



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

**APPELLATE SIDE**

**CRIMINAL APPEAL NO 1815 OF 1984**

**(From Original Conviction of the Second Class District Magistrate and Sentence of the Senior Resident Magistrate in Criminal Case No 4000 of 1983 of the Senior Resident Magistrate's Court at Machakos: D Konya Esq and L B Ouma Esq)**

**JOHN WAMBUA MUNGUTI ..... APPELLANT**

**(Original Accused No 2) v e r s u s**

**REPUBLIC ..... RESPONDENT**

**CORAM O'KUBASU J**

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

**J U D G E M E N T**

The appellant was convicted on what appeared as a plea of guilty, on a charge of house breaking and stealing contrary to Sections 304 (1) and 279 (b) of the Penal Code. For house breaking contrary to section 304 (1) of the Penal Code, the appellant was sentenced to five years imprisonment and for stealing from a dwelling house contrary to section 2789 (b) of the Penal Code, he was sentenced to five years imprisonment with 10 stokes of the cane.

The record of the lower court shows that, on the 1st October, 1983, when the appellant (and others) appeared for plea, he denied the charge but on the 7th November, 1983, he said:

"I wish to change my plea and admit to the charge". [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) Then on the 22nd November 1983 the appellant appeared before the learned Second Class District Magistrate (M D Konya) when the facts were narrated to the court and appellant admitted the facts to be all true. He was then convicted. When the appellant was referred to the learned senior Resident Magistrate for sentence he told the learned Senior Resident Magistrate. "I wish to change my plea to that of not guilty"

This change of plea was refused and so the appellant was sentenced. The learned State Counsel (Miss Mbarire), did not support conviction as the plea was not unequivocal.

Having considered the record of the lower court, I am satisfied that the learned Second Class District Magistrate (Mr Konya) followed the correct procedure until he referred the case to the Learned Senior Resident Magistrate. The only error was on the part of the Senior Resident Magistrate, who refused to

accept the appellant's change of plea. The manner of recording a plea of guilty and steps to be taken were set out in *Adan v R* [1973] E A 445 at p 446.

Since the appellant was entitled to change his plea before sentence and as he was denied that right, I have no alternative but to allow their appeal. Hence, the conviction is quashed and sentence set aside. The appellant is to be set free unless otherwise lawfully held. The prosecution is of course, at liberty to re-arrest the appellant and charge him afresh with the original offence. Order accordingly.

**Delivered at Nairobi, this 14th day of December 1984.**

**E O'KUBASU**

**JUDGE**



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