



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 29 OF 2016**

**BENJAMIN MUEMA ITHONGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the Original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 324 of 2015 by K. Sambu P M on 21/04/16)*

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

1. **Benjamin Muema Ithonga**, the Appellant was charged jointly with others as follows:

**Count 1: House Breaking** contrary to **Section 304(1)(a)** and **Stealing** contrary to **Section 279(b)** of the **Penal Code**. Particulars of the offence were that on the **17<sup>th</sup> day of June, 2015** at **Mwingi Township** in **Mwingi Central District** within **Kitui County** jointly broke and entered the dwelling house of **Mary Makau** and stole from therein one gas cooker, one mobile phone make Nokia and cash **Kshs. 10,000/=** all valued at **Kshs. 30,000/=** the property of the said **Mary Makau**.

**Count 2: Resisting Arrest** contrary to **Section 253(b)** of the **Penal Code**. Particulars of the offence were that on the **19<sup>th</sup> day of June, 2015** at **Mwingi Township** in **Mwingi Central District** within **Kitui County** resisted by **No. 91081 P C Denis Wafula** a Police Officer who at the time of the said resistance was acting in the due execution of his duty by arresting the said **Benjamin Muema Ithonga** for the offence of **House Breaking and Stealing**.

2. He was tried, convicted on both Counts and sentenced to **three (3) years imprisonment** on each Count which were to run concurrently.

3. Aggrieved by the conviction and sentence the Appellant appealed on grounds that the learned trial Magistrate erred by: finding that he was one of the drunkards who left the cylinder at the place of work of one of his co-accused who did not confirm the allegations; There was no record to establish that he identified his co-accused and led the police to arrest him; evidence adduced was contradictory and his alibi defence was rejected, yet, it was strong.

4. Facts of the case were that on the **17<sup>th</sup> June, 2015** PW1 **Mary Peter Makau** left her house under key and lock at **7.40 a.m.** At **3.25 p.m.** she got information about her house having been broken into. She went to the house to find the doors open. Items were strewn all over the house. She found her gas cylinder, mobile phone make Nokia, a flash disc and cash **Kshs. 10,000/=** missing. She reported the matter to the police. On the **19<sup>th</sup> June, 2015** PW3 **No. 91081 P C Dennis Wafula** and others acting on information received went to a bar where they found the Appellant. They requested him to get out of the bar and he complied. However, while outside on realizing they were police officer he started running away. They chased after him; on reaching him he resisted arrest and tore PW1's shirt. He was subdued and arrested. On interrogation he led the police to the bar where they arrested one of his co-accused. Both the suspects were drunk such that the police had to let them sober up. On **20<sup>th</sup> June, 2015** the two (2) suspects led them to the arrest of a 3<sup>rd</sup> suspect who was found at **Basemen Bar**. The gas cylinder was recovered. Investigations were concluded and the suspects were charged.

5. When put on his defence the Appellant stated that he went to the pub after work to play a webgame (gametable). At about **6.00 p.m.** some strangers went to the pub and ordered him to accompany them. He insisted that the two (2) individuals identify themselves but they refused. The persons arrested him. Later, at night they took him to his house that was searched but nothing was recovered. He denied knowing his co-accused and concluded his testimony by stating that he was assaulted by the police who injured him.

6. The Appellant canvassed the Appeal by way of written submissions. He stated that evidence adduced was mere suspicion. There was no direct evidence to convict him with the offence that was committed. That his co-accused who was acquitted denied the allegation that he (Appellant) took the gas cylinder to his bar. He argued that had he resisted arrest as alleged, the police could have called independent witnesses to confirm the allegations and that evidence adduced having allegedly come from an informer was hearsay.

7. The State through learned Prosecuting Counsel, **Mr. Mamba** opposed the Appeal. He submitted orally that the breakage was confirmed. The cylinder found connected the Appellant to the offence committed. He argued that the conviction was proper.

8. This being a first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(See Okeno vs. Republic (1973) EA 32).**

9. It is not in dispute that the Complainant's house was broken into at daytime and various items stolen. One of the stolen items, a gas cylinder, was found at a bar and it led to the arrest of a suspect who was jointly charged with the Appellant but was acquitted at trial. The police arrested the Appellant acting on information received but he was not found in possession of any stolen property. Evidence against him was therefore circumstantial in nature.

10. In the case of **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990** the Court stated that:

***“It is settled law that when a case lies entirely on circumstantial evidence, such evidence must satisfy three tests:***

***(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***

***(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

***(3) The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

DW3 **Martin Ndungu Mwaura** in whose pub the gas cylinder was found told the Court that the cylinder was left at the bar by some three (3) customers who got drunk and left. He denied knowing the Appellant and his other co-accused. The learned Magistrate reached a finding that the Appellant must have been one of the drunk customers because at the time of his arrest he was drunk. What he failed to appreciate was the fact that the individual failed to identify the Appellant as one of the three (3) men.

11. The Appellant allegedly led the police to the bar after he was identified by an informer. **Section 111(1)** of the **Evidence Act** provides thus:

***“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:***

***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:***

***Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”***

12. The fact that he did not commit the offence and ultimately take the cylinder to the bar was within him. He denied and alleged that the police are the ones who led him to the bar. He was absolved from blame by his co-accused who was indeed found in actual possession of the gas cylinder. It was important for the Prosecution to adduce evidence to prove the fact beyond any reasonable doubt. Some doubt did arise because of the evidence that was adduced by the 3<sup>rd</sup> individual.

13. Regarding the offence of resisting arrest. It was stated that police officers were in civvies. According to them they requested the Appellant to get out of the bar and he co-operated by complying. They all stated that he was in a drunken stupor such that they had to let him sober up. It was alleged that it was after he sensed danger that he started running away. They chased after him and subdued him but the episode resulted into PW3's shirt being torn.

14. The Appellant was stated to have sensed danger on realizing the individuals that he had calmly accompanied were police officers.

15. PW3 the Complainant stated thus:

***“However the 1<sup>st</sup> accused person upon realizing that we were police officers started to run away. We gave chase and caught up with the 1<sup>st</sup> accused person who resisted arrest and in fact tore my shirt. One torn shirt marked PMFI 2, we however managed to wrestle the 1<sup>st</sup> accused person and eventually overpowered him and managed to handcuff him and escort him to Mwingi police station on further interrogation the 1<sup>st</sup> accused person alleged that he was just but an agent of one IBRAHIM MWENDWA VUNDI who had instructed him to sell the gas cylinder on his behalf. The 1<sup>st</sup> accused person later escorted us back to Gate way Bar where we arrested the 2<sup>nd</sup> accused person.”***

16. The Appellant is stated to have been so drunk such that they left him to sober up. This is a suggestion that his normal capacity to reason was inhibited. It was suggested that indeed he was incapable of acting as an ordinary prudent and cautious person would act in similar conditions.

17. The Prosecution witnesses did not expressly state when the shirt was torn. They said they wrestled him. Could the shirt have been torn in the course of the scuffle? Evidence adduced proved that the person attempted to run away but because of his drunken stupor he may not have been capable of expressing himself independently of the exercise of his will. The inebriation to resist arrest was not established therefore he was not criminally responsible.

18. From the foregoing, I find the Prosecution having failed to prove both Counts against the Appellant. Therefore I quash the conviction and set aside the sentence imposed. The Appellant shall be set at liberty unless otherwise lawfully held.

19. It is so ordered.

**Dated, Signed and Delivered at Kitui this 29<sup>th</sup> day of May, 2018.**

**L. N. MUTENDE**

**JUDGE**