



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO.19 OF 2017**

**BETWEEN**

**BRIGHTON OTIENO ODIWUOR.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from original conviction and sentence in Homa Bay**

**CM's Criminal Case No.178 of 2016 by L. Simiyu, SRM dated 8<sup>th</sup> March, 2017)**

**JUDGMENT**

1. **BRIGHTON ODUOR OTIENO** (the appellant) was convicted on a charge of house breaking contrary to **Section 304 (1) (b)** and **Stealing** contrary to **Section 279 (b)** of the **Penal Code** and sentenced to serve 2 years imprisonment. The particulars were that on 1<sup>st</sup> April 2016 at Homa Bay Town within **HOMA BAY** County, jointly with another, they broke and entered the building used as a dwelling house by Chief Inspector **ROSE ROHAAY** and stole a pair of shoes, navy blue raincoat, police lady's cap, assorted clothes, 10kg rice, 4 kg sugar and one mobile phone make T-XIG all valued at Kshs.20,000/=.

The appellant had denied the charge.

2. The complainant Chief Inspector **ROSE ROHAAY** left her house which was situated within **HOMA BAY** town for official duty in Nairobi on 31/03/2016 at 8.00 a.m., she had left her daughter who locked the door using a padlock on 01/04/2016 and left for school. When the daughter returned home for lunch at 1.00 p.m., she found the door broken and the shutter damaged.

The items earlier mentioned in paragraph 1 were missing. This information was eventually relayed to PW1, and a report was also made to police.

3. Meanwhile on the same day in the evening, **PC MACHUKI** who was walking towards CLUB 112 met the appellant on a road within **HOMA BAY** while wearing a police rain coat and a cap. On close scrutiny he realized the items bore police identification numbers – so the appellant was apprehended.

4. Police also visited the scene and took photographs which were produced as **Exhibit** – the house had been ransacked and several items were strewn all over.

5. **PC RICHARD OBIRO MACHUKI** (PW2) confirmed meeting the appellant as he was heading to **CLUB 112** which is off the main road; he stated:

**“The road had solar lights. It was bright and I realised the Cap for female inspector of Kenya Police and the crown was Kenya police. The person was ahead of me and when he bypassed I became suspicious ... because jeans cannot be paired with a crown and open shoes.”**

He also realized that the cap was the type designed for female officers yet the wearer was a man – so he approached him after calling for help from guards who were at the Club's gate.

6. After interrogation the appellant led them to a house where his co-accused Stephen was and from where the police recovered a pair of black leather police shoes. PW2 stated:-

**“The shoes were for the class of officers and definitely an Inspector ....”**

PW2 was also able to recognize the rain coat as police property saying:-

**“It’s peculiar, it has flayers and it is short. It is only used by police inspector and above.”**

7. **PERIS ADHIAMBO MAJIWA** (PW3) confirmed receiving a report from PW1’s daughter that their house had been broken into. She rushed to the police station and made a report. She accompanied police and PW1’s daughter (described as a little girl) back to the house and noticed that some items were strewn within the house and there were clothes missing from the hangers.

8. **CPL PAUL MUREITHI** (PW4) who investigated this matter confirmed visiting the scene and finding it ransacked and items thrown about. He also got information from **P.C. MACHUKI** regarding the recovered cap and rain coat.

He confirmed that the appellant led them to a house within Shauri Yako estate from where a pair of police officer’s shoes was recovered. PW1 later identified the recovered items as hers – the raincoat bore her force number 2326223.

9. In his sworn defence, the appellant said he was on his way to Club 112 to pick up his girl friend **EUNICE MORABA** who worked at the club as a waiter. After entering into the club and being served with a drink, two people entered and **EUNICE** showed him one of the men as one who had been pestering her for a sexual relationship – that man was PW2.

10. When PW2 attempted to get cosy with **EUNICE**, the appellant intervened and informed him she was his girlfriend. That’s when PW2 (who was very drunk) assaulted the appellant and together with one Dennis, mobilized boda boda men to assault and apprehend him. By the morning PW2 had framed him with the said items which he saw for the first time at Homa Bay police station.

11. As for the said **EUNICE**, appellant said he never set eyes on her again after the incident.

12. The trial magistrate upon considering the evidence found that the house breaking and stealing as documented by photographs produced and evidence of witnesses was not disputed.

13. Further the recovered items bore special marks which PW1 had placed on the uniform namely the force number inscribed on the crown of the cap and on the rain coat.

14. She considered the appellant’s evidence and rejected it saying the existence of **EUNICE** was in doubt as there was no evidence that she even lived and worked at the club.

The defence was described as malicious.

15. Being dissatisfied with the outcome the appellant lodged an appeal saying the trial magistrate shifted the burden of proof onto the defence and also relied on uncorroborated evidence as those who purportedly assisted PW2 to arrest him were not called to testify.

16. At the hearing of the appeal, the appellant made oral submissions saying PW1 was not truthful as she was not the one who made the complaint about the incident.

Further that despite PW2’s claims that there were guards who assisted him to arrest the appellant outside Club 112, none of them testified.

He insisted that PW4 was used by PW2 to implicate him.

17. He argued that his defence was improperly rejected and it was not up to him to prove the existence of his alleged girl friend whom he suspects relocated to Tanzania.

18. In opposing the appeal, **MR. OLUOCH** argued that the recovered items were positively identified as belonging to the police force. The appellant was caught with recently stolen properties and he was lucky to get away with only 2 years imprisonment.

19. I take note that during the entire trial the appellant never made mention of **EUNICE** or a love triangle in his cross examination – the trial magistrate rightly rejected it as an afterthought of a non-existent being.

20. There is no evidence suggesting that PW2 had even got wind of the theft of PW1’s property – infact on that day, it was his testimony that he was off duty and was heading towards Club 112 when his attention was caught by a man who was wearing police regular mixed with civilian clothes. His curiosity was further stoked due to the fact that the wearer being a man, wore a female cap. The person he met never ran away, indeed the appellant did confirm in his evidence that he had encountered PW2 that evening – only that it was under different circumstances.

21. It did not require a collection of numerous witnesses to prove this case – the trial magistrate’s finding took into account the circumstances and in my view the conviction was safe and is upheld.

22. The offence carries a sentence of up to 7 years imprisonment – infact the sentence should have been on each limb and he is lucky to have been given a global sentence of 2 years which was extremely lenient. I find no reason to interfere with the sentence and the same is

confirmed.

23. The appeal lacks merit and is dismissed

**Delivered and dated this 19<sup>th</sup> day of March, 2018 at Homa Bay**

**H.A. OMONDI**

**JUDGE**