



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 290 OF 1984

(From Original Conviction and Sentence in Criminal Case No 3500 of the Resident Magistrate's Court at Makadara M L Kangatta Esq)

MOHAMED MZEE APPELLANT

V e r s u s

REPUBLIC RESPONDENT

CORAM

O'KUBASU

Appellant absent, unrepresented and not wishing to be present.
L M Mbarire (Miss) (State Counsel) for Respondent

J U D G M E N T

The appellant was convicted on his own plea of guilty, on a charge of House Breaking and Stealing contrary to Sections 304© and 279(b) of the Penal Code. The appellant was sentenced to twelve months imprisonment, with one stroke of the cane, on each limb of the charge.

The appellant now appeals against both conviction and sentence on the following grounds:-

1. I pleaded not guilty to the charge.
2. The exhibit before the court was recovered by the police from someone else other than me.
3. No P W S's to prove the charge before the court.
4. The complainant never appeared before the court.
5. I feel there was misuse of Justice.

The record of the lower court shows that the appellant appeared before the court on the 29th December, 1983 and pleaded guilty. The records states:

“The substance of the charge and every element of it, read and explained to accused and

understood.

Accused in his own words replies,

“It is true that I opened the house. I did not break the padlock. The padlock could be easily open. I went into the house and took the items listed in the charge. I went with items to Mutomo (my home) in Kitui. The complainant is my friend.”

Upon the above, the learned trial magistrate entered a plea of guilty. The case was then adjourned to the following day (30th December, 1983) for facts. On the following day the prosecution narrated the facts. After the facts had been given, the accused is recorded to have said:-

“Accused: What the prosecutor has told the court is true. I broke into the house and took away the items listed in the charge sheet. The padlock was firm and opened easily. I did not have to force it open”.

Upon the above admission of the facts, the appellant was convicted. He was subsequently sentenced.

The manner in which a plea of guilty should be recorded and the steps that should be followed, was laid down by the former East African Court of Appeal in *Adan V R* (1973) E A 445.

Having considered the lower court’s record, it is clear that the learned magistrate followed the correct procedure as laid down in *Adan’s* case, (supra) as later approved by the Court of Appeal in *Michael Mbaria Kariuki v Republic – Criminal Appeal No 22 of 1984 – unreported*.

Hence plea of guilty was properly recorded and conviction entered. There can be no complaint against conviction.

As regards sentence, I notice that the appellant was awarded one stroke of the cane for housebreaking contrary to Section 304(1)(c). That section does not provide for corporal punishment. Hence, an award of one stroke of the cane must and is hereby set aside. Hence, the sentence should now read, 12 months imprisonment on each limb of the charge, together with one stroke of the cane on the second limb of the charge. The sentences to run concurrently. Only to that limited extent does this appeal succeed otherwise it is dismissed. Order accordingly.

Delivered at Nairobi this 4th day of September, 1984.

E O’KUBSU

JUDGE