

IN THE COURT OF APPEAL

AT NAKURU

CRIMINAL APPEAL 11 OF 84

JOHN MURIITHI NJERI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Eldoret (Mbaya, J) dated December 23, 1982 In

Criminal Appeal No 232 of 1982)

JUDGMENT OF THE COURT

The appellant has appealed to this Court against the judgment of Mbaya, J, upholding the appellant's conviction for shopbreaking and stealing contrary to Section 306(a) of the Penal Code.

The eight grounds of appeal listed by the appellant in his petition do not raise any points of law, except grounds 5 and 6 in which he appears to have put up the issues of "autrefois acquit". What we have been able to gather from the trial court's record is that the appellant informed that court on April 14, 1982 that he was also charged in a Kerugoya Court and that, that hearing was on May 13, 1982 and he wanted this case heard earlier, but he was informed that as this case could not be tried before June 8, 1982, the Kerugoya one would be heard first. There was no evidence, and, in fact, the appellant did not tell the Court that the Kerugoya case and this case were in any way related and/or that he had been acquitted on the Kerugoya or any other previous charge involving an acquittal on the subsequent charge. He never raised the issue of his having been acquitted in the District Magistrate 1 Court when he testified at his trial, nor did he raise the point in his first appeal. We do not see the basis for the allegation and in the absence of concrete evidence must reject it. The Senior State Counsel, however, clarified that the appellant was discharged under Section 87(a) of the Criminal Procedure Code and rearrested. As to Rosemary's evidence, the trial was in open court as the lower court's record shows. There was no evidence that Rosemary was in the Court room, but even if she were, no prejudice has been occasioned to the appellant. Her evidence does not support anyone else. She said she saw the appellant from the kitchen.

The appellant took the ladder and tools he used to gain entry to the complainant's shop to Mbolea Night Club at Saboti. Simeon Kitiyo (PW 2) saw him bring in those items also when he took them away. Simeon, Michael Kitui (PW 3) and Rosemary Molanje (PW 4) saw him in the roof of the complainant's shop. Simeon fetched him from the shop's roof where he had carved out a hole to gain entry.

The appellant was caught before he had completed his mission in the shop and although the complainant said that he lost Shs 1,500 and a calculator, it is doubtful whether the appellant took these items, as when he was searched after being fished out from the roof of the shop by Simeon, nothing was found on him and, four boxes of picture frames which were charged were found in the shop. So there was the transportation of the four boxes which was inferred to have been done by the appellant. He successfully broke into the shop and stole therefrom. There was, therefore, a complete offence under Section 306(a) of the Penal Code.

Ground 7 is on sentence. We are barred by Section 361(1)(b) of the Criminal Procedure Code from entertaining an appeal against severity of the sentence where it is lawful. For the reasons stated, we dismiss the appeal.

Dated at Nakuru this 3rd day of August, 1984.

A A KNELLER

JUDGE OF APPEAL

Z R CHESONI

AG JUDGE OF APPEAL

J O NYARANGI

AG JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR