



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 5 OF 2019

MARK SIMIYU WANYONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence Made on 28th December, 2018 by Hon. D. Onyango in Kimilili SPM CR. No. 395 of 2018)

J U D G M E N T

1. **Mark Simiyu Wanyonyi ('the appellant')** and another were charged with the offence of house breaking contrary to **section 304 (1) (b) of the Penal Code**. It was alleged that on 3/5/2018 at Musembe Village Kamukuywa Location in Kimilili Sub-county of Bungoma County, jointly with others not before court they broke and entered the dwelling house of **Abraham Wekesa Nasogo** with intent to steal therein.
2. They also faced a second count of stealing contrary to **section 279 (b) of the Penal Code**. The particulars were that on the same day, time and place, jointly with others not before court, they stole one TV set make LED, one bicycle, a bag containing assorted clothes, four sacks of maize all valued at Kshs. 42,000/- the property of **Abraham Wekesa Nasongo** from his dwelling house.
3. There was an alternative charge of handling stolen property contrary to **section 322 (1) (2) of the Penal Code**. It was alleged that on 6/5/2018 at Musembe Village Kamukuywa Location in Kimilili Sub County of Bungoma County, otherwise in the course of stealing, the appellant dishonestly received and retained one TV set make LED and one bicycle knowing or having reason to believe them to be stolen goods.
4. The appellant denied the charges but after trial, he was found guilty of both counts, was convicted and was sentenced to serve 18 months for count 1 and 18 months for count 2. The sentences were to run concurrently.
5. Aggrieved by the said decision, the appellant filed this appeal challenging both the conviction and sentence raising 4 grounds which was basically that **the prosecution case was not proved beyond reasonable doubt**.
6. As held in **Okeno v. Republic [1972] EA 32**, this Court as the first appellate Court must re-appraise the evidence afresh review the same and come up with its own independent findings and conclusions but having in mind that it did not have the advantage of seeing the witnesses.
7. The prosecution case was that on the material day, **Abraham Wekesa Nasogo (Pw1)**, the complainant, was at work at Kamkuywa market. At about 3pm, he was informed that his house had been tampered with. When he got to his house, he found that the house had been broken into and various items including a TV, bicycle, 4 bags of maize, a pair of shoes, utensils and clothes were missing. He reported the incident at Kamukuywa Police Station.
8. On 5/5/2018, **Jimmy Ngairi (Pw3)** called at about 9.30 pm and informed him that someone was trying to sell him a TV and that he should go and find out if it was his. He went the following day and confirmed the TV to be his. **Pw3** informed him that it was the appellant and his co-accused who had attempted to sell him the TV.
9. **Pw1** then went to the Police to report the developments when he learnt that the appellant's co-accused had been arrested. He accompanied members of the public and flushed the appellant from his parents' home. The appellant led them to a house at Kimilili where they recovered the bicycle and a black bag.
10. **PC Issa Hussein (Pw2)** told the court that he was assigned the case to investigate and he recorded the witness statements on 6/3/2018. When he visited the scene he found that the house was broken into as the padlock was destroyed. After recording the witness statements, the complainant went to the appellants' home and recovered a TV, bicycle and the appellant was charged

11. In his defence, the appellant gave unsworn testimony. He recalled that on 6/5/2018, he was at home at Kamukuywa when at about 10.00 am about 20 people invaded their home. They told him to follow them to Kamukuywa Market. There, they ordered him to sit down and they demanded that he releases the stolen items. When he said that he had none, he was assaulted and doused with fire. The crowd then dispersed and he was taken to the Police Station.

12. The court has carefully considered the submissions of the respective parties. The appellant submitted that his was a case of mistaken identity. That **Pw1** had testified that the appellant did not steal but was with the people who stole.

13. The Court has carefully considered the record and the judgment of the trial Court. The only evidence connecting the appellant to the offence was the testimony of **Pw3**. His testimony was that two boys had attempted to sell him a TV but when he demanded for a receipt, they abandoned it and run away. He stated that one of the boys was the appellant. That after the boys had run away, he called the complainant who identified the TV following day and they took it to the Police Station.

14. **Pw1's** testimony was that after identifying the TV to be his, he together with **Pw3** took the TV to the Police Station where they learnt that the appellant's co-accused had been arrested. The record is not very clear on what transpired. The record reads;

"We opted to go the police station. Upon entering the station to record a witness statement. He told me the other boy was in the cell.

We recorded our witness statement we told the police about the suspect (Already convicted).

He told us that they had been stolen elsewhere. He said Simiyu was not there but they were together when they stole the items. He said accused (now in court) had the items.

Mark had not been arrested. We left the station and went to the home of the accused at Musembe area.

...

He directed us to the house my bicycle was recovered. There was another young man looking for his bag. He got it there".

15. From the foregoing, it is not clear from the evidence of **Pw1** who was giving him the information at the police station. He did not clarify whether it was **Pw3** or the police or the appellants co-accused.

16. According to the testimony of **Pw2** who investigated the case, it is after he had recorded the witness statements that **Pw1** went to the accused's home and recovered the TV and the bicycle.

17. This Court notes that earlier on, the appellants co-accused had been convicted by the same Court. The facts that were read to the co-accused upon which he was convicted were crystal clear.

They were that; ***"On 3/5/2018 the complainant Abraham Wekesa was at his business place when a neighbor called him that his door was broken.***

...

He reported at Kamukuywa police station. On 6/5/2018, he got a tip of (sic) that someone was sited. Upon arrival(Accused 1). He told the police who proceeded to arrest him. Upon arrival the crowd (sic) had set accused 1 on fire. They rescued him after which accused 1 mentioned accused no.2 as an accomplice and indicated that the lost items were in his house.

Police went to the house of accused 2 where a bicycle, TV and black bag were recovered and retained as exhibit the accused was arrested and charged".

18. These were the facts upon which the appellant's co-accused pleaded guilty and was convicted and sentenced to two years imprisonment. Can the same court convict two different accused persons on the same offence on a two set of facts? What is to be believed, the testimony of **Pw1** on the recovery of the items or that of **Pw2** or the court record upon which one accused has already served nearly the entire sentence of two years?

19. The evidence of **Pw1** was that the TV was offered for sale to **Pw3** and they delivered it to the police. That the bicycle was recovered from a house pointed out by the appellant. The testimony of **Pw2** was that the TV and bicycle were recovered from the house of the appellant. The record upon which the co-accused was convicted shows that both items were recovered from the house of the co-accused.

20. From the foregoing, the Court notes that the prosecution evidence had gaping holes. It was inconsistent and unsafe to sustain a conviction. Accordingly, I find the appeal to be meritorious and the same is allowed.

21. The conviction is hereby quashed and the sentence set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

DATED and **DELIVERED** at Meru this 12th day of August, 2020.

A. MABEYA

JUDGE