



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCRA NO. 15 OF 2015
(FORMERLY MERU HCCRA 122 OF 2014)

JOHN NJERU KATHENYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment and conviction of L.N. MESA - made on 5/9/2014 in Marimanti Senior Resident Magistrate's Criminal Case No. 9 of 2014).

J U D G M E N T

1. John Njeru Kathenya, the Appellant herein was on 2nd January, 2014, arraigned with six (6) others before the Principal Magistrate's Court, Marimanti with the offence of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code. It was alleged that on the night of 13th and 14th December, 2013 at Mwarangi village, Marimanti Location in Tharaka South District within Tharaka Nithi County, jointly with his co-accused, the Appellant broke and entered the dwelling house of Julius Ngari Wakirema with intent to steal therein and did steal therefrom various goods of the said Julius Njagi Wakirema valued at Kshs.231,200/-. The Appellant also faced an alternative charge of handling stolen property contrary to section 322 (1) (2) of the Penal Code. It was alleged that on 30th December, 2013, at Gatue sub-location in Tharaka North District within Tharaka Nithi County, otherwise than in the course of stealing, the Appellant dishonestly received or retained one weighing machine, one DVD player, 15 CDs, one solar panel, two spray pumps, two beds sheets, two bed covers, one blanket and one lessso knowing or having reason to believe them to be stolen goods.

2. The Appellant denied the charges but after trial, he was convicted of the main count and sentenced to three (3) years for burglary and (2) years for stealing, respectively. The sentences were to run concurrently. The Appellant was aggrieved by the conviction and sentence and has appealed to this court against the same. He sets out six (6) grounds of appeal which can be summarized into two (2): that the trial court erred in convicting the Appellant on weak evidence which did not prove the case to the required standard and secondly, that the Appellant's defence was not considered. This being the first appellate court, it behoves the court to review and re-evaluate the evidence afresh in order to draw its own independent findings and conclusions. **Okeno .V. Republic [1972] EA 32.** However, in doing so, this court must at all times have in mind that it did not have the advantage of seeing the witnesses testify.

3. The prosecution case was that on 14th December, 2013, Julius Njage Karima, the complainant (PW1) was informed on phone by his wife that their house had been broken into and things stolen. He rushed home and found a few neighbours who had responded to his wife's screams. The complainant and the neighbours followed the foot prints and motor cycle tyre marks upto the banks of river Nthananto. They

saw the foot marks had entered the home of the most feared family in the area and they therefore decided not to cross. The complainant made a report to the sub-area on the same day. That again on 19th December, 2013, his houses were broken into and everything was stolen. This time he reported to the police who came and confirmed the incident. A police raid was then conducted on 30th December, 2013 in the homesteads of inter alia, the Appellant whereby various items were recovered which included PExh 1 to 10. That the items were recovered from the Appellant's house and the houses of three (3) of his brothers. In cross-examination, he stated that what was stolen on the night of 13th/14th December, 2013 was food stuff. He denied that one of the Appellant's brothers Benson Katheranya borrowed any money from him or that he had any title belonging to the Appellant's said brother.

4. Francis Kairi Kamani, (PW2) told the court how he rushed to the complainant's homestead on the morning of 14th December, 2012 after he heard the complainant's wife scream. He was the first to arrive. She told him and the other villagers who arrived after him that her house had been broken into and various items stolen from therein. They followed the foot-steps and tyre marks up to river Thananto whereby they decided not to cross as the family across was very dangerous. That a police officer had been killed in that homestead some years ago. He told the court that he was present when some of the stolen items were recovered from the houses of amongst others, the Appellant. In cross-examination, PW2 told the court that amongst the things recovered from the Appellant's house was a bed, a mattress and solar. That the complainant's wife had indicated that goats had also been stolen and that they had marks. CIP Calestus Olando (PW3) the then OCS Gatunga, told the court how a raid on the Appellant's family was planned and carried out on 30th December, 2013 at about 3.00 a.m. That information had been received from both the members of the public as well as the County Commander that the Appellant's family was terrorising people in Marimanti and Gatunga. During the raid, he entered the house of the Appellant and found a lady there. He recovered therefrom a weighing machine (PExh 3), solar panel (PExh 6), and other items. Some animals were also recovered and they brought all the items to Marimanti Police Station. That a police officer had there before been killed in that homestead

5. Nicholas Nyaga (PW4) was the area chief. He told the court that because of information received in his office, on 30th December, 2013, a raid was organized involving over 30 police officers from Marimanti and Gatunga Police Stations targeting five (5) homes including that of the Appellant. That the family of the Appellant's father was notorious; that a police officer had been killed in that home; that the Appellant had killed one of his brothers in the 1990's but his father volunteered that he is the one who had killed his son to save the Appellant. He told the court that the complainant was not related to the Appellant as they both came from different districts, Tharaka North and Tharaka South districts, that is, respectively. In cross-examination, he denied ever presiding over the sale of land between the wife of the late David Kavindu and one Kithinji Ndatho of his location. PW5, PC Joab Muhande was the investigating officer. He told the court how the complainant made a report of house breaking into his house to Marimanti Police Station on 15th December, 2013. He booked the report and visited the scene. That a joint operation by police officers from Gatunga and Marimanti Police officers was carried out directed at the homes of several people including the Appellant. That the raid recovered from the house of the Appellant two 2 spray pumps (PExh 2), weighing machines and stone (PExh 3), one DVD (PExh 4), 2 beds (PExh 5), a solar panel (PExh 6), 15 CD's (PExh 7), 3 spanners (PExh 8), ½ Kg Nