REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 38 OF 2015

JAMES GACHOKI NTHIGA.....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Being an appeal from the original conviction and sentence in CR 1296 of 2014 at Embu Chief Magistrate's Court by V.O. Nyakundi - RM on 30th March, 2015)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of five (5) 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 imposed upon him by the court of the Resident Magistrate on 30th March 2015.

2. The respondent/state has supported both the conviction and sentence.

3. This is a first appeal. As a first appeal court according to ***Peters v. R Sunday Post Ltd (1958) EA 424*** I am required to re-assess the evidence upon which the appellant was convicted and thereafter arrive at my own independent conclusions. At the same time, I am required to generally defer to findings of fact as found by the trial court. The reason being that the trial court had the advantage of seeing and hearing the witnesses, an opportunity that this court does not have.

4. The appellant was convicted on the basis of circumstantial evidence. According to Margaret Njiru (PW 2) who was the Assistant Chief, she saw the complainant's (PW 1) house had been broken into and her household goods were scattered in the house. She then informed the complainant who confirmed that her house had been broken into and several goods had been stolen. They then proceeded to the house of the appellant together with AP police officers. The appellant led them to a place where nappier grass was growing and from that place they recovered some of the household goods of the complainant, which were put in evidence as prosecution exhibit 1, 2, 3, 4 and 5.

5. The evidence of the police officer APC Francis Kingori (PW 4) is that he accompanied the appellant, PW 2 and PW 3 to the place where the stolen household goods were hidden. According to him, it is the appellant who led them to the scene where the household goods were hidden. There was another person who had been arrested and he had pleaded guilty and sentenced. He was called by the appellant as his defence witness and he testified as DW 2.

7. The appellant gave sworn evidence. He stated that he was in Embu Provincial Hospital when the said offence was committed. He specifically mentioned that he was in that hospital between 10.00 a.m. to

1.00 p.m and that he returned home at 3.00 p.m. During the night of that day, police officers went to his house and arrested him and that is where he met the person who committed this offence. He called that person as his defence witness namely Joseph Nthiga Gichovi (DW 1). According to him, Gichovi was arrested, charged and pleaded guilty to this offence. He finally stated that he used to be a bad person but he has now reformed. He concluded his evidence by stating that the person who committed the offence was Joseph Nthiga Gichovi.

8. Joseph Nthiga Gichovi (DW 1) testified that the appellant and himself come from the same village. He went further to state that he knows the complainant, who is also a village mate. He further testified that he pleaded guilty in respect of the same offence with which the appellant was convicted and was sentenced. More importantly, he gave evidence that it is him who committed the offence and that the appellant was not involved. He further confirmed in his evidence that none of the stolen items were recovered from the house of the appellant. Interestingly, he testified that he told the police when he was arrested that he is the one who committed the offence with which the appellant is convicted but the police ignored him completely.

9. It is his further evidence that the stolen household goods were recovered in his house and that when the appellant was arrested, this witness was already in prison. He concluded his evidence by stating that he was taken to the house of this appellant and nothing was recovered in that house.

10. The appellant has raised five grounds of appeal. In ground 1 he has stated that the trial court rejected his evidence without good reason, which he says is in contravention of section 169 (1) of Criminal Procedure Code (Cap 75) Laws of Kenya. It is clear from the judgement of the trial court that the evidence of the appellant was considered and found to be untruthful. It should be remembered that it is this appellant who led the witnesses to the nappier grass where the stolen household goods of the complainant were recovered. In the light of this evidence, this ground of appeal is without merit and is hereby dismissed.

11. In the 2nd ground of appeal, the appellant has stated that the trial court erred in law and fact by convicting him because the actual person who stole the goods of the complainant was Joseph Nthiga Gichovi (DW 1). According to the appellant, since DW 1 openly confessed in court he should not have been convicted. This witness stated that the stolen goods were recovered in the house and not at the place where there was nappier grass. It should be borne mind that the evidence of the DW 1 was that of an accomplice. His evidence was rightly found to be incredible. This evidence of DW 1 was rightly rejected as being untruthful, because the appellant led the prosecution witnesses to where the stolen household goods were recovered. I find that DW 2 and the appellant were joint offenders within the meaning of ***section 21 of the Penal Code (Cap 63) Laws of Kenya***. The provisions of that section state that: ***" When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*** DW 1 and the appellant had a common intention when they jointly broke into the premises of the complainant and stole his properties. I find DW 1 to be an-untruthful and convicted accomplice of this appellant. It seems to me that DW 1 was trying to shield the appellant from being punished for this offence. This ground of appeal is without merit and I hereby reject it.

12. In ground 3 the appellant has stated that the trial court erred in law by failing to find that the offence was not proved beyond reasonable doubt. In this regard the trial court after considering the evidence correctly came to the conclusion that the offence against this appellant was proved beyond reasonable doubt. This finding of fact is supported by ample evidence. And for this reason, this ground of appeal is without merit and is hereby rejected.

13. In ground 5 the appellant has stated that the trial court erred in law and fact by failing to inform him that it was his right to be represented by an advocate at state expense. This he has asserted violated his constitutional rights as stipulated in Article 50 (2) (g) & (h) of the 2010 Kenya Constitution. This particular provision has not been actualized because parliament has not enacted enabling or implementing legislation. It is one of those rights that are to be progressively realized. In the circumstances, the trial

court did not commit any error. The reason is that a court is not allowed to make an order in vain. This ground of appeal is without merit and is hereby dismissed.

15. In ground 4 the appellant has faulted the sentence imposed upon him as being harsh and excessive and it should be reduced. The issue of sentencing is a matter for the discretion of the trial court. According to ***Wanjema v. R (1971) EA 493*** an appeal court is not allowed to interfere with the sentence imposed by a trial court unless that trial court overlooked some material factor, took into account some immaterial factor,acted on a wrong principle or the sentence is manifestly excessive in the circumstances of this case. An additional criterion that entitles an appeal court to interfere, arises where the sentence imposed by the trial court is manifestly lenient as to amount to a failure of justice in the circumstances of the case.

16. In sentencing the appellant, the trial court took into account that he was a first offender. It also took into account that the offence was rampant in that particular locality and concluded that a deterrent sentence was called for to deter this appellant and potential offenders. All these were relevant factors. The trial court should have taken into account that some of the household goods were recovered. This was a relevant factor which was not taken into account. It therefore follows the sentence in second limb of the offence is hereby reduced from ten to five years imprisonment. The appellant will therefore serve 5 years in the first limb and 5 years in the second limb. Both sentences to run concurrently.

17. The upshot of this is that the appeal of the appellant is hereby dismissed in its entirety.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this 21st day of April **2016**

In the presence of both the appellant and Ms Mbae for the Respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

21.04.16