or any other place of business. The particulars of the offence which I set out earlier do not support that. They clearly state that the place which was broken into was not a dwelling house, but a place of business. It was therefore not necessary to include section 279(b) of the Penal Code in the statement of the offence. The particulars having been explicit I do not consider that prejudice was occasioned by the inclusion of that section in the statement of the offence. The conviction of the appellant was principally based on his possession a few days after the break into and theft from the place of business of Florence Tabu, a skirt which the latter positively identified as hers and one of the items which had been stolen during that theft. The appellant admitted he had possession of it and that he had given it to Nuru Salim. He however denied a statement by Nuru Salim that he had sold the skirt to her. Whether or not the appellant had sold the skirt to her was not the issue before the trial court, the appellant having admitted he had given the skirt. The question which the trial magistrate was called upon to determine and which, to my mind, he did, was whether the appellant's possession of the skirt was innocent.

The prosecution having called evidence to show the appellant was found in recent possession of a skirt which had been stolen during a break into and theft from the shop of Florence Tabu, a rebuttable presumption was raised that the appellant alone or in conjunction with other persons was responsible for the act. The burden shifted to him to rebut the presumption. The appellant offered an explanation which the trial magistrate rejected, properly so in my view. The explanation was that he found the skirt abandoned in a bush where he had gone for the call of nature. The explanation was to say the least, preposterous and totally unbelievable in the circumstances of the case. The appellant sold the skirt. His explanation that he did not sell it to Nuru Salim was properly rejected by the trial magistrate. Why would he have given her the skirt to keep when he had his own accommodation?

The appellant's conviction should have been under S 306(a) of the Penal Code only, which is the offence the evidence the prosecution adduced and the particulars supported. His conviction under S 306(a) and 279 (b) is quashed, and in place therefore is substituted a conviction for shop breaking contrary to S 306(a) of the Penal Code. The sentence passed under S 279(b) of the Penal Code is set aside, but that which was meted out under S 306(a) Penal Code is affirmed. To that extent only the appeal succeeds. Orders accordingly.

Dated and Delivered at Mombasa this 16th Day of June, 1989

S.E.O. BOSIRE

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JUDGE