



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 12 OF 2015**

**BENSON SILA WAMBUA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 608 of 2014 in the Senior Principal Magistrate's Court at Voi delivered by Hon S.M. Wahome (SPM) on 23<sup>rd</sup> December 2014)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Bernard Sila Wambua, was jointly charged with Peter Mwoki (hereinafter referred to as "the Appellant's Co-Accused") on two (2) Counts. Count I related to the offence of stealing by servant contrary to Section 281(1) as read with Section 281 of the Penal Code. He was also charged with the alternative Count I of handling stolen property contrary to Section 322(2) of the Penal Code. Count II related to the offence of malicious damage to property contrary to Section 339 (1) of the Penal Code.
2. The Appellant and his Co-Accused were both tried and convicted by Hon S.M. Wahome Senior Principal Magistrate. He sentenced each of them to serve two (2) years' imprisonment for each Count.

**COUNT I**

**"On the diverse dates between the month of June 2013 and 5<sup>th</sup> June 2014 at Musinga Village in Voi area within Taita Taveta County, jointly with another not before the court, being servants to FLORENCE SYOKAU MAKAA stole from the said FLORENCE SYOKAU MAKAA (see the attached list) which came to you by virtue of your employment. "**

**ALTERNATIVE COUNT I**

**"On the 30<sup>th</sup> day of July 2014 at Kathiani area within Machakos County otherwise than in the course of stealing dishonestly retained one bed, one mattress and a teddy bear, knowing or having reason to believe them to be stolen goods."**

**COUNT II**

**"On the diverse dates between the month of April 2014 and 5<sup>th</sup> June 2014 jointly with another before court willfully and unlawfully damaged three roomed dwelling house build**

(sic) with bricks valued at Ksh. 950,000/= the property of FLORENCE SYOKAU MAKAA.”

3. Being dissatisfied with the said judgment, on 26<sup>th</sup> January 2014, which was erroneously stamped as 26<sup>th</sup> January 2015, the Appellant filed a Notice of Motion application seeking to be allowed to file an Appeal out of time. The said application was allowed and the Petition of Appeal deemed as having been duly filed and served. The Grounds of Appeal were:-

**1. THAT he was too remorseful.**

**2. THAT he was begging leniency despite the offence(sic).**

**3. THAT he was a first offender and a layman in law.**

**4. THAT he prayed for the honourable high court to consider his states (sic) of health he was too weak comparison to fours sentenced (sic).**

5. On 6<sup>th</sup> October 2016, he filed his Written Submissions and Amended Grounds of Appeal. The Amended Grounds of Appeal were as follows:-

**1. THAT without prejudice and to the foregoing the learned trial magistrate erred in law and facts by failing to consider the prosecution failed to prove its case beyond reasonable doubt as required by the law c/s 109 and 110 of the Evidence Act (sic).**

**2. THAT the pundit trial magistrate erred in law and fact in failing to consider that there was no cogent reason to link him with the alleged stealing and malicious damage to property.**

**3. THAT the learned trial magistrate erred in law and facts by failing to adequately consider his defence.**

5. On 29<sup>th</sup> November 2016, he filed his Reply to the State's Written Submissions dated and filed on 9<sup>th</sup> November 2016. He relied on the following Amended Grounds of Appeal:-

**1. THAT the pundit trial magistrate erred both in law and facts by failing to consider that the prosecution witnesses failed to prove their (sic)case beyond reasonable doubt as required by the law.**

**2. THAT the learned trial magistrate erred in law and facts by failing to adequately consider his defence.**

**3. THAT the learned trial magistrate erred in law and facts when he made a partial evaluation in the instant case favouring the crown/prosecution instead of awarding the benefit of doubt to the defence.**

6. When the matter came up on 19<sup>th</sup> December 2016, both the Appellant and the State asked this court to deliver its Judgment based on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

## **LEGAL ANALYSIS**

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it**

**must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

8. As can be seen hereinabove, the Appellant had filed as he filed three (3) sets of Grounds of Appeal. Be that as it may, after perusing the pleadings and the Written Submissions by both the Appellant and State, this court found that the second and third sets of the said Grounds of Appeal more or else raised the same issues. After consolidating the same, this court concluded that that the only issue that was really before it for determination was:-

