REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 36 OF 2017

DANIEL MACHUKI.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. J. Mwaniki – RM dated and delivered on the 17th day of May 2017 in the Original Keroka Chief Magistrate's Court Criminal Case No. 717 of 2015}

JUDGEMENT

In the lower court the appellant was the 2nd accused and was jointly charged with his six co-accused on two counts of burglary and stealing contrary to Section 304 (2) and 279 (b) of the Penal Code. The appellant together with two other of his co-accused also faced an alternative charge of handling stolen goods contrary to Section 322 (1) (2) of the Penal Code. They were convicted only on one of the counts of burglary and stealing (count 1) and sentenced to four (4) years imprisonment on each limb and the sentences were to run concurrently.

The particulars of the charge on which they were convicted were that on the night of 22nd and 23rd June 2015 at Gesabakwa Sub-location within Kisii County jointly with others not before court they broke and entered the shop of OSORO OMOSA DOUGHLAS with intent to steal therein and did steal therein assorted shop goods the property of OSORO OMOSA DOUGHLAS the said assorted goods being of the value of Kshs. 30,000/=.

The appellant pleaded not guilty and the record shows that the prosecution called two witnesses the complainant being the first witness (Pw1). His testimony was brief. He stated that he was a businessman and that on 22nd June 2015 he went to his hotel and found it had been broken into and some wheat flour, cooking oil, clothes, soap, beans and 1,250/= were missing. He reported the incident to the police. Later a vigilante group called him and they recovered the items from the appellant herein and one of his co-accused. It is the appellant and his co-accused who named their other accomplices who were all rounded up and together they were charged with this offence.

The only other witness who testified was Alice Nyanchama (Pw2). She testified that she was the mother of one of the accused persons (not the appellant). She stated that on 22nd June 2015 at about 8pm some women went and told her about some flour and beans which had been stolen by some people who had hidden them. She stated that she told the women to take the flour and beans to the chief's office which they did. Pw2 stated that the women told her that the thieves were her son and other persons and that some of the items were recovered from the 6th accused and her son the 1st accused. She identified some of the items in court.

In his defence, the appellant stated that on 25th June 2015 he was at home when he heard screams. He rushed to the scene and found members of the public beating the 1st accused. He was arrested when the 1st accused said they used to walk together. He contended that he did not know why he was arrested.

The appellant has appealed against the conviction and sentence. The petition is premised on grounds that: -

> **"1. THAT the Learned Magistrate erred in law in fact by passing sentence against the evidence tendered which did not support the charge preferred.**
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> **2. THAT the Learned Trial Magistrate erred in law and in fact by disregarding the standard of proof in criminal matters to writ; beyond reasonable doubt.**
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> **3. The Learned Trial Magistrate erred in law and in fact by finding that offence of Burglary was committed by a stone against the evidence of prosecution witnesses.**
>
> **4. The Learned Trial Magistrate erred in law and in by convicting and subsequently sentencing the appellant on his own**

opinion.

5. The Learned Trial Magistrate erred in law and in fact by convicting the appellant on the evidence that did not clearly identify the appellant.

The appeal was canvassed by way of written submissions and is understandably conceded. On my part, I agree with Counsel for both sides that the evidence in this case did not meet the threshold to support a conviction. It is also my finding that the charge was defective as the appellant and his co-accused ought to have been charged under **Section 306 (a) of the Penal Code** given that the premises/building they were alleged to have broken into was not a dwelling house. Both **Section 304 (2) and 279 (b) of the Penal Code** apply where the offences of breaking and stealing are committed in a dwelling house.

Secondly, I find that the charge was defective for omitting to enumerate the items stolen from the complainant's premises which the person who drew the charge sheet also wrongly described as a shop instead of a hotel. On the merits this court finds that in the absence of the list of items stolen it could not be confirmed that what is said to have been recovered from the suspects was stolen from the premises. It is also not clear how, where or when the items exhibited were recovered as all the complainant stated was that he was later called by vigilantes and they (him included) recovered the items in court. Further he did not tell the court why he came to the conclusion that those were his items. More importantly as I stated earlier in this judgement there was no nexus between the items allegedly recovered and the charge facing the appellant and his co-accused.

The complainant's evidence as to who was found in possession of the so called stolen items was in any case contradicted by Pw2. She did not mention the appellant as one of those the items were recovered from. The evidence in this case was very scanty and it did not help that the investigating officer and the vigilantes who recovered the items were not called as witnesses.

I am satisfied that this appeal has merit. It is allowed. The conviction of the appellant is quashed and the sentence is set aside. The appellant shall be freed forthwith unless otherwise lawfully held.

Dated, signed and delivered at Nyamira this 31st day of January 2019.

E. N. MAINA

JUDGE