



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 69 OF 2017**

**[From the original judgement and sentence in Criminal Case No.844 of 2013 in the Chief Magistrate's Court at Narok, R. v. Stephen Langat]**

**STEPHEN LANGAT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence of 7 years imprisonment in respect of the composite charge of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) both of the Penal Code (Cap 63) Laws of Kenya.
2. The state has conceded the appellant's appeal against both conviction and sentence.
3. The appellant was convicted on the circumstantial evidence of Peter Lemeria Ole Ntutu (PW1) and Dominic Tulanta Ole Ntutu. The defence of the appellant was that of an alibi.
4. The appellant has raised 7 grounds in his petition to this court. Furthermore, he has also additional grounds in his supplementary of appeal to this court. I will start with ground 4 of his supplementary petition of appeal. In that ground, he has faulted the trial court for finding that there was circumstantial evidence which pointed to the guilt of the appellant. In this regard, the evidence of PW2 is that he went to the house of the complainant on 3/6/2013 at around 3.30 p.m. He had gone to the homestead of the complainant (PW1) to check its condition since the complainant had gone to Nairobi. He found the window grills of the sitting room had been cut. He also found a television set near the window which he then removed and hid it. As a result, he informed the complainant who was his brother. He then went away. At about 8 p.m., they found the appellant riding a motor cycle carrying a pillion passenger. He then went to the homestead of the complainant and found a motor cycle near the house of the complainant. As a result, they laid an ambush. After an hour, two people appeared from a wheat farm, one of whom was the appellant.
5. PW2 enquired from the appellant as to what they were looking for and the appellant responded that they were looking for something which they were unable to get. He arrested this appellant and his pillion passenger escaped. He then took the motor cycle of the appellant and his mobile phone. He put the appellant on his motor vehicle and his employee rode the motor cycle of the appellant. As he was driving the motor vehicle, it got stuck in the mud and as a result the appellant opened the motor vehicle door and escaped. Subsequently, the appellant was arrested and charged with this offence. There is evidence from John Kibii Rotich (PW3) that the motor cycle belonged to him and not the appellant. His evidence was that he had lent the motor cycle to the appellant. His further evidence was that the appellant

was his neighbour. As a result of his evidence the motor cycle was released to him.

6. In his sworn defence, the appellant raised the defence of an alibi. He testified that on 1/7/2013, he went to work in the hotel of Samuel Sang in Kutete centre where he worked until the night of that day. He left for his rented house at 10 p.m. which is 200 metres from Kutete centre. The appellant called Leonard Kiprono Chemgel (DW3). He then closed his case.

7. I have considered the evidence of the prosecution witnesses and I find that the appellant was not arrested with any stolen properties of the complainant. I also find from the foregoing evidence that there was no direct evidence connecting him with the commission of this offence. In regard to a conviction based on circumstantial evidence, such evidence must irresistibly point only to the guilt of the accused. In the circumstance of this case, there is evidence of suspicion as to what the appellant was doing in the homestead of the complainant (PW1). That suspicion is not sufficient to support in evidentiary terms the composite charges of burglary and stealing. In the circumstances, I find that this ground of appeal is meritorious and I uphold it.

8. In ground 1, the appellant has faulted the trial court for convicting the appellant on a charge that was bad for duplicity which is contrary to section 135 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya. In this regard, reference to section 135 (2) is important. The provisions of that section states as follows:

*“Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.”*

It is to be noted that the offences with which the appellant is convicted are founded on a composite charge. This form of framing composite charges is authorized by the 2<sup>nd</sup> schedule to the Criminal Procedure Code [Cap. 75] Laws of Kenya, which is in relation to the forms of framing offences. This form of charging is authorized by the 2<sup>nd</sup> schedule to the Criminal Procedure Code. In the circumstances, it is an exception to the rule of law expressed in the provisions of section 135 (2) of the Criminal Procedure Code. In the circumstances, I find that this ground of appeal is without merit and is hereby dismissed.

9. In ground 2, the appellant has faulted the trial court in failing to find that the charge as framed was prejudicial to the appellant. In view of my finding that the charge was not bad for duplicity, I find that this ground of appeal is lacking in merit and is hereby dismissed.

10. In ground 3, the appellant has faulted the trial court in allowing the prosecution to be conducted by an incompetent prosecutor. In this regard, Ms Maritim for the appellant cited *Evans Gathuri Ndung'u v. R. High Court of Kenya at Nairobi Criminal Appeal No. 496 of 2004* which cited with approval the case of *Roy Richard Elirema and Another vs. R. Criminal Appeal No. 67 of 2002 Court of Appeal at Eldoret* in which that court stated as follows:

*“In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provisions of the Constitution and the Code, there must be a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution....for one to be appointed as a public prosecutor by the Attorney General one must not be a police officer below the rank of an Assistant Inspector. We suspect the rank of Assistant Inspector must have been replaced by that of Acting Inspector but the code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity.”*

The record of the proceedings in this regard shows that the prosecution was conducted by police constable Ihaji. Additionally, it also indicates that a qualified prosecutor by the name Mercy appeared on behalf of the prosecution to take judgement. In the circumstances, I find that the proceedings were nullity because the prosecutor held the rank of a police constable when the law requires that a prosecutor should

have been a police officer holding the rank not below that of an assistant inspector. In the circumstances, I find merit in this ground of appeal and I uphold it.

11. I have considered the grounds in the petition of appeal and I find that the supplementary petition of appeal has covered all the grounds except ground 4 of the petition of appeal. In ground 4 of the petition of appeal the appellant has faulted the trial court for sentencing him to 7 years imprisonment which he asserts is manifestly excessive. In view of the fact that the appellant's appeal had succeeded in the major grounds of appeal, I find it unnecessary to consider this ground of appeal.

12. This is a first appeal. As a first appeal court, according to *Okeno v. R. (1972) EA 32*, I am required to scrutinize the entire evidence tendered at trial and make my own findings and conclusion. I have done so and I find that the conviction and sentence of the appellant are not supported by the evidence produced at trial.

13. In the light of the foregoing, I hereby allow the appeal. The conviction and sentence are hereby quashed. The appellant is to be set free unless otherwise held on other lawful warrants.

Judgement delivered in open court this 27<sup>th</sup> day of July 2017 in the presence of Ms Maritim for Appellant and Ms Nyaroita for state.

**J. M. Bwonwonga**

**Judge**

**27/7/2017**