**a. Whether or not the Prosecution had proved its case beyond reasonable doubt?**

### **I. PROOF OF THE PROSECUTION’S CASE**

9. The Appellant submitted that the law provides that a person who asserts a fact must prove the same. In this regard, he placed reliance on the provisions of Sections 109 and 110 of the Evidence Act Cap 80 (Laws of Kenya), the case of **Muiruri Njoroge vs Republic Cr Appeal No 115 of 1982** and the definition of “**an assertion**” given in the Chambers 21<sup>st</sup> Century Dictionary Revised Edition in which he stated that an assertion has been defined “**as a strong statement or claim and that would need to be proven by evidence.**”

10. He contended that the Learned Trial Magistrate relied on mere allegations with no proof or clear line of reasoning because the Complainant herein, Florence Syokau Makaa (hereinafter referred to as “PW 1”) did not submit in evidence a Title Deed to prove that she owned the land at Kaloleni or produce photographic evidence to show that her house had been damaged as she had alleged, plans from the Ministry of Planning and Housing or the estimate from the engineer to prove her claims.

11. He further stated that if PW 1’s cousin one Vincent Wambua went missing, her allegations could not be proven. It was his contention that PW 1’s cousin may very well have been the culprit. He contended that the said Vincent Wambua ought to have attended court to speak the truth.

12. He questioned why PW 1 who arrived from the United States of America (USA) on 5<sup>th</sup> June 2014 reported the incident a month later and even after going to Mazeras with him. He termed the delay as extra ordinary and averred that it was an afterthought sufficient to have given her time to fabricate the case against him.

13. He argued that PW 1’s evidence and that of Edgar Nyota (hereinafter referred to as “PW 4”) and Haron Zuwa (hereinafter referred to as “PW 5”) was not sufficient to have sustained the conviction against him. He said that this was because PW 1 was not present when her property was allegedly stolen or house demolished and that both PW 4 and PW 5 never saw him demolish her house. He contended that although PW 4 was a Village elder, he could not have known all the people who had built houses or rented houses in the area as there were so many structures in Voi township.

14. It was his further argument that the Learned Trial Magistrate partially evaluated the evidence in favour of the Prosecution, which prejudiced him. He referred this court to the case of **Okeno vs Republic (1972) E.A 32** where the court therein dealt with the issue of such evaluation.

15. He added that the said Learned Trial Magistrate ought to have weighed both sides of the case as was held in the case of **Oketh Olale vs Republic (1965) E.A.C.A. 555 on page 557** that :-

**“...a conviction should be based on the weight of the evidence adduced and it is dangerous and inadvisable for a trial judge to use a theory of his/her own canvassed evidence.”**

16. It was his submission that the Prosecution did not prove its case beyond reasonable court and urged this court to allow his Appeal as the Learned Trial Magistrate had misapprehended himself on the evidence that was adduced before him.

17. He relied on the case of **Chemagong vs Republic (1984) KLR** in which it was held that **“it was an established principle that an appeal court like the present one will not normally interfere with the findings of fact by the trial court, unless it is based on no other evidence or an (sic) misapprehension of the evidence or the magistrate is shown demonstrably(sic) to have acted on wrong principles in reaching the findings.”**

18. On its part, the State submitted that although the Appellant had contended that he was not PW 1's employee, George Mayaka Nyabati (hereinafter referred to as “PW 3”) and PW 4 had confirmed that the Appellant was one of the people who were working in PW 1's farm. It added that PW 1 used to reside in the USA but owned a house next to Ngutuni Lodge and had employed the Appellant and other workers to oversee construction of her house while she was abroad.

19. It questioned why the Appellant had searched for a house for PW 1 if he was not her worker as he had contended and he was not related to her. It also wondered why he had introduced PW 1 to Stephen Mwakale Ali (hereinafter referred to as “PW 2”) as his boss.

20. It argued that the fact that PW 1 did not produce any receipts to confirm ownership of the items said to have stolen did not mean that the Appellant did not steal from her and that in any event, some of her items were recovered at his house while others were found at his Co-Accused's house as was confirmed by PW 5.

21. It added that the Appellant rented a house from PW 2 and that on 3<sup>rd</sup> May 2014 at around 4.00pm, the Appellant brought a canter loaded with household goods and moved out of the said house after five (5) days. It pointed out that the Appellant went back to PW 2 and informed him that he wanted to rent a house for his boss.

22. It also pointed out that PW 3 testified that on the same 3<sup>rd</sup> May 2014, the Appellant and his Co-Accused approached him and offered to sell to him sixty three (63) posts, chain link and barbed wire which they told him PW 1 wanted to sell. In addition, it stated that PW 4 had testified having seen the Appellant remove sheets from PW 1's house and together with his Co-Accused, pack numerous items in a pickup in the same month of May.

