IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 130(B) OF 2013

JOHN MUKUNDI KABIRU....................................APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Appeal from the judgment of the Hon.V.O.Nyakundi Chief Magistrate Nyeri delivered on the 28.10.2013in Criminal Case No. 115 of 2013)

JUDGMENT

FACTS

1. The Appellant, **John Mukundi Kabiru,** was charged with the offence of house breaking and stealing contrary to **Sections 304** and **279(b)** of the **Penal Code.**
2. The particulars of both charges were that on the 4th day of February, 2013 at Gichira Village in Nyeri County the appellant broke into the dwelling house of Julius Ndungu Wagura and stole a mobile phone make YXTEL valued at Kshs.2,500/- and cash in the sum of Kshs. 200,000/-.
3. After the trial, the Appellant was found guilty on both charges and was duly convicted and sentenced; the sentence that was meted out was five (5) years for the offence of house breaking and seven (7) years for the offence of stealing.
4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and the grounds of appeal are summarized as follows;

i. That the learned trial magistrate convicted him on the evidence of PW1, PW2 and PW3 whose credibility was doubtful;
ii. That there were no prosecution witnesses who gave evidence connecting him to the offences;
iii. That the offences were not proved beyond reasonable doubt;
iv. That the trial magistrate rejected the appellants defence with no good reason or explanation given.

5. At the hearing of the appeal the appellant relied on his written submissions and prayed that the appeal be allowed; whereas Ms Maundu Prosecuting Counsel for the State made oral submissions and opposed the appeal.

ISSUES FOR DETERMINATION;

6. After reading the appellant written submissions and hearing the Respondents oral submissions this court framed the following issues for determination;

i. Whether there was direct evidence on identification of the appellant on the offence of breaking into a dwelling house;
ii. Whether the offences were proved by the prosecution to the desired threshold;
iii. Whether to substitute the latter charge.

ANALYSIS

7. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**
8. The particulars of the offence are that the appellant broke and entered into the dwelling house of PW1; the evidence adduced by PW1 was that on the 4/02/2013 at around 11am he was called by his brother named Mureithi and informed that his house had been broken into; his evidence was that his cell phone make YXTel was stolen together with the sum of Kshs.200,000/-; that he immediately made a report to Gichira Police Post.
9. Martin Mureithi (PW3) the brother of PW1 also testified and his evidence was that when he arrived home he found that his brothers' house had been broken into; this happened on the 4/02/2013 and he puts the time as 11.30pm; he then called his brother and informed him of the incident.
10. The Investigating Officer (PW4) recalled that a report was made by PW1 on the 4/02/2013 that his house was broken into and a phone and Kshs.200,000/- was stolen; that he had been informed by his brother and didn't know the thieves; that on the 19/02/2013 the stolen phone was recovered at Kieni Trading Centre as it was being charged; that they later went to the appellants home at 11pm and conducted a search but nothing was found; but that the appellant admitted that the stolen phone was his but did not identify who had sold it to him; the appellant was arrested and arraigned in court.
11. Breaking in is a key ingredient of the offence and although neither PW1 or PW3 or PW4 mentioned in their evidence that it was the appellant who broke into the dwelling house of PW1 the trial court when passing judgment made a finding to that effect; the finding reads as follows;

"I find this neither here nor there as there's evidence PW1's house was broken into and the accused was found with Exb.1 six days after the theft. The accused failed to give a satisfactorily explain how he acquired Exh.1 Iam satisfied that it is the accused who broke into PW1"s house and stole Exh.1 and Kshs.200,000/-"

12. This court reiterates that nowhere in the evidence adduced by the prosecution witnesses PW1, PW3 and PW4 do they mention that it was the appellant who broke into and entered the dwelling house belonging to PW1; yet in its judgment the trial made a finding which was not based on any evidence tendered by the prosecution.
13. In the absence of direct evidence to prove that the appellant broke into and entered a dwelling house this court finds that the conviction cannot be sustained.
14. These two grounds of appeal are found to have merit and are hereby allowed.
15. On the latter part of the offence the appellant is charged "**with intent to steal and did steal one YXTEL mobile phone all valued at KShs.202,500/".** Going by the evidence of the Investigating Officer (PW4) which was that he went to the appellants house in the company of PW1; that he conducted a search but did not recover any of the stolen money; but he was told that the appellant had come into money and had purchased a cow valued at Kshs.9,000/- and had leased land at Gichuru and was farming and had employed four farm hands.
16. The evidence of this witness can at best be described as hearsay evidence which is inadmissible and should be disregarded; in the circumstances there is no evidence connecting the appellant to the theft of Kshs.200,000/-; the trial courts' finding that the appellant stole the sum of Kshs.200,000/- is erroneous as it is unsupported by any evidence.
17. In the particulars of the charge reference is also made to a cell phone model XYTEL having been stolen from PW1's house; the evidence of Boniface Maina (PW2) was that on the 18/02/2013 he spotted two people with the phone; namely Boniface and Charles and that they were downloading songs from the stolen phone to another; he was able to identify it as it had a particular gash; he made enquiries about the phone and he was told that the appellant had sold the phone and memory card to them; he then made an offer to the appellant to purchase the phone for Kshs.1300/- which was accepted by the appellant; the appellant sold the phone to him and gave him the phone and memory card and promised to avail the ear phones, the charger and the receipt, which he never

did.

18. It was this evidence that led to the arrest of the appellant; that the appellant was unable to give a satisfactory account as to who had sold the phone to him; the possession of the phone was indeed recent and together with his inability to give a satisfactory account as to who had sold him the phone this led to a presumption of fact that the appellant was the one who broke into the dwelling house of PW1.
19. Based on this the trial court found the appellant guilty and convicted the appellant and sentenced him to a term of seven (7) years; the appellant was a first offender; the term prescribed by the Section 279 is imprisonment for fourteen years.
20. This court finds this is an ideal case for substitution as the offence of theft of a phone valued at Kshs.1300/- has been established; the reason for substitution is due to the absence of evidence of aggravated circumstances like the use of violence immediately before or after the time of stealing; the appellant is also a first offender.
21. This court has jurisdiction to impose a substituted conviction for an offence that is minor and cognate to the offence charged; the offence of theft under Section 275 has a common factor with Section 279(b) and the maximum term prescribed for imprisonment is three (3) years; therefore it is minor and cognate to Section 279(b).

FINDINGS and DETERMINATION

22. In the light of the forgoing this court makes the following findings;

i. I find that the appellant was not positively identified by any of the prosecution witnesses; the prosecution is found to have failed to prove the offence of breaking and entering into a dwelling house to the desired threshold.
ii. The appeal on conviction and sentence for the offence of breaking in and entering a dwelling house contrary to Section 304 of the Penal Code is found to be meritorious and is hereby allowed; the conviction is hereby quashed and sentence set aside.
iii. Invoking the provisions of Sections 361(4) of the Criminal Procedure Code I hereby quash the conviction for the offence of stealing contrary to Section 279(b) of the Penal Code and substitute it with a conviction for the offence of stealing contrary to Section 275 of the Penal Code.
iv. The appellant was sentenced to seven (7) years imprisonment; the sentence is hereby set aside and substituted with the term served.
v. The appellant to be set at liberty forthwith unless otherwise lawfully held.

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 26th day of May, 2016.

HON. A. MSHILA

JUDGE