REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEALS NOS. 556 & 557 OF 1982

PETER KIAMBA MBUNGO ………..………APPELLANT

VERSUS

REPUBLIC……………………………..…..RESPONDENT

JUDGMENT

The appellant, Peter Kiamba Mbungo, has appealed against sentence in two cases in which he pleaded guilty and so the two criminal appeal cases being No 556/82 and No 557/82 are consolidated.

It is observed in criminal appeal number 556/82 that the appellant was charged with burglary and stealing from dwelling house contrary to sections 304(2) and 279(b) of the Penal Code (cap 63) to which he said, when the substance of the charge and every element of it was read and explained to him and which he understood was:

"It is true"

Had the matter remained here I would have had some doubts as to whether or not the appellant's plea could really be called an unequivocal plea of guilty to the charge. See: *Hando s/o Akunaay v R* (1951) 18 EACA 308 in which it was said:

"Before convicting on any such plea of guilty it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent"

and by *R v Yonasani Egalu & others* (1942) 9 EACA 65.

Most of what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally and in *R v Yekoyasi Okedi s/o Akagye* (1944) 11 EACA 110 it was said:

"The actual words used by an accused in pleading guilty to a charge should be recorded verbatim but of course translated into English.'

In this case however the prosecution stated the facts to the court with which the appellant agreed but though the prosecutor said that on May 5, 1982 at 8.00 pm the complainant locked her house and went to sleep in her mother's house he did not say when the complainant returned to her house on the following morning which, of course, could have been halfpast six o'clock in the morning, I must I think, which I

hereby do substitute a conviction for housebreaking in place of burglary and I think the sentence imposed must also be altered, because if for nothing else, a charge of housebreaking does not carry a mandatory sentence of corporal punishment. I therefore substitute for the sentence imposed by the learned magistrate in respect of the charge in this case a sentence of three (3) years' imprisonment on each limb of the charge to run concurrently and the appellant will suffer six strokes of corporal punishment on the charge concerning theft from a dwelling house, that the failure to treat PW 1 as a possible accomplice has not occasioned a failure of justice and that it would be wrong to interfere with this case.

The appellant was imprisoned for one year where the maximum in respect of this offence is two years. In other cases with which I have dealt arising out of the disturbances on August 1, 1982 the sentences which have been passed and confirmed on appeal have been the maximum. In those circumstances and in view of the type and value of the property which was found being conveyed by the appellant it cannot be said that the sentence passed by the learned district magistrate was excessive although he was not entitled to impose strokes and that matter has already been dealt with on revision at the application of the district magistrate himself.

Accordingly for the reasons I have given above, this appeal against conviction and sentence will be dismissed.

Dated and Delivered at Nairobi this 4th Day of March, 1983

J.H.S. TODD

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JUDGE