23. It was its submission that the fact that the Appellant moved houses twice in one month, the same month PW 1's goods were stolen was not just a mere coincidence but that it was clear from PW 3, PW 4 and PW 5's evidence that it was consistent to demonstrate that the Appellant and his Co-Accused stole PW 1's goods.

24. In respect of Count II, the State contended that PW 3 and PW 5 had told the Trial Court that in the month of May, they witnessed the Appellant demolishing PW 1's house. It was its argument that although PW 1 did not adduce in evidence documents to prove that she was the owner of the house that had been demolished, it was clear from PW 3's, PW 4's and PW 5's evidence that PW 1 was the owner of the said house and moreover, PW 4 was a Village elder who knew members of his community.

25. It was its submission that the Prosecution had proven its case beyond reasonable doubt and urged this court to dismiss the Appellant's Appeal. It asked this court not to interfere with the sentence that was meted upon the Appellant by the Learned Trial Magistrate because the maximum sentence for stealing by servant was seven (7) years while the offence of malicious damage attracted a maximum sentence of five (5) years imprisonment. It added that the Learned Trial Magistrate had had due regard to the Appellant's mitigation that he was a first offender and consequently, a sentence of imprisonment for two (2) years for each Count was appropriate.

26. This court carefully combed the evidence that was adduced before the Trial Court with a view to determining which side the truth of this matter lay. It was the Appellant's word against that of PW 1 as to really what transpired in this matter. According to PW 1, she relocated to the USA in 1996 from where she sent the Appellant for the construction of a house on land she had purchased near Ngutuni Lodge in 2009. She left the Appellant, his Co-Accused and the said Vincent Wambua the duty of looking after her

said property.

27. She visited her property in December 2011 and was happy with the work the Appellant and her cousin had done. However, in 2012, the Appellant informed her that eight (8) of her goats had died and that elephants had demolished her house and crops in the said land.

28. In the month of March 2014, while in the USA, she rented a house that she would live in when she returned back home as the Appellant had informed her that she could not live in a demolished house. The Appellant rented the house in May 2014 but failed to pay rent. She visited her farm on 5<sup>th</sup> June 2014 and noted that there was no house, fence or gate and that her property that included beds, clothes, wardrobe, mattresses, blankets, shoes, wheelbarrows amongst many other worth over Kshs 7,000,000/=, was missing.

29. On enquiring from the Appellant where her house was, he informed her that the bricks had broken in small pieces. She reported the matter to Voi Police Station but the Appellant ran away. However, he was arrested at his house in Ukambani from where a teddy bear, a bed and mattress belonging to her were recovered.

30. She stated that they recovered four (4) iron sheets that had been removed from her house from the Appellant's Co-Accused person's house and a small bed, four (4) plastic chairs, one (1) mattress, chicken wire, one solar battery and one (1) solar converter from Vincent Wambua's house. Vincent Wambua went into hiding and at the time of the trial, his whereabouts were still unknown. The Appellant's Co-Accused took them to PW 3's house where they recovered the chain link and barbed wire.

31. During her Cross-examination by the Appellant herein, PW 1 accused him of having stolen her laptop and that he had also lied to her that her house had been demolished by thieves. She also said that he had lied about Vincent Wambua having been sick which she said was not true.

32. PW 2 confirmed having seen several items which included mattresses, solar battery, executive chair amongst other items being brought into the house the Appellant, his Co-Accused and another person had rented and then pack the same items in a pickup. They informed him that they were taking the items to Ukambani, a fact he reiterated during his Cross-examination. He stated that the Appellant's Co-Accused was the one who came and requested for a house for his boss who was coming from abroad.

33. In his Examination-in-Chief, PW 3 stated that the Appellant told him that he was relocating to Mtwapa and that he paid him a sum of Kshs 6,000/= for a chain link, sixty three (63) posts and barbed wire that the Appellant sold to him. In his Cross-examination, PW 3 was emphatic that the Appellant told him that he was clearing PW 1's farm.

34. In his Examination-in-chief, PW 4 testified that around May 2014, he heard noises that sounded as if people were removing iron sheets in the neighbouring compound and on reaching there, he saw the Appellant, his Co-Accused and one Anthony putting the iron sheets in a Pick Up. He said that he saw speakers, beds, gates, timber among other items and that the Appellant told him that PW 1 had instructed them to remove the items as they were relocating, a fact he reiterated during his Cross-examination.

35. PW 5 also corroborated PW 3's evidence that the Appellant had told him that they were relocating to Mtwapa and that they had been instructed by PW 1 to demolish the house, which he said they had done several times before. He said that he stored a few of PW 1's items in his house for them and when the police came, he gave them the doors and pieces of iron sheets. In his Cross-examination, he confirmed having been paid by PW 3 to remove the posts, barbed wire and chain link.

