



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 16 OF 2013**

**MORRIS GITONGA NJERU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in CR 251/13 at the Chief Magistrate's Court at Embu by P.C. Biwott – SPM on 16<sup>th</sup> May, 2013)***

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence of three years imprisonment imposed on each limb 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, by the court of the Senior Principal Magistrate at Embu on 16th May 2013.
2. The appellant has raised eight grounds of appeal through his counsel. In ground 1 he has stated that the trial court erred in law and fact by convicting him on the uncorroborated evidence of a minor child. In ground 2 he has stated that the trial court erred in law and fact by convicting him on the evidence of a co-accused. In ground 3 he has stated that the trial court erred in law and fact in failing to find that the appellant's co-accused was a minor aged 10 years old. In ground 4 he has stated that the trial court erred in law and fact in failing to find that the evidence of his co-accused, who was a minor ought to have been corroborated. In ground 5 the appellant has stated that the trial court erred in law and fact in failing that there was no sufficient evidence to warrant the conviction for burglary and stealing. In ground 6 the appellant has stated that the trial court erred in law and fact in dismissing the appellant's defence that he did not commit the offence. In ground 7 the appellant has stated that the court erred in both law and fact in failing to consider the appellant's mitigation and in concluding that he was not remorseful. In ground 8 the appellant has stated that the trial court erred in law and fact in failing to test the veracity of the evidence of the co-accused, which was not on oath.
3. The appellant's counsel filed written submissions dated 11th November 2015 urging the court to set aside the conviction and sentence. The respondent's counsel opposed the conviction and sentence and urged the court to uphold the judgement of the trial court in its entirety.
4. This is a first appeal. As a first appeal court, I am required to re-assess the entire evidence and come to my own independent conclusions according to *Peters v Sunday Post Ltd (1958) EA 424*, while deferring to findings of fact made by the trial court based on the credibility of the witnesses. I have done so. Having done so, I find that the appellant was convicted on circumstantial evidence. There was no eye witness who saw the appellant break into the house of the complainant (PW 1).
5. The evidence of Francis Njeru (PW 2) is that he had locked the house of the complainant (PW 1) on 4<sup>th</sup> April 2013. After locking the house securely, he put on security lights. According to him

- when the complainant (PW 1) came from Nairobi on 5<sup>th</sup> April 2013, he took the keys from him. PW 1 then proceeded to his house. He found that it had been broken into and a number of household goods including mattresses, radio, bedsheets and assorted clothes were missing. It is the evidence of PW 1 that entry into his house was gained through the 3<sup>rd</sup> bedroom window. The value of his stolen household goods was Kshs 36,000/-. He reported to the police in the same morning. Thereafter police came with a boy who led them to the tea plantation where most of his household goods were recovered. He positively identified them by producing purchase receipts for them. When asked whether he knew the appellant who was accused No. 3 in the trial court, he denied knowing him.
6. Accused No. 2 in the trial court who is described by the assistant chief Robert Nderi Onesmus as a boy took them to Kalani village. He confessed breaking the window and used master keys to open the doors to the complainant's house. Apparently he led them to where the stolen household goods were recovered, which was 20 meters away from the complainant's house.
  7. According to the Assistant Chief, Robert Nderi Onesmus (PW 3), none of the stolen properties were recovered from the appellant. The evidence of No. 43151 Sergeant Robert Chebii (PW 5 ) is that he arrested the appellant and the co-accused in the trial court. According to him, none of the household goods were recovered from the appellant.
  8. When put on his defence, the appellant made an unsworn statement in which he denied the offence. According to him, he was implicated by the co-accused No 1 and 2 in the trial court, whom he described as children. It is his further evidence that accused No. 1 and 2 in the lower court stated that he despised them. He does not know why they implicated him.
  9. I have reassessed the entire evidence and I find that the stolen household goods were not recovered from the appellant. It is clear from the judgement of the trial court that this appellant was convicted on the evidence of the co-accused No. 1 and 2 in the trial court. The evidence of accused No. 2 in the trial court was accomplice evidence which was not corroborated. Corroboration was necessary in the circumstances of this case.
  10. It is clear from the judgement of the trial court that the learned Magistrate failed to consider the evidence implicating each accused separately. It is a requirement of the law according to the Supreme Court (now renamed the High Court) in *Joseph Mbebi S/O Mati v. R (1957) EA 426* that the evidence against each accused must be considered separately. It is also clear that the trial court did not direct itself that it was convicting this appellant on circumstantial evidence. According to *Uganda v Musoke (1958) EA 715* in a case depending exclusively on circumstantial evidence the court before deciding upon conviction must first find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis other than that of guilt.
  11. In the circumstances, I find that the conviction of appellant cannot stand. I therefore allow his appeal against both conviction and sentence. The conviction and sentence are hereby quashed. The appellant is hereby set free unless otherwise held on other lawful warrants.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this 24th day of February 2016

In the presence of Ms Ndongop for the appellant and Ms Mbae for the State.

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**24/02/16**