



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 15 OF 2019**

**BETWEEN**

**ERIC MWITI KINOTI.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal against conviction and sentence in Githongo Criminal Case No. 381 of 2020 by Hon. S.Ndegwa(SPM) on 28<sup>th</sup> July, 2021)**

**JUDGMENT**

1. On 28<sup>th</sup> July, 2021; **ERIC MWITI KINOTI** (Appellant) was convicted for the offence of breaking into a building and committing a felony contrary to section 306 (A) of the Penal Code (**the Act**) and an alternative count of handling stolen property contrary to section 322(1) (2) of **the Act**.

2. By a judgment dated 28<sup>th</sup> July, 2021, Appellant was convicted of the main count and was sentenced to 4 years' imprisonment.

**The Appeal**

3. Dissatisfied with the conviction and sentence, Appellant lodged the instant Appeal mainly on the ground that the Prosecution case was not proved beyond any reasonable doubt.

**Analysis and determination**

4. The duty of the first Appellate Court is to carefully examine, consider and set out the evidence that was tendered before the trial court and subject the whole evidence to a fresh and exhaustive re-examination and re-evaluation so as to arrive at own independent conclusions on the appellant's guilt or otherwise. (See **Michael Muriuki Munyori v Republic [2017] eKLR**).

**Prosecution case**

5. The evidence as adduced by PW1 is that on 02<sup>nd</sup> May, 2020, he lent Appellant Kshs. 2,000/- in exchange of which Appellant gave him a TV set and a vacuum cleaner which he offered to sell to him at Kshs. 2,000/- and Kshs. 1,500/- respectively. That on the same day, both were arrested in his house and the TV and vacuum cleaner which were suspected stolen property taken away by police. PW2 who was present during recovery and arrest identified the TV and vacuum cleaner as some of the properties that had been stolen from Mukiria Technical School on 30<sup>th</sup> April, 2020. That subsequently on 04<sup>th</sup> May, 2020, he accompanied police and the PW4, area assistant chief to Appellant's house where a pink bucket, brush and a broom inscribed Mukiria were recovered from. PW3 the deputy principal of Mukiria Institute identified the recovered items at the police station. The investigating officer arrested both Appellant and PW1 and recovered a TV and a vacuum cleaner which were identified to have been stolen from Mukiria Institute. He was not present during the recovery from Appellant's house.

**Defence case**

6. In his sworn defence, Appellant denied the offence and said he was framed after he declined to sell his land to the principal of Mukiria Institute and for declining an offer to give police and the chief Kshs. 100,000/- if he sold the land.

7. I have carefully considered the evidence on record and the written submissions filed on behalf of Appellant and by the state and the

issues for determination are whether the Prosecution proved that Appellant broke into a building and stole from therein.

8. Evidence that Appellant gave the TV and the vacuum cleaner to PW1 is that of PW1 as against that of Appellant. However, there is corroborated evidence by PW2 and PW4 that a pink bucket, brush and a broom which had been stolen together with the TV and the vacuum cleaner were recovered from Appellant's house.

9. When Appellant was called he give his defence, he failed to explain how property that had been recently stolen was found in his house. He instead raised the issue of being framed and as was rightly pointed out by the trial magistrate failed to interrogate the witnesses in cross-examination and his defence can only have been an afterthought.

10. From the foregoing, I find that the conviction was well founded on the evidence tendered by the prosecution.

11. Concerning sentence, the maximum sentence for the offence of breaking and committing a felony is 7 years. Appellant was a first offender and all the stolen goods were recovered.

12. The trial court record reveals that Appellant was in custody during the trial for a period of one year. Section 333(2) of the Criminal Procedure Code provides that:

**(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**

**Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.**

13. In the end, the conviction is confirmed but the 4 years' sentence is substituted with a 2-year sentence from **02<sup>nd</sup> May, 2020** when Appellant was arrested.

**DELIVERED IN MERU THIS 24TH DAY OF FEBRUARY 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

**COURT ASSISTANT - KINOTI**

**APPELLANT - PRESENT IN PERSON**

**FOR THE STATE - MS. MWANIKI**