REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 21 OF 2017

BETWEEN

BENSON INYAMA MANGUMA.................APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the judgment of the Hon. F. Makoyo SRM

delivered on 10th January, 2017 in Kakamega CMC Cr. Case No. 830 of 2016)

J U D G M E N T

Introduction

1. The appellant herein was charged with the offences of house breaking contrary to Section 304(1) and stealing contrary to Section 279(b) of the Penal Code, the particulars thereof being that on 14th day of March, 2016 at Mukomari B village, Lukusi Sub-location entered the dwelling house of Susan Vukutsa with intent to steal therein and did steal therein kshs.4,000/= the property of the said Susan Vukutsa. The appellant denied the charges when he appeared for plea on 15th March, 2016. The case thus proceeded to hearing during which the prosecution called four witnesses in its effort to prove the case against the appellant to the required standard of proof beyond reasonable doubt.

The Prosecution Case

2. The complainant in this case, Susan Vukusta testified as PW1 (Susan). She told the court that on 14th March, 2016 at about 8.00am, she locked her house with a padlock and left for church. At about 8.20am, Susan's friend, Pamela Asalo PW2 (Pamela) telephoned her and informed her that she was desirous of borrowing something from Susan. Susan returned to her house only to realize on arrival thereat that somebody had locked himself in her house. Susan called Pamela to come quickly and she also called the village elder and informed him about the incident. The village elder, Patrick Indeche(Patrick) testified as PW3. He testified that at about 8.00am on 14th March, 2016, while he was at his home he received a telephone call from the Senior Village elder by the name Atyano Inganyi informing him of the incident. On getting to the scene, Patrick was informed of what the appellant had done. During the ensuing search for the appellant, he (appellant) was found hiding in the sugar cane plantation. Patrick took the appellant to Mukhonje Police Station. Patrick also confirmed that the appellant had stolen Susan's Kshs.4,000/=.

3. PW4 was number 76265 Police Constable Peter Sewe of Mukhonje Police Station. He was the investigating officer in the case. He testified that on 14th March, 2016, at about 10.30 am while at the police station, Susan and Patrick went to the station together with the appellant. After booking the complaint by Susan, and after visiting the scene, PC Sewe charged the appellant with the offence.

The Defence Case

4. At the close of the prosecution case, the trial court ruled that the prosecution had established a prima facie case against the appellant to warrant his being put on his defence. The appellant gave an unsworn statement in which he claimed that Susan fabricated the case against him after he refused to have sex with her on 3rd February, 2016. He urged the court to acquit him

The trial Court's Judgment

5. Upon careful analysis of the evidence before it, the trial court was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt and found the appellant guilty as charged on both limbs. On conviction, the appellant was fined kshs.20,000/= in default to serve two(2) years imprisonment on each of the two limbs of house breaking and stealing. The sentences were to run concurrently.

The Appeal

6. Being dissatisfied with both conviction and sentence, the appellant filed his home made petition of appeal on 6th February, 2017. The appellant averred that as a result of his ignorance with court processes, he did not understand how the case proceeded and further that during the trial, the learned trial Magistrate did not give him adequate opportunity to cross –examine witnesses. He prayed that this honourable court do grant him a chance to have his case heard afresh.

Duty of this court

7. Before determining whether or not to allow the appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to coming to its own conclusion, only remembering that it is only the trial court that saw and heard the witnesses. In this regard, the judgment of the trial court cannot be set aside on flimsy grounds. That can only be done if this court is satisfied that the trial court applied wrong principles in arriving at its findings or completely misapplied the law or that the facts of the case do not support the findings. Generally see **Pandya – vs – R[1957]EA 336 and Mark Oiruri Mose – vs – Republic [2013] eKLR**.

Issues for Determination

8. The issues for determination on this appeal are similar to the issues framed by the trial court in its judgment, namely

(a) Whether Susan's house was broken into

(b) Whether it was the appellant who broke into the said house and

(c) Whether anything was stolen therefrom.

9. It is necessary at this point to look at the provisions of Section 304(1) of the Penal Code for the definition of the offence. The section reads as follows:-

"*304(1) Any person who –*

(a) Breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or

(b) having committed a felony in any such building, tent or vessel breaks out thereof, is guilty of the felony termed house breaking and is liable to imprisonment for seven years."

10. Regarding the first and second issues, there is no doubt that Susan's house was broken into. Susan testified that on 14th March, 2016 at around 8.00am, she locked her house using a padlock and left for church. At 8.20am, her friend Pamela, who needed to borrow something from Susan, telephoned Susan with a request to which Susan needed to respond, so Susan went back only to find the door to her house locked from inside. Susan informed the village elder of the incident by phone, and while Susan was standing at her house, the appellant opened the door and came out. Since Susan had not left the appellant in her house, clearly the appellant broke into the house as defined under Section 304(1) of the Penal Code and also broke out of it. It is on record that when the appellant emerged from Susan's house, he asked Susan to forgive him for what he had done.

11. In her testimony, Pamela stated that while she was standing outside Susan's house, the appellant opened the door and came out of the house, saying as he did so that it was the devil who had tempted him. The appellant then left for his own house which was barely 50 meters away.

12. From all the above, I am satisfied that the prosecution proved beyond any shadow of doubt that Susan's house was broken into and that it was the appellant who did so. I have considered the appellant's defence and submissions on this issue and find the same wanting in light of the overwhelming evidence against him.

13. Regarding the third issue, Susan testified that the appellant stole kshs.4000/= out of the Kshs.12,000/= which she had left in her purse inside her draw. She also testified that when she entered her bedroom in the company of Pamela and Pamela's husband, her purse which had been left in a drawer was lying on the bed with only Kshs.8,000/= inside it instead of Kshs.12,000/= Pamela also confirmed seeing the purse on the bed. Although the appellant denied stealing the money, I have no reason to depart from the trial court's assessment of all the witnesses who testified before him on the issue. The trail court had this to say about the witnesses:-

"*PW1 and PW2 both struck me as truthful witnesses whose testimonies we consistent in every material element and was not shaken by the cross examination or the defence as laid forth by the accused person. The accused was known to both witnesses as he is their neighbour and they saw him clearly as it was during the day."*

14. I fully concur with the learned trial court’s findings on the demeanor of the witnesses. I am also in agreement that the appellant’s defence was an afterthought which did not in any way shake the prosecution’s case against him. The fact of the matter is that when the appellant cross examined Susan, he never brought out the issue of being framed on the sex-in exchange for firewood from the forest.

15. Before I conclude this judgment, I would like to say something about the sentence. In my considered view, the sentence of Kshs.20,000/= fine in default two(2) years imprisonment was quite lenient comparted to the seven years prescribed by law. However, since the prosecution did not raise the issue during the trial, I have no reason to interfere with the same. And in any event, I am aware that sentencing is a matter of discretion for the trial court.

Conclusion

16. For all the above reasons, I find and hold that the appellant’s appeal lacks merit. The same is dismissed in its entirety and the judgment of the learned trial court is confirmed.

It is so ordered

Judgment delivered, dated and signed in open court at Kakamega this 29th day of May 2018

RUTH N. SITATI

JUDGE

In the presence of:

………Present in person…………………for Appellant

………Mr. Ngetich (present)…………..for Respondent

………Polycap………………………...Court Assistant