



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 01 OF 2019**

**MUSA HASSAN JUMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the decision and judgment of the Honourable D. Mochache, Senior Principal Magistrate, delivered on the 14<sup>th</sup> day of December 2018 in Shanzu Criminal Case No. 699 of 2015).*

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

1. The Appellant was found guilty and convicted in Shanzu SPMC CR.C.No.699 of 2015 for the offences of breaking into a building and committing a felony contrary to Section 306(A) as read with Section 306(B) of the penal code and obtaining money by false pretences contrary to section 313 of the penal code.

2. The appellant was dissatisfied with the conviction and sentence and has petitioned this court on the following grounds:-

**I. That the learned trial magistrate erred in law and infact in convicting the Appellant to serve 3 years on probation and to pay the sum of Kshs.1,000,000/= to the complainant.**

**II. That the Hon. Learned trial Magistrate erred in law and fact in convicting the appellant for a crime committed where the appellant was outside the territorial jurisdiction of the Republic of Kenya.**

**III. That the learned trial Magistrate erred in law and infact in failing to take into account the material contradictions and variances in the testimonies of the prosecution witnesses. The appellant prayed that the appeal be allowed, the conviction quashed and appellant set at liberty.**

**IV. That the learned trial magistrate erred in law and fact in disregarding the appellants alibi duly supported by requisite evidence.**

3. The appeal was canvassed by way of written submissions. The appellants counsel argued that the prosecution failed to prove ingredients of offence of housebreaking and stealing beyond reasonable doubt and that the trial Magistrate failed to take his defence of alibi into consideration since he left the country on 17/11/2012 and the offence took place on 9/12/2012.

4. He said he was on 90 day visa to Saudi Arabia where he was working as a truck driver. The appellants counsel relied on the authority of **Elizabeth Waithiengi Gatumu vs Republic High Court at Nyeri Criminal Appeal No. 50 of 2012** where it was held:-

***“Thus it is settled law that the defence of alibi must be proved on a balance of probabilities and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution”.***

5. The Respondent/state in submissions relied in the holding in the authority of **Micheal Maundu Wambua vs Republic (2006) eKLR** to argue that the offence of housebreaking & stealing was proved against the appellant as he gained access into the house where machine was stored without the permission of the owner.

6. In regard to the appellants ground that his defence of alibi was not considered the Respondents argued based on the holding on **Republic vs Sukha Singh h/b Waziri Singh & Others (1939) 6 E.A.C.A 145** that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. The Respondents

conceded that indeed the appellant's defence of alibi was not considered by the trial Magistrate and yet he was away on 7/12/2012 when the offence in question was committed.

7. This being a 1<sup>st</sup> appeal I have perused the trial court's proceedings i.e. evidence adduced by the prosecution as well as the defence and submissions, I have also perused grounds of appeal and the submissions by respective parties to this appeal and filed that the Respondents have rightly conceded to the appeal. PW 3 proceeded to appellant's premises and took the water purifying machine apparently in the absence of the appellant and without knowing that the same machine had previously been sold to PW 1 & PW 2.

8. The conduct of the appellant in relation to the complainants was more of fraud rather than breaking into the house where PW 1 & PW 2 were running their businesses. If the offence is alleged to have been committed on 7/12/2012 and he left the country on 17<sup>th</sup> November 2012 unless it is proved that he was an accomplice to the house breaking then the charge cannot be sustained.

9. In the circumstances the appeal succeeds, the conviction is quashed and set aside.

**Dated, signed and delivered at Mombasa this 28<sup>th</sup> day of January 2021.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**