REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. E010 OF 2021

RASHID HUSSEIN SALAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the judgement of Honourable Principal Magistrate Amos.K. Mokoross,*

in Wajir Principal Magistrate Court in Criminal Case No. 9 of 2020, which was

delivered on the 24th November 2020.)

JUDGEMENT

1. The appellant was charged with the offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code. He was convicted and sentenced to Seven (7) years imprisonment for the offence of **Breaking into a building used as a dwelling and committing a felony contrary to Section 304 (1) (a) of the Penal Code.**

2. The particulars of the offence were that Rashid Hussein Salat, the Appellant on the 8th day of September 2019 at Wajir High Area in Wajir East Sub County within Wajir County, broke and entered into the building used as a dwelling house of Meymuna Hussein Adan and stole the following items; Two Tv Sets 40" and 32" respectively make Sony and four gold rings all valued at Kshs. 102,900/= the property of the said Meymuna Hussein Adan.

3. Being aggrieved and dissatisfied with the judgement, the appellant filed this Appeal on 4th December 2020 raising thirteen (13) grounds of appeal that can be summarized as follows;

a. That the learned magistrate erred in law an in fact when he failed to conduct *voire dire* examination on PW3 who was the only witness to the offence.

b. That the Honorable learned magistrate erred in law and in fact in failing to caution himself when he chose to rely primarily on circumstantial and uncorroborated evidence of the prosecution witness in convicting the appellant.

c. That the learned magistrate erred in law and in fact in failing to find that the evidence of the prosecution was contradictory and did not place the appellant at the scene of the crime.

d. That the Honorable Learned Magistrate erred in law and in fact by not finding that the charge was defective having charged the appellant with the wrong section of the law which ought not to have been cured to the detriment of the appellant.

e. The Honorable Learned Magistrate erred in law and in fact by relying on the evidence of the prosecution which from the onset failed to call crucial witnesses.

f. That the sentence was manifestly excessive in view of the circumstances of the case.

4. On 28th October 2021 this Court directed the parties to canvass the appeal through written submissions. The submissions are summarized as follows; -

Appellants Submissions

5. It was submitted on behalf of the appellant that the prosecution failed to call witness who allegedly discovered the Breaking in, recovered the identity card, the witness who informed PW1 that her house had been broken into and the police officers who took photos of the scene.

6. On inconsistencies and uncorroborated facts, it was submitted that PW2's evidence of identifying the tuktuk marks, identity card and ladder was not corroborated by any other witnesses. That there was glaring inconsistencies on who found the identity card and the position it was found. Further, there was no proper investigation as the same was conducted eleven (11) days after the offence. On visual identification the evidence of PW3 and the evidence of PW1 with reference to the tuktuk marks he allegedly found on the scene was inconsistent. No identification parade was conducted. That PW3's testimony cannot be relied upon because *viore* dire examination was not conducted. That PW3 being the star witness her testimony remained uncorroborated. In this regard the following cases were cited**; Julius Kiunga M'Rithia v Republic (2011) eklr, Johnson Muiruri v Republic (1983) KLR 447, Peter Kariga Kiune Criminal Appeal No. 77 of 1982, Regina v Campbell (Times December 10, 1982), Nyeri Criminal Appeal No. 16 of 2014 Samuel Karimi v Republic, Wamunga v Republic (1989) KLR 424, M'Birithia v Republic (2013) eklr, Kiori v R (Criminal Appeal No. 150 of 1964 (unreported) E.A.C.A. R V Kipkeringarapa Koskei and Another, Simon Musoke v R Criminal Appeal No. 188 of 1996**

7. On the sentence it was submitted that the same was excessive and that the trial magistrate was influenced by irrelevant considerations. Counsel for the Appellant cited the case of **Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No. 253 of 2003.**

Respondents Submissions

8. The Respondent submitted that whereas the prosecution case relied on circumstantial evidence the appellant's identity card was found at the scene of crime and the Appellant was seen carrying a television set. That the inference of guilt is built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence. That in this case all strands pointed to the appellant. The state cited the case of **Abanga alias Onyango v R Cr. App No. 32 of 1990** and opined that it had met all the three tests set out when a case rests entirely on circumstantial evidence.

