



**REPUBLIC OF KENYA**

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

**HCCRA NO 12 OF 2019**

**JOHNSON MURIUKI MAKUNYI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the Judgment of the Senior Principal Magistrate at Marimanti (HON. P.N. MAINA -SPM) delivered on 6/2/2019 Marimanti Principal Magistrate's Court Criminal Case No. 353 of 2018).***

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

1. **JOHN MURIUKI MAKUNYI** the Appellant herein was charged and convicted of the offence of House Breaking Contrary to **Section 304(1) (b)** and Stealing Contrary to **Section 279 (b)** of the **Penal Code** vide **Marimanti Senior Principal Magistrate's Court Criminal Case No.358 of 2018**. The particulars of the offence were that on 14<sup>th</sup> June 2018 at Kamatunga Location in Tharaka South Sub-County within Tharaka Nithi County broke and stole assorted items all valued at **Kshs.98,449** the property of **JOEL MWANGANGI KITHURE**. The Appellant also faced an alternative charge of handling stolen property but since he was convicted of the main charge, the alternative charge is not material in this appeal.
2. The brief facts regarding the evidence tendered by the prosecution at the trial court shows that the Appellant broke into a dwelling house belonging to the complainant by cutting a chain link in the compound of a house which was still under construction and stole assorted items listed on the charge sheet. The prosecution called an eye witness (Benjamin Mutua- PW2) who was passing by the complainant's house and saw the Appellant carrying some metal bars and a bag and upon being asked what he was doing, he ran off. Later on 17<sup>th</sup> June 2018 after the matter had been reported to the police, a search was conducted on the Appellant's house and some of the stolen items to wit a pair of sandals, shorts and trousers were found. The complainant identified the items as his and were tendered as evidence (P Exhibit 1, 2 & 3).
3. When placed on his defence, the Appellant denied the offence and stated that he was framed up. The trial court however dismissed the unsworn defence and found that the prosecution had proved its case to the required standard and convicted the Appellant and sentenced him to serve 3 years imprisonment on the 1<sup>st</sup> limb of the offence and 5 years on the second limb with both sentences running concurrently.
4. The Appellant felt aggrieved and lodged this appeal listing the following grounds namely:-
  - (i) ***That the sentence meted out was too harsh.***
  - (ii) ***That the evidence adduced by the prosecution against him was not corroborated and had inconsistencies.***
  - (iii) ***That the trial court erred by failing to note that the complainant had vendetta against him.***
  - (iv) ***That the trial court erred by failing to note that there was no independent witness to clear doubts.***
  - (v) ***That the learned trial magistrate erred by rejecting the defence without giving cogent reasons.***
5. In his written submissions, the Appellant contends that there was no evidence that the stolen items were found in his house submitting that the investigating officer should have taken photographs as proof that indeed the stolen items were found in his house.
6. He points out that the complainant in his evidence did not mention akala shoes were stolen in his house and that no receipts were tendered to prove that the stolen items found were his.

