REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 27 OF 2016

WESLEY KIBET KOSKEY……..…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(**Appeal from the conviction and sentence in Criminal Case No. 1103 of 2011 (Hon. L. Kiniale (SRM) dated 24th October 2016)**

JUDGMENT

1. The appellant was charged with the offence of burglary contrary to section 304(2) and stealing contrary to section 279 (b) of the Penal Code. The particulars of the offence were that on the night of the 28th of April 2011 at Chepseon Trading Centre in Kipkelion District within Rift Valley Province, he broke and entered Chepseon Filling Station belonging to Henry Kipngetich Koskey with intent to steal and did steal therein cash, Kshs 202,270, the property of Henry Kipngetich Koskey. He was tried and convicted of the said offences, and sentenced to 5 years' imprisonment on each charge, the sentences to run concurrently.

2. Dissatisfied with both his conviction and sentence, the appellant has filed the present appeal. In his Amended Petition of Appeal dated 28th March 2017, he relies on the following grounds:

> ***1. The trial magistrate erred in law and in fact by ignoring his alibi defence.***
>
> ***2. The trial magistrate erred in law and in fact by relying on contradictory evidence, which did not prove the prosecution case beyond reasonable doubt.***
>
> ***3. The trial magistrate erred in law and in fact by relying on circumstantial evidence whereas the nature of the case did not warrant it.***
>
> ***4. The learned trial magistrate erred in law and in fact by relying on evidence of a shoe that did not belong to the appellant and neither did it fit him.***

3. The appellant was represented by Mr. Davies Sang at the hearing of the appeal while Ms Keli appeared for the state.

The Evidence

4. As this is a first appeal, I am under a duty to reconsider and re-evaluate the evidence on record, bearing in mind that I did not see or hear the witnesses, and reach my own conclusion-See **Okeno vs R [1972] EA. 32** and **Mohamed Rama Alfani & 2 Others vs Republic, Criminal Appeal No. 223 of**

2002.

5. The prosecution case against the appellant as it emerged from the evidence of the four prosecution witnesses is that the appellant was formerly employed as an attendant by PW1, Henry Kipngetich Koskey, the owner of Chepseon petrol station. He had elected to leave employment and pursue his own business.

6. According to PW1, on 28th April 2011, he was called by PW2, Wesley Kipyegon Kirui, the manager of the petrol station, and informed that there had been a break-in in the room where they kept the money from daily collections at the petrol station. He was also informed that a shoe and a cap were found at the scene of the break-in, as well as some Kshs 47,500 and a motor cycle.

7. Kipyegon Wesley Kirui, PW2, the manager of Chepseon petrol station, was in his office on the 28th of April 2011 when the watchman came to call him to see what had happened to the owner's office. He found that the office, which had been alright during the day, had been broken into. He stated that the office had been broken into between 7.30-7.40 p.m. Kshs 47,500, an iron bar as well as a leather shoe and a cap were found outside the broken office. There was also a motor cycle parked at the pumping place. PW2 identified the shoe, cap and motorcycle as belonging to the appellant.

8. According to PW2, the appellant had been to his office at about 6.00 p.m. on the material day. They had taken tea together, then PW1's brother had come to ask the appellant to carry some petrol for him. PW2 testified that at the time he was with the appellant, the appellant was wearing shoes and a red cap with a white stripe.

9. The evidence of PW3, Joseph Kipkemoi Ngeno, was that he was the watchman at the petrol station. He went to work at 6.00 p.m. and found the appellant with Wesley Kirui (PW2). One Philemon, a brother of the owner (PW1), came and bought paraffin which the appellant took for him on his motor cycle. Later, according to PW3, the appellant returned to the petrol station at around 7.30 p.m. and chatted with the pump attendants. PW3 testified that the appellant asked where the generator was and was shown where it was, he then left as if he was going to the toilet.

