REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 16 OF 2017

(From original conviction and sentence in criminal case number 502 of 2017 of the Principal Magistrate's Court at Kapenguria)

STANELY KIMWETICH KIMUTAI……. APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

JUDGEMENT

The Appellant herein was charged, tried, convicted and sentenced in the Lower Court for the offence of **breaking into a dwelling house with intent to commit felony, contrary to section 305 (1) of the Penal Code.**

The particulars of this offence being that on 20th day of May, 2017 at Makutano Township within West Pokot County. The accused broke and entered a dwelling house of Stela Chepchirchir with intent to commit felony.

The prosecution case is that in May, 2017 PW-1 was a tenant of PW-2 at Makutano Township, within West Pokot County. At the time she was a student at Kisii University. On 19/5/2017 she had travelled to her rural home, upcountry. That day at night, at about 2.00 a.m. PW-3 who is a neighbour to PW-1, received a phone call from yet another neighbour, informing him that he could hear the noise of someone breaking a door nearby. PW-3 peeped through the window and saw two people breaking the door to the house of PW-1. They broke it and entered therein. PW-3 woke up other neighbours and they all ambushed the two intruders. When the two realized the presence of neighbours they tried to flee. One succeeded in doing so while the other was arrested. Neighbours contacted police officers. The police visited the scene. Among them was PW-4 in this case. They rescued the suspect from the angry mob and recovered a metal bar allegedly used in breaking into the said house. He was taken to Kapenguria Police Station and the recovered metal bar was kept as an exhibit.

PW-1 was notified of the incident. She travelled back and confirmed that indeed the house was broken into but nothing was stolen. The accused was then charged.

The accused's defense is that he is a businessman at Makutano. On 19/5/2017 he woke up as usual and went to work. He worked till 6.30 p.m. He went home and after he took supper went to watch football match at a club. He left the place at 11.15 p.m. heading home. On the way he was attacked by some people and was rescued by police officers on patrol. He was taken to the police station and charged with an offence he did not commit.

The trial court evaluated the evidence, found him guilty and sentenced him to serve 3 years

imprisonment. Dissatisfied with the said conviction and sentence he appealed to this court on the following grounds:-

1. ***That he pleaded not guilty during trial.***

2. ***That the case was poorly investigated and crucial witnesses did not offer evidence.***

3. ***That his fundamental rights were violated by the prosecution.***

4. ***That his defense was rejected without cogent evidence.***

5. ***That prosecution case was contradictory and lacked merit to sustain a conviction.***

6. ***That the evidence was insufficient to warrant a finding of guilty.***

The state prosecutor opposed the appeal and relying on the evidence adduced averred that the offence was proved beyond reasonable doubt.

I have carefully reweighed the evidence adduced. According to the evidence of the most crucial witness, who is PW-3, the offence took place at about 2.00 a.m. That is at night. The appellant should therefore have been charged under **section 305 (1) as read with section 305 (2)** and not **305 (1) alone of the Penal Code**. 305 (1) reads:-

> ***"Any person who enters or is in any building, tent or vessel used as a human dwelling with intent to commit a felony therein is guilty of a felony and is liable to imprisonment for five years."***

305 (2) reads:-

> ***"If the offence is committed in the night, the offender is liable for imprisonment for seven years."***

PW-3 said he peeped through the window and saw two people. He does not disclose the source of light which enabled him to see at night. He went further to say he and other neighbours laid an ambush for the two intruders. When the intruders saw them, they tried to flee and they managed to arrest the accused while his accomplice escaped. This evidence lacks essential details necessary in ascertaining that they arrested the real culprit and could not have made a mistake of him. The scene was not described by him and neither was by the Investigating Officer.

We do not know whether the house was in an enclosed plot or an open one. For an enclosed plot, it would have been hard to escape and for an open one easy to. Given that one assailant escaped, details of how he managed, while the appellant did not, should have been given. We do not know how many neighbours laid ambush and how good was their trap net. We as well do not know exactly who arrested the appellant and where in relation to the location of the house. PW-3 is not clear that he was followed without losing sight of him from the complainant's house to the point of his arrest. He had nothing with him which could be connected to the offence. His defense is that he was arrested while going home. Given that we do not know exactly where he was arrested, there is a possibility he was arrested while along the road going home as he claimed, and mistaken for the real culprit, who could have escaped just as his accomplice did. The short fall herein is due to poor investigations. Other neighbours who took part in arresting the appellant were not considered as witnesses. Nothing was availed to show that the door was broken or the padlock. The scene was not photographed and sketch plan of it drawn. The Investigating Officer should have done better. The presented scanty evidence raises doubt as to whether the neigbours arrested the real culprit.

I resolve the doubt in his favour and the appeal is therefore allowed. He is accordingly set free unless otherwise lawfully held.

Judgment is read and signed in the open court in presence of the appellant and Ms Kiptoo for the state this 29th day of November, 2017.

S. M. GITHINJI

JUDGE

29.11.2017