7. The Appellants submits that there was no evidence adduced that linked him with the offence and that the prosecution's case did not meet the threshold.
  8. The Appellant further claims that he was convicted of an alternative count yet there was no photographs tendered to show that he was found in possession of the said stolen goods. He submits that the police officers who recovered the items should have been taken snap shots of the stolen items on their mobile phones.
  9. The Appellant further contends that the case against him was fabricated because in possession of the said stolen goods.
  10. He further faults the sentences meted out against him saying that there was nothing to show that the same was to run concurrently.
  11. The Respondent has opposed this appeal and supported both the conviction and sentence meted out stating that the sentence meted out was fair citing the provisions of **Section 304(1)** and **279** of the **Penal Code**.
  12. The Respondent submits that the evidence adduced during trial was clear consistent and well corroborated. It contends that the evidence tendered were unshaken during cross-examination. It contends that the Appellant did not give a satisfactory answer as to how he came into possession of stolen items and failed to call any witness to corroborate his unsworn statement of defence.
  13. On allegations of vendetta against the Appellant, the Respondent submits that the trial court interrogated the allegations well and came to conclusion that there were no reasons disclosed to show that the complainant had framed the Appellant.
  14. The State also submits that contrary to the Appellant's contention, there was independent witnesses and pointed out that one such witness was PW2.
  15. The State also submits that the Appellants defence was duly considered and found wanting.
  16. This court has considered this appeal and submissions made. I have also considered the Response put forward by the Respondent. This being a 1st appellate court, my mandate is to re-evaluate or re-assess the evidence tendered by the prosecution in the subordinate court and come to own conclusion as to whether the trial court arrived at the correct conclusion having in mind that unlike the trial court, this court does not have the advantage of having seen the witnesses testify in court.
  17. I have perused through the proceedings and noted that as the Appellant concedes in his written submissions, there is no doubt that the complainant's items were stolen from his house-which was under constructions. The investigating officer visited scene and noted that **"part of the perimeter fence was cut"**. He also noted some spilt cow peas and green grams near the window where the burglar had gained access and pulled away items from the house belonging to the complainant.
  18. I have noted from the proceedings from the lower court that a prosecution's witness named Benjamin Mutua (PW2) provided crucial evidence that directly linked the Appellant with the commission of the offence. He literally found him in the act and when he inquired from the Appellant what he was upto, the Appellant took off clearly showing that he was guilty of some mischief.
  19. This court is not persuaded by the Appellant's contention that the prosecution's case was not corroborated or that there was no independent witness. The evidence of PW2 was corroborated by PW3, the wife of the complainant who was alerted about the Appellant's transgression in her homestead.
- The Appellant has not stated that he had a prior problem with either the complainant, PW2 or PW4 (the investigating officer) so as to make them conspire to frame him. I find that the allegations of frame up were not proven and the trial court was right to dismiss the defence which was mainly hinged on conspiracy theory as a sham and afterthought.
20. This court further finds that the fact that some of the stolen items were found in possession of the Appellant (they were recovered in his house) only 3 days after the theft indicates that the doctrine of recent possession also applied in the case against him. He never gave any explanation as to how the stolen items were found in his house.
  21. In my considered view the prosecution adduced sufficient evidence which proved beyond doubt that the Appellant had committed the offence of housebreaking and stealing therefrom.
  22. This court has however considered the ground raised by the Appellant regarding the sentences meted out against him and finds that there was a problem regarding the manner in which the charge was framed by the prosecution. The charge sheet presented read **"House Breaking contrary to Section 304(1)(b) and stealing contrary to Section 279 (b) of the Penal Code"**. The charge sheet in my view as drafted disclosed two distinct offences (counts) which should have been drawn in separate paragraphs to avoid duplicity of the charges as clearly discerned. Under **Section 135(2)** of the **Criminal Procedure Code** the law provides;

***" Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge called a count."***

A look at the provisions of **Section 304** shows that the offence of House breaking and burglary is a distinct offence. Stealing under **Section 279** is also a distinct offence. Lumping together the offences without separating them as provided under **Section 135 (2)** of the **Criminal Procedure Code** as seen above was improper as it amounts to duplicity of charges. It is no wonder that when the trial court ran into some difficulty when meting out the sentences and ended falling into error by meting out two separate sentences for the same offence.

Under **Section 304(1) (b)** a person who breaks into any building or tent used as a human dwelling and commits a felony is guilty of a felony termed housebreaking and is liable to imprisonment for 7 years. The trial court sentenced the Appellant to 3 years but went ahead to sentence him to 5 years for stealing which was improper and amounted to duplicity.

23. This court finds that the error in the charge sheet is one of those errors that can be rectified under **Section 382** of the **Criminal Procedure Code**. This court finds that the trial court should have found the Appellant guilty of the offence under **Section 304 (1) (b)** of the **Penal Code** and not the 2<sup>nd</sup> limb of the charge. The sentence in the 2<sup>nd</sup> limb is hereby set aside.

In the end this appeal partly succeeds. The conviction of the Appellant on House breaking and Burglary contrary to **Section 304(1) (b)** is upheld but the conviction and sentence of 5 years for stealing contrary to **Section 279(b)** of the **Penal Code** is set aside. The Appellant was properly sentenced for 3 years for the offence under **Section 304(1) (b)**. He shall therefore serve that sentence of 3 years but the further sentence of 5 years is set aside for the aforesaid reasons.

Dated and signed by;

**HON. JUSTICE R. K. LIMO.**

**SIGNED: DATED 14<sup>TH</sup> SEPTEMBER 2020**

**Dated, signed and delivered in the open court on 28<sup>TH</sup> day of SEPTEMBER 2020.**

**By:**

**HON. LADY JUSTICE L.W. GITARI**