10. Later, PW3 went to look for a bucket and found that the back of the building was dark. He checked and found that it had been broken into. He tried to raise the alarm but no one responded. He found a shoe and some money, Kshs 47,500 on the ground, and a marvin (cap) on the fence. He also found a metal rod on the floor. He asked the pump attendant to whom the shoe and marvin belonged and was informed that it belonged to the appellant, who had also left his motor cycle. PW3 identified these items in court. In cross-examination by the appellant, he maintained that he had seen the appellant wearing the shoes and the marvin. He had found the shoe in the room with the money, while the marvin was on the fence.

11. PW4, Corporal Samuel Nyaribo, narrated the events as reported to him by PW1, PW2 and PW3. He had arrested the appellant on 15th May 2011, about two weeks after the events. He produced the money, shoe, marvin, metal rod and photographs of the accused's motor cycle.

12. In his defence, the appellant elected to give an unsworn statement and called one witness. He denied that he stole the money in question. His evidence was that on the material day, at about 7.00 p.m., he had parked his motor cycle at a petrol station. It was raining, and he took tea at a nearby hotel. He then went to get his motor cycle as there were passengers on the road. He was informed by a security officer that money had been stolen and he was a suspect. The security officer refused to give him his motor cycle. He went back to the hotel and informed the passenger that his motor cycle had been taken, then took another motor cycle and went home. He reported to the police on 15th May 2011 that his motor cycle had been taken, and he was arrested. He alleged that the owner of the petrol station had a grudge with him and detained his motor cycle.

13. DW1 was Rodgers Kibet. His evidence was that on 28th April 2011, at around 7.00 p.m., he was heading home. It was raining so he went to take shelter at a hotel. He found Wesley (the appellant) and

asked him to take them (DW1 makes references to "we" and "them", though no other person is named) home after it stopped raining. That when it stopped raining, the appellant went to get his bicycle but returned and said that there had been a burglary and his motor cycle was detained. DW1 then decided to go home by some other means. The appellant informed them the following day that he was a suspect with regard to the burglary.

14. In her judgment, the Honourable Magistrate found that it had been established that a burglary had occurred in PW1's petrol station, and from the receipts produced in evidence, a sum of Kshs 202, 278 stolen. Indeed, the issue of the theft had not been contested by the accused. She also found that the prosecution had established that it was the appellant who had committed the burglary and proceeded to convict him and sentence him as aforesaid. It is against this conviction and sentence, which was based on circumstantial evidence, that the appellant appeals to this court.

15. In presenting the appellant's case, Learned Counsel, Mr. Davies Sang, submitted that the learned trial magistrate failed to consider the appellant's alibi defence in which the appellant had stated in his unsworn defence that he had only parked his motor cycle to shelter and was at a nearby hotel taking tea. According to Mr. Sang, the appellant had stated that he was with one Rodgers Kibet, DW2. His submission was that while an alibi defence may be implicit, it must be considered at the trial, and the trial court erred by merely dismissing the appellant's defence as an afterthought.

16. Further, that since the appellant's defence was an unsworn statement, the prosecution was not able to cross-examine him to clarify or otherwise impeach the alibi defence. It was submitted on behalf of the appellant that to that extent, the alibi was implicit and the appellant bears no burden of proving his alibi. According to Mr. Sang, the appellant's alibi was solid and cannot be impeached.

17. Mr. Sang further submitted that the appellant was therefore entitled to the benefit of doubt, that it should be taken that he had raised an alibi defence. In his view, regardless of the time at which an alibi defence is raised, it must not be ignored and must be considered against the evidence adduced by the prosecution.

18. Counsel submitted that when an alibi defence is raised for the first time during the defence and not when pleading to the charge, the correct approach is for the trial court to weigh the alibi defence against the prosecution evidence, which was not done in this case. Counsel relied on **Peter Okello vs R, Kakamega High Court Criminal Appeal No. 260 of 2011**.

19. It was further the appellant's submission that the trial magistrate further erred in law and fact by totally ignoring the alibi defence and not considering the possibility of its truth. In his view, the trial court should have evaluated the defence presented by the appellant in his alibi defence. According to the appellant, the prosecution should have applied to the court to obtain evidence for purposes of rebutting the alibi of the appellant. He relied on the decision in **Elias Kiamati Njeru vs R Embu High Court Criminal Appeal No. 1 of 2015** to submit that the fact that the prosecution did not apply to call additional evidence to rebut the appellant's alibi in accordance with section 309 of the Criminal Procedure Code put the prosecution case in doubt.