9. On whether the prosecution failed to call relevant witnesses the respondent relied on the provisions of **Section 4 (3) of the Evidence Act** which provides that no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.

10. As to the charge sheet the respondent conceded that the appellant ought to have been charged under Section 304 of the Penal Code as opposed to Section 306 of the Penal Code. It was the Respondents submission however that the test on whether a charge sheet is fatally defective is substantive rather than formalistic. In this instance the appellant was aware of what he had been charged with and that it was quite clear from the cross examination that he understood he was charged with breaking into a dwelling house and committing a felony. That the charge sheet therefore was not fatally defective and could be cured under Section 382 of the Criminal Procedure Code.

Analysis and Determination

11. This Court, as the first appellate court, is enjoined to examine, analyse and evaluate afresh the evidence adduced before the trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where 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."**

12. **Pw1 Miamuna Hussein Ali** testified that on 8th August, 2019 at around 2:30 a.m. while in Nairobi, she received a call from her younger sister and was informed that her house had been broken into. She was informed that two television sets, four gold rings and cash in coins had been stolen. It was her evidence that she travelled to Wajir the following day and arrived at around 11 a.m. Upon arrival she confirmed that indeed her house had been broken into and the said items stolen. She found the door and the lock to the house had been cut.

13. She further testified that while on her way back, she was informed that an I/D card had found near the fence. Upon arrival she made enquiries as to the owner of the identity card and several people identified the owner. She went to the police station the day after her arrival and surrendered the identity card. Thereafter they proceeded to the appellant's home but they did not find him. The police visited her home and took photos of the parts broken. She identified the photos during the trial. She had never met the suspect before.

14. **PW2 Ibrahim Hussein Adan** testified that he was informed by his wife that his sister's house had been broken into. That he proceeded to his sister's house at around 7 p.m. where he found that the house had been broken into. That he slept at the house on that date. He told the court further, that following day, he left for the mosque and upon his return he saw a ladder leaning against the wall. He then proceeded outside the compound and saw tuktuk tracks and an Identity card where the ladder was. He called and informed PW1 who asked him to keep the same until she arrived. He enquired around for the owner of the I.D. and was informed who he was and where he lived. He first saw the accused upon arrested. He recalled he was arrested in January 2020. He did not know the accused before his arrest.

15. **PW3 L.M. (name** withheld**)** testified that she is ten years old and in class 8. she stated that on August. 2019 at around 10:00 a.m. she outside their home when she saw someone with a TV. The person passed close to the home. He was carrying the TV in the sack and part of the TV was outside the sack and could be seen. Further on the same day at around 4:00 p.m. she heard people screaming near their home and she went to the scene and learnt that the house had been broken into and some things were stolen and among the things said to have been

stolen were 2 TV sets. The house robbed is two houses from theirs. The person she saw carrying the TV had come from the direction of the robbed house. That she saw the house that had been broken into. She identified the picture of the door that had been broken into. It was also her testimony that she did not know the appellant before. She however identified the appellant as the person who had the TV by pointing out to him in court.

16. **PW4 PC Evans Otieno** was the investigation Officer. He testified that he was given the case to investigate on or about 21st of August. 2019. Together with **PC Ochieng** they proceeded to the scene and found the broken door. They photographed the scene. That they then arrested the appellant with the aid of the family members. He presented the photos of the door and the drawers that were damaged as EXH 1 a,b,c,d and the Identity card as EXH 2. He pointed out to the appellant as the person they arrested.

17. The trial court found the appellant had a case to answer and put him on his defence. He chose to give a sworn statement where he informed the Court that the charge against him is false. He had lost his identity card in Shellety though he had not reported the loss of the said identity card.

