



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 668 OF 1977**

**MULWA MUNYALO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against convictions and sentence at the Second Class District Magistrates' Court, Kitui, in Criminal Case No 349 of 1977)***

**JUDGMENT**

**Trevelyan J** ruled that the convictions of the appellant for housebreaking and theft must be quashed. He then continued: That disposes of the appeal, but more must be said. The sentence of the court, the matter of there being two charges being overlooked, was "Accused placed on probation for two years". I will assume that orders were made in respect of both charges. The orders were made on 9th February. On 11th August the record has, "Accused convicted. Production order to issue for 15th August 1977". On 15th August we have the prosecutor saying, and the magistrate repeating, that the appellant had committed another offence, the record ending:

Mitigation nil. Sentence. The accused is imprisoned for eight months on each limb of the charge and will receive four strokes on each limb of the charge. The terms will run concurrently but consecutive with the other prison terms.

It may be that the magistrate himself convicted and sentenced the appellant for the other offence (it seems likely that it was so); but whether that be so or not, the procedure adopted was wrong. When a defendant is brought before a Court for the breach of a probation order, the breach should be put to him in the very clearest possible way and he should be asked whether he admits it. He should be told the grounds on which it is said that he has broken the terms of the probation order. If the order has been broken by the commission of another offence, he should be told the Court at which he appeared, the offence with which he was charged and the adjudication of the court. If he admits the matter put to him, the Court can proceed to deal with him. If he denies those matters, however, they must be proved and he must be asked if he wishes to give evidence (or make a statutory statement) and call witnesses. After all the evidence has been taken, the Court must pronounce whether it finds the breach proved: see *R v Devine* [1956] 1 WLR 236, 237.

In the present case, the appellant did not admit the breach and, had the convictions been upheld, I would not have supported the sentences of imprisonment and corporal punishment. I allow the appeal. I quash the convictions and set all the awards aside.

*Appeal allowed.*

Dated and delivered at Nairobi this 18th January 1978.

**E. TREVELYAN**

**JUDGE**