



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.14 OF 2020**

**GIDEON KIGEN.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the original conviction and sentence of five (5) years imprisonment by Hon. W. KARANI (RM) in Kericho CMCR. No.115 of 2018 delivered on 18/5/2018).***

**JUDGMENT**

1. The Appellant was sentenced to five (5) years imprisonment on 18/5/2018 for the offence of Burglary and Stealing Contrary to Section 304 (2) and Section 279(b) of the Penal Code.
2. The particulars of the charge were that on the night of 2/10/2017 at about 1.50 am at Kapsoit Market, Kapsoit Sub-Location in Kericho East Sub-County within Kericho County, the Appellant jointly with others not before Court broke and entered the dwelling house of **ISABELLA CHEPKIRUI** with intent to steal and did steal one Gas Cylinder, one Laptop, one Cellphone make Techno WX3, one Suitcase containing assorted clothes, one bag and one woofer all valued at Kshs.36,300/= and also cash Kshs.7,000/= the property of **ISABELLA CHEPKIRUI**.
3. The Prosecution evidence in summary was that the Complainant **ISABELLA CHEPKIRUI (PW.1)** locked her house on 1<sup>st</sup> October, 2017 at 2 pm and went to work. Her neighbor called her at 2 a.m. on 2/10/2017 and told her that her house had been broken into.
4. PW.1 rushed to the scene and confirmed her house had been broken into and the padlocks had been removed and her items listed in the charge sheet were missing.
5. PW.2, the neighbor had managed to arrest the Appellant but two other people had escaped. PW.2 said the Appellant fought with him and he empowered him and also escaped. PW.2 identified the Appellant as Gideon Kigen.
6. PW.1 and PW.2 reported the matter at Kapsoit Police Station and on 13/1/2018, the Appellant was arrested and charged with this offence.
7. The Appellant said in his defence that he stays in Embakazi, Nairobi where he is a driver of Public Service Vehicles and also usually given "Squads" by his friends so that he can get some money. He said on 2/10/2017, he was at Nairobi and he could not have committed the offence as he was in Nairobi.
8. The Trial Court found the Appellant guilty as charged and convicted him and sentenced him to five (5) years imprisonment. The Appellant has now appealed to this Court against both conviction and sentence on the following grounds:-
  - (i) ***THAT there was insufficient evidence to link the Appellant to the said offence.***
  - (ii) ***THAT the Trial Court did not consider the defence evidence.***
  - (iii) ***THAT the Complainant was a lady who had requested for love from the Appellant and when he refused she said she would make sure he suffered.***
9. The parties filed written submissions in this appeal which I have duly considered. The Appellant submitted that the Trial Court convicted him without sufficient evidence and further that the Trial Court violated the law by relying on the Prosecution evidence and ignoring his defence that he was not at the scene of crime on 2/10/2017 but he was at Embakazi Nairobi where he is a Public Service Vehicles driver.

10. The Appellant also stated in his submissions that he met the Complainant only once while working as a Public Service Vehicles driver and she requested him for love on the same day and when he refused, she insisted she will make sure he suffered.
11. The Respondent opposed the appeal and submitted that PW.2 was an eye witness who said he had started sleeping when he heard the Complainant's house being broken into.
12. PW.2 went to the scene and he managed to arrest the Appellant temporarily. PW.2 said he knew the Appellant and he managed to recognize him. The Appellant fought PW.2 and he also managed to escape. PW.2 said the Appellant was with two others who managed to escape with the goods stolen from the Complainant's house.
13. PW.2 said there was security light at the scene and he managed to see the Appellant.
14. The Respondent further submitted that the Trial Court considered the defence evidence and noted that the Appellant raised an alibi defence which was not introduced early in the Trial nor raised in Cross-Examination of the Prosecution witnesses and further, the same did not shake the prosecution evidence.
15. On the 4<sup>th</sup> ground raised by the Appellant that the complainant had requested for love from the Appellant, the Respondent submitted that the said issue was not raised during the Trial and further, the prosecution evidence was overwhelming rendering the conviction herein safe.
16. This being a first appeal, it is the duty of this Court to re-evaluate the evidence adduced before the Trial Court and to arrive at its own independent conclusion whether or not to support the findings of the Trial Court.
17. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”**

18. The Court of Appeal also held in the case of **Kiilu & Another vs. Republic [2005]1 KLR 174** as follows:

**1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**

**2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

19. The issues for determination in this appeal are as follows:-

**(i) Whether the prosecution proved its case to the required standard.**

**(ii) Whether the Court considered the Appellant's alibi defence.**

**(iii) Whether the appeal should be allowed.**

20. On the issue of the standard of proof, it is the duty of the prosecution to prove the guilt of the Appellant and the standard required is beyond reasonable doubt.
21. In the current case, I find that the prosecution called four witnesses. PW.2 was the only eye witness who arrested the Appellant momentarily before the Appellant managed to escape. PW.2 said the Appellant was with others when he broke into the Complainant's house. PW.1 recognized the Appellant whom he knew as **GIDEON KIGEN**.
22. The Complainant said she left her house at 2 p.m. and went to work and at 2 a.m. the following morning, PW.2 who was her neighbor called her to the scene and she went and found her house had been broken into and her property listed in the charge sheet stolen.
23. The law does not require a specific number of witnesses to prove a fact. Even the evidence of one witness can prove a case. The law is clear under **Section 143** of the **Evidence Act**, that even one witness can prove existence of a fact.
24. **Section 143** of **Evidence Act** (Cap 80) Laws of Kenya states as follows:

**“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”**

25. I find that the Trial Court warned itself on the danger of relying on the testimony of a single witness on identification and found the testimony of PW2 reliable.

26. PW2 had an opportunity to identify the Appellant whom he found coming out of the Complainant's house with two others. PW2 knew the Appellant before the incident and there was security light at the scene. I find that the testimony of PW2 was sufficient to convict the Appellant with the offence of Burglary and Stealing Contrary to Section 304 (2) and Section 279(b) of the Penal Code.

27. On the issue as to whether the Trial Court considered the alibi defence by the Appellant, I find that although the same was raised at defence stage, the Court considered it and found that it did not dislodge the prosecution evidence.

28. The Appellant raised extraneous issues in his appeal that were not before the Trial Court such as the issue that the Complainant had requested love from him.

29. I find that the appeal herein lacks in merit and I accordingly dismiss it and I uphold both the conviction and the sentence.

**Delivered, signed and dated at Kericho this 22<sup>nd</sup> day of January, 2021.**

**A. N. ONGERI**

**JUDGE**