18. The onus of proving a criminal matter beyond all reasonable doubt is upon the prosecution so that the accused does not have to prove his innocence. In discharging this mandate, the prosecution may rely on direct or indirect evidence.

19. In the instance case no one saw the person who broke, entered and stole belongings of **PW1** as she had at the time travelled to Nairobi and there was no one in the house at the material time. To prove it's case therefore the prosecution relied on circumstantial evidence from 2 main witnesses **PW2 & PW3.**

In **R vs. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135.** It was held that:

> **"In order to justify circumstantial evidence, the inference of guilt, and the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.**

In **Abanga alias Onyango v R Cr. App. No 32 of 1990,** the Court of Appeal court set out the conditions as follows:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; (iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else…."**

20. The court will start by addressing the evidence of **PW3which** has issues in that she was a child of tender years. She informed the court that she was 10 years old. The court failed to do a *voire dire* examination yet she took oath.

Section 2 of the Children Act defines a child of tender years to be at age 10. In **Kibageny Arap Kolil v R (1959) EA 82** the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The Court of appeal in **Patrick Kathurima v R Criminal Appeal No.137 of 2014** and in **Samuel Warui Karimi v R Criminal Appeal No.16 of 2014** stated categorically that the definition in the Children's Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for *voire dire* examination. See also **Maripett Loonkomok v Republic [2016] eKLR.** The Court held as follows;

> **"It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;**
>
> **"In appropriate case where *voir dire* is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."**

See also Athumani Ali Mwinyi v R Cr. Appeal No.11 of 2015

21. Therefore, even without considering the evidence of **PW3** The court can consider the evidence of **PW1, PW2 & PW4** and be able to arrive at a decision.

22. **PW2** stated that he found the Identity card of the appellant at the scene of crime. He also saw a ladder leaning against the wall, he went to the other side of the said wall and saw tuktuk tracks and the Identity Card. He restated the same during cross-examination. His statement was consistent. The appellant claimed that he lost his identity card at a place called Shellety but stated that he did not report the loss. The fact that the Identity Card of the Appellant was found at the scene of crime without a reasonable explanation place him at the scene of crime and no other inference can be drawn other than he was at the scene during the theft. The chain is complete, there is no escape from the conclusion that within all human probability the crime was committed by the appellant or him in the company of others and none else.

23. The above is evidence of one witness, the prosecution is not obliged to call a superfluity of witnesses to establish the charge beyond any reasonable doubt. See **Keter V Republic [2007] 1 EA 135**. The witnesses presented by the prosecution were sufficient to prove the charge against the appellant, in particular the evidence of **PW2**.

24. The Appellant was charged under Section 306 of the Penal Code, whereas the facts and evidence of this case from the onset pointed to an offence under Section 304 (1) (a)of the Penal Code.

The correct section to have charged the Appellant with is Section 304 (1) (a) of the Penal Code, the anomaly is not fatal and can be cured by invoking Section 382 of the Criminal Procedure code as no injustice will be occasioned to the Appellant. The only difference is that they refer to different type of premises from the other but the sentence is similar upon conviction.

Section 382 states as follows;

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless, the error, omission or irregularity has occasioned a failure of justice."**

25. This court resonates with the conviction by the trial court. As for the Sentence imposed the principles upon which an appellate court can in exercise of its discretion review/interfere with a sentence imposed by the trial court are well settled and they include; when the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. See **Amos Kariuki Nyaga v Republic [2020] eKLR**

26. The offence herein carries a maximum sentence of seven (7) years imprisonment. Considering the facts of this case the court finds the sentence is excessive and the same is set aside. In its place the Appellant is sentenced to three years' imprisonment.

27. The appeal herein therefore succeeds only on Sentence.

DATED SIGNED AND DELIVERD IN GARISSA THIS 25TH DAY OF NOVEMBER, 2021

ALI-ARONI

JUDGE