REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO.23 OF 2019

KENNETH KORIR alias ERIC.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Bomet CM Criminal Case No.647 of 2019 – P. J Adeke RM)

JUDGMENT

1. The appellant KENNETH KORIR alias ERIC was convicted by the magistrate's court of Bomet for entering a dwelling house with intent to commit a felony contrary to section 305 (1) of the Penal Code and sentenced to serve 2 years imprisonment.

2. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal on the following grounds –

> **1. The learned magistrate erred in law and fact by holding that the element of the offence had been proved yet the prosecution were unable to disclose the offence the appellant had allegedly intended to commit.**
>
> **2. The learned magistrate erred in law and fact by failing to put weight on the appellant's defence that this was his girlfriend with whom he had sired a child and that his intention may have been to exercise his paternal right of visitation.**
>
> **3. The learned magistrate erred in law and fact by holding that the complainant was mentally ill without the necessary medical report.**
>
> **4. The learned magistrate erred in law and fact by holding that the complainant was a minor without the benefit of a birth certificate to ascertain her age.**

3. During the hearing of the appeal, Mr. Langat for the appellant submitted that though in the charge sheet it was alleged that the appellant broke into the house intending to commit a felony of stealing, the prosecution evidence did not disclose such intention. Counsel argued that the failure by the prosecution to adduce such evidence was fatal, and the appellant should thus have been acquitted by the trial court.

4. Secondly, counsel argued that the magistrate wrongly made findings which were not supported by the evidence by stating that the complainant was mentally handicapped without any medical evidence to support the same and also stating that the complainant was a minor without the benefit of a birth certificate.

4. Counsel conclude by stating that there was no evidence that the house belonged to the complainant, and that the defence of the appellant that he was exercising parental visitation rights should have made the trial court acquit him. Counsel urged this court to allow the appeal.

6. In response, the Principal Prosecuting Counsel Mr. Murithi conceded to the appeal and stated that a crucial witness Justus was not called by the prosecution to corroborate the evidence of PW2. Counsel added that in view of the prosecution allegation that the appellant demolished the house, photographs should have been produced, which was not done.

7. This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own independent conclusions and inferences – see **OKENO – VS – REPUBLIC [1972]EA 32.**

8. I have re-evaluated the evidence on record. The prosecution called 3 witnesses. PW1 was the complainant. PW2 Benard Kipkoech was a neighbour of PW1, while PW3 PC John Cheruiyot was the investigating officer.

9. The evidence of PW1 was that the appellant just came to the one roomed house at 3am, and made a hole, put his hand and opened the door. He entered the house and refused to come out, and the two slept in that single room, though in different corners.

10. PW2 Benard Kipkoech a neighbour heard screams from PW1and proceeded there but the appellant refused to come out of the house and he thus locked the door from outside, and left the complainant and appellant in the house till after day break.

11. PW3 PC John Cheruiyot the investigating officer testified that he established that the appellant and the complainant had a child, and was also informed that the appellant broke into the complainant's house and thus charged him in court.

12. In his defence, the appellant stated that he entered the house because he had a child with the complainant.

13. Having considered all the evidence on record, I find that there is no evidence that the appellant broke and entered the house to commit any offence, let alone the offence of stealing. He merely entered that one roomed house occupied by the complainant forcefully and refused to come out and infact slept therein until day break. The complainant also slept in the same room.

14. The prosecution thus did not prove the offence alleged against the appellant. The learned magistrate was thus wrong in convicting him as the prosecution did not discharge its burden of proving the offence alleged beyond any reasonable doubt. The Principal Prosecuting Counsel was thus right in conceding to the appeal.

15. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated this 30th day of April 2020.

GEORGE DULU

JUDGE

Delivered through video conferencing in the presence of Mr. Langat court assistant, Mr. Musyoka ICT officer, Ms Fundi for state, Mr. Onesmus Langat for the appellant and the appellant.