REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 72 OF 2016

EDWIN NYANTIKA.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

[Being an appeal against the Judgement of Hon. L. Komingoi – Senior Resident Magistrate delivered on the 12th day of May 2009 in the Original Nyamira Senior Resident Magistrate's Court Criminal Case No. 26 of 2008]

JUDGEMENT

On 12th May 2009, the appellant was sentenced to serve a concurrent term of three (3) years imprisonment for House breaking contrary to Section 304 (1) and Stealing contrary to Section 279 (b) of the Penal Code.

The particulars of the charge were that between 15th and 21st January 2008 at Nyabisimba sub-location Nyamira District within Nyanza Province he broke and entered the dwelling house of Delilah Bosibori Ongaro with intent to steal and stole from therein Kshs. 350,000/= the property of the said Delilah Bosibori Ongaro.

He pleaded not guilty to the charge. At the trial, the prosecution called four witnesses while on his part, the appellant gave evidence on oath but did not call any witness. After evaluating the evidence, the trial magistrate found the appellant guilty and convicted him. Being aggrieved by the conviction and sentence he preferred this appeal which he prosecuted even though he had served the term of imprisonment. The grounds of appeal are that: -

"GROUND ONE

That my lord the trial learned magistrate faulted both in law and fact when erroneously misdirect herself in convicting the appellant on misapprehension and from the strength of mere suspicion given that there was no material evidence adduced in court to connect the appellant to the crime in question.

GROUND TWO

That my lord the trial learned magistrate once more faulted both in law and fact when seemingly based the conviction on hearsay and shared intentions both from the prosecution and the court given to the fact that alleged crime was alleged to have been committed without the knowledge of the complainant and none of the prosecution witnesses witnessed the alleged crime being perpetrated.

GROUND THREE

That my lord the trial learned magistrate faulted both in law and fact when maliciously contravened section 177 of the C.P.C the law was trampled upon by the trial court on restitution of the property, the property alleged to have been bought from the money alleged to have been stolen, the trial court did not give directions whether the property to be restored to the accused person or to be forfeited by the state or the property to be given to the complainant.

GROUND FOUR

That the trial learned magistrate similarly faulted both in law and fact when miserably based the conviction on circumstantial evidence yet the same was unsafe due to co-existing evidence.

GROUND FIVE

That my lord the trial learned magistrate finally faulted both in law and fact when seemingly overlooked and objected the appellants defence without cogent reasons yet the same was remarkably comprehensive in casting considerable doubts to the strength of the prosecution case."

Briefly the prosecution's case as narrated by the four witnesses was that on 15th January 2008 the complainant withdrew Kshs. 300,000/= from an account she held with her husband (Pw2) at Gusii Mwalimu Sacco. She took the money home and gave it to her husband (Pw2) who kept it in a briefcase together with Kshs. 50,000/= which he already had in his possession. He locked the brief case and kept it in a wardrobe in their bedroom. On 18th January 2008, he left to go send some of that money to their daughter but took it back to the house when he heard there were skirmishes in Kisii. The next day the whole family went to Church. On 21st January 2008, Pw2 went to get money from the briefcase so he could give it to a daughter who was travelling but found the money missing. The briefcase was torn. He soon discovered that entry had been gained by cutting the grill of the window in the adjacent room. They suspected the money had been stolen while they were in Church. They had left the door of their bedroom open. They reported the matter to Nyamira Police Station. Later the appellant who was their turn-boy called Pw2 and asked him if he could purchase tyres for him. He also promised to buy the complainant a phone and sent 100/= to her husband. He also told them that he had bought a vehicle. That same day he went to their home with a Subaru Leone Saloon Registration No. KAA 807L. The complainant and her husband (Pw2) convinced that it was the appellant who had stolen their money, called the police and he was arrested and subsequently charged with this offence. The car was confiscated and was later produced as an exhibit together with a black briefcase, sale agreement between the appellant and George Morara Onwonga (Pw3) the owner of the car, the car's logbook and a bank statement (Exhibit 1 – 5).

When he was put on his defence, the accused denied that he stole from the complainant. He testified that the money he bought the car with were proceeds of sale of a piece of land belonging to his late father. He testified that he had also worked as a conductor including for the complainant who he had worked for for three months. He stated that he had paid Kshs. 240,000/= for the car leaving a balance of Kshs. 10,000/=. It was also his evidence that he had heard the complainant's husband instructing her to withdraw the money but contended that many other people had heard the conversation as it was made on phone. He stated that although he knew where the complainant and her husband lived he was never allowed into the compound and did not know where their bedroom was. He told the court that he did not have the title deed of the land, a portion of which he claimed to have sold to one Peter Momanyi.

At the hearing of the appeal, the appellant relied on written submissions to which the prosecution responded orally. The appellant was also allowed to reply.

I have considered the rival submissions carefully but as the first appellate court, it is my duty to reconsider and evaluate the evidence in the court below so as to arrive at my own conclusions. I have done so while appreciating that I did not see or hear the witnesses and did not therefore observe their demeanour. I am satisfied that the charge against the accused person was proved beyond reasonable doubt. Firstly, the accused conceded that he worked for the complainant as a conductor, secondly he admitted that he eavesdropped the conversation between the complainant and her husband in regard to the withdrawal of the money from the bank and thirdly the prosecution adduced cogent evidence that the complainant did in fact withdraw a sum of Kshs. 300,000/= from their joint account at Mwalimu Sacco on 15th January 2008. There was also evidence that the money was stolen from the complainant's house, the thief having gained entry into the house by breaking the window of the room adjoining the bedroom where the money was kept in a briefcase. The thief then tore the briefcase. The same was exhibited in court. The appellant admitted that during the period in issue he purchased a motor vehicle worth Kshs. 250,000/=. Since it was obvious that he could not afford to purchase the car from proceeds of his salary, his defence was that he bought it after selling a piece of land. This court appreciates that it is never the duty of an accused person to prove his innocence. However, the sale of the plot/land was a fact within his special knowledge and so he was required to prove it under Section 111 (1) of the Evidence Act which states: -

"111. Burden on accused in certain cases

(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."

Whereas the evidence against the accused is purely circumstantial too, like the trial magistrate, am satisfied that ***"the incriminating facts are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis other than of his guilty."***

Accordingly, I find no merit in the appeal against the conviction and as the sentences imposed were lawful, the entire appeal is dismissed.

It is so ordered.

Signed, dated and delivered at Nyamira this 22nd day of November 2018.

E. N. MAINA

JUDGE