20. Counsel further submitted that there was evidence adduced before the court of shoes, which were produced before the court, which neither fitted nor belonged to the appellant. The appellant urged the court to allow his appeal, quash his conviction and set aside the sentence.

The State's Response

21. In submissions on behalf of the state, Learned State Counsel, Ms. Keli, opposed the appeal. The state's position is that the prosecution case was proved beyond reasonable doubt and there was overwhelming evidence against the appellant that placed him at the scene. Counsel cited the evidence of PW2 and PW3 who knew the appellant well, used to see him on a daily basis and clearly identified his belongings, which included his shoe and cap, which were recovered at the scene.

22. With respect to the appellant's alibi, Ms. Keli's submission was that it was considered by the trial court and found to have no basis. It was her submission that the trial court was therefore right in reaching the conclusion that the appellant is the person who committed the offence of burglary. The fact that his clothing and motor cycle were recovered from the scene left no other reasonable explanation other than that he was the one involved in burglary of the premises he knew well. In Ms. Keli's view, in the circumstances of this case, the inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation on any hypothesis other than that of guilt.

23. Learned State Counsel submitted that the conviction was therefore safely secured, the sentence was legal and not excessive considering that the first limb of the charge carries a sentence of 10 years and the second 14 years. As the appellant was sentenced to serve 5 years on each limb, the sentences to run concurrently, there was no basis to interfere with the decision of the trial court.

Analysis and Determination

24. The case of the prosecution is primarily based on circumstantial evidence. I have examined the prosecution evidence which I have set out in brief above. Two witnesses, PW2 and PW3, the manager and watchman of the petrol station, testified that he had been at the petrol station at about 6.00 p.m. He had taken tea with the manager. They had noted what he was wearing, and identified his shoe and cap (marvin) which were found at the scene.

25. In its decision in **Simon Musoke vs R [1958] EA 717** the court stated as follows with respect to circumstantial evidence:

> ***"… in a case depending exclusively upon circumstantial evidence he (the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."***

26. In **Okeno vs R [1972] EA 32** it was held that:

> ***"In our view the magistrate clearly appreciated that a conviction based on circumstantial evidence can only be had where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."***

27. On the same issue, the Court of Appeal sitting in Mombasa held in **Peter Mote Obero & Another vs Republic [2011] eKLR** that:

> ***"It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – TEPER V R [1952] AC 480."***

28. The core of the appellant's case before me is that he advanced an alibi defence, albeit at a late stage, that the court was under a duty to consider. In her judgment, the trial magistrate observed that the accused had stated in his defence that he had taken shelter from the rain and then gone back for his motorcycle only to be informed of the burglary, and that his motorcycle had been detained. He had not put this to the prosecution witnesses, and in the court's view, had raised the alibi defence too late in the day.

29. The appellant has relied on the decision in **Elias Kiamati Njeru vs Republic (supra)** in which the court cited the decision in the case of **Kiarie vs Republic [1984] KLR** where the Court of Appeal held that:-

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons".

30. In the present case, I am satisfied that the trial court was correct in dismissing the appellant's case as an afterthought. He was present at the petrol station where the burglary took place. His shoe and cap were found at the scene where the burglary took place. His motor cycle was also at the scene, and he left it there for over two weeks, reporting its alleged detention by PW1 over two weeks after the incident. He was known to PW2 and PW3, with whom he had worked at the petrol station, and they recognised his shoe and cap. In the circumstances, I can find nothing in the appellant's last minute allegation that he was at a hotel taking tea, and was therefore not at the scene of the burglary, that displaces the very strong circumstantial evidence adduced by the prosecution.

31. I therefore find no merit in the present appeal, which is hereby dismissed, and the conviction and sentence upheld.

Dated, Delivered and Signed at Kericho this 27th day of September 2017.

MUMBI NGUGI

JUDGE