36. No 73423 PC Joshua Koffa (hereinafter referred to as "PW 6") was the Investigating Officer. He tendered in evidence the recovered items which PW 1 identified as belonging to her. He corroborated PW 1's evidence regarding what was recovered from the Appellant's and his Co-Accused's house as well as items that were recovered from PW 3's and PW 4's houses. In his Cross-examination, he stated that they recovered a dismantled bed from the Appellant's house.

37. In his unsworn evidence, the Appellant confirmed that he was PW 1's employee and when he informed her that the said Vincent Wambua had fallen sick, PW 1 sent her a phone for Christine and when she called her, Christine told him that PW 1 had sent her to pray for them.

38. His evidence was that Christine came, prayed and found some witchcraft paraphernalia. On informing PW 1 of what had transpired, she asked them to move out of her property and burn other items as she no longer needed them. He was emphatic that they removed PW 1's goods from the property on her instructions. It was his testimony that PW 1 sent them money which he used to rent two (2) houses, one for her and another for "them".

39. He said that on 20<sup>th</sup> July 2014, he asked her about his June salary because she had not paid the same. He said that his Co-Accused left after having problems with her. He also went to his home on 26<sup>th</sup> July 2014 and on 30<sup>th</sup> July 2014, PW 1 came to his home accompanied by police officers and arrested him. It was his contention that the mattress and teddy bear that were found in his home belonged to him.

40. This court carefully combed through the evidence that was adduced and established that it was undisputed that the Appellant and his Co-Accused were PW 1's employees, items were removed from her property and that she was the owner of the subject parcel of land.

41. Although this court considered the Appellant's submission that PW 1 did not submit in evidence documents to prove her ownership of the subject property or that her house was demolished, it found the same to have been irrelevant and immaterial in the circumstances of the case herein. This is because the Appellant did in fact admit in his unsworn evidence that he worked for PW 1 and that he removed a few items such as mattresses, beds and kitchenware which PW 1 had told them to set on fire after witchcraft paraphernalia was found in her property.

42. It was not therefore necessary for PW 1 to have adduced the Title Deed in evidence to prove that the land was hers and that there was a house at the said land because items such as mattresses, beds, kitchenware amongst other items could not have been stored in an open place. It is expected that the said items could only have been inside a structure in the PW 1's property.

43. Having said so, what appeared to have been in contention was whether or not PW 1's house was demolished and items removed under her instructions. According to PW 1, her eight (8) goats died after some prayers were held at her farm while the Appellant alluded to the prayers having been conducted after witchcraft paraphernalia was found at the farm.

44. This is what this court understood to have been the Appellant's justification for having removed PW 1's property from her home. He did not, however, allude to the demolishing of her house. On her part, PW 1 was emphatic that she did not instruct the Appellant and his Co-Accused to demolish her house or to burn any items from her house.

45. Although there was no photographic evidence to confirm that indeed a house once stood in PW 1's land, this court was persuaded to accept that a house existed because her evidence that her house was demolished was corroborated by PW 3, PW 4 and PW 5 who all alluded to the Appellant having demolished her house. In addition, as stated hereinabove, it would not have been expected that a teddy bear, beds, mattresses, kitchen ware or plastic chairs that were recovered from the Appellant and PW 1's cousin could be lying around in a compound without them being in a house or structure.

46. However, in the event this court was found to have arrived at a wrong conclusion regarding the existence of house in PW 1's land, it was nonetheless hesitant to accept the Appellant's version of what really transpired because he gave PW 2, PW 3, PW 4 and PW 5 contradictory and/or inconsistent explanations on why they were demolishing PW 1's house, why they were removing PW 1's items from her property, why they moved into a rental house and why they moved out of that rental house to a different rental house all within the same month and the same month that PW 1's items were removed from her property.

47. In addition, the fact that PW 3 confirmed having paid a sum of Kshs 6,000/= for sixty three (63) posts, chain link and barbed wire which were found in his possession and three (3) wooden doors were recovered from PW 4 which PW 1 confirmed were hers and removed without her instructions was evidence of malicious damage to her property.

48. This court was thus persuaded by the State's submissions that it was not a mere coincidence for the Appellant to have moved out of the rental houses in the manner that he did. Consequently, in the absence of any evidence to the contrary, this court was inclined to accept PW 1's evidence that the Appellant maliciously damaged her property, which damage had happened more than once. Indeed, PW 3 testified that the Appellant used to build and demolish PW 1's house and they would then sell the items recovered therefrom.

49. Turning to the offence of stealing by servant, this court was satisfied that the Appellant's guilt was proven by the recovery of the teddy bear from his house at Machakos. A teddy bear is a very personal item and its owner would more often than not, identify it. It was therefore not necessary for PW 1 to have produced a receipt to prove ownership of the said teddy bear or the bed and mattress because she was certain that the said items were hers.

50. Further, the fact that several other items which PW 1 identified as having belonged to her were recovered in different houses and corroborated by the evidence of PW 2, PW 3, PW 4 and PW 5 was sufficient to satisfy this court that the Appellant stole PW 1's property in his capacity as her servant.

51. The fact that he was arrested on 30<sup>th</sup> July 2014 did not necessarily mean that PW 1 reported the matter a month after the incident and that it was thus an afterthought. Indeed, 30<sup>th</sup> July 2014 was the day the Appellant was arrested and not the date for reporting of the incident as he had contended. His submission regarding the delay by a month was irrelevant for the reason that PW 2, PW 3 and PW 4 saw him with the items that PW 1 identified as hers.

52. Having considered the Written Submissions by the parties and the case law that they each relied upon, this court came to the firm conclusion that the Prosecution proved its case beyond reasonable doubt. The Learned Trial Magistrate considered the Appellant's defence which had little or no probative value as the same was unsworn.

53. Indeed, the Appellant failed to demonstrate that there was bad blood between him and PW 1 that could have led her into framing him with the offences he had been charged with. Notably, in his sworn evidence, his Co-Accused implicated him in the taking of PW 1's property when he stated that the Appellant informed him that PW 1 had told him that they could give her property to neighbours or burn the same.

54. The Appellant failed to proffer a plausible explanation why PW 1 could have instructed them to demolish her house and take away her property and then turn round to claim for the same. The fact that some of PW 1's property was also recovered from Vincent Wambua's house after he went missing persuaded this court to believe that that recovery was closely connected to the recovery of PW 1's property in the Appellant's house leading this court to make an inference that he was guilty of the offence of stealing by servant.

55. In the premises foregoing, all the Grounds of Appeal raised by the Appellant were not successful and the same are hereby dismissed.

## **II. SENTENCING**

56. Section 268(1) of the Penal Code Cap 63(Laws of Kenya) provides as follows:-**"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."**

57. Section 278 of the Penal Code Cap 63(Laws of Kenya) provides as follows:-

**“If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”**

58. The import of the penalty is that a Trial Court cannot sentence a person convicted to the offence of stealing by servant to not more than seven (7) years imprisonment. The sentence of two (2) years was therefore proper and in accordance with the law.

59. In respect of the offence of malicious damage, Section 339(1) of the Penal Code provides as follows:-

**“Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.”**

60. Before the Learned Trial Magistrate read out the sentence herein, the Appellant said the following in mitigation:-

**“I pray for leniency. I have a wife and children. My parents are jobless. I pray for mercy.”**

61. The Learned Trial Magistrate then recorded the following:-

**“I have considered the mitigation by the accused. In Count I, each accused is sentenced to two (2) years imprisonment. In Count II, each accused is sentenced to two (2) years imprisonment. Right of appeal 14 days (sic) explained.”**

62. It was the considered opinion of this court that the Learned Trial Magistrate exercised his discretion judiciously when he sentenced the Appellant and his Co-Accused to two (2) years for each Count they had been charged with.

63. This court saw no reason to interfere with the decision that was arrived at by the Learned Trial Magistrate. The case of **Chemagong vs Republic**(Supra) that the Appellant had relied upon in support of his casewas not of assistance to him.

## **DISPOSITION**

64. Accordingly, the upshot of this court’s judgment, therefore, was that the Appellant’s Petition of Appeal filed on 26<sup>th</sup> January 2015 but erroneously stamped as 26<sup>th</sup> January 2014was not merited and the same is hereby dismissed. The sentence that was meted upon the Appellant by the Learned Trial Magistrate is hereby affirmed.

65. However, for the avoidance of doubt, the two (2) sentences are to run consecutively as the two (2) offences occurred on diverse dates between June 2013 and 5<sup>th</sup> June 2014.

66. It is so ordered.

**DATED and DELIVERED at VOI this 23<sup>RD</sup> day of FEBRUARY 2017**

**J. KAMAU**

**JUDGE**

In the presence of:-

Benson Sila Wambua... Appellant

Miss Anyumba for State

Josephat Mavu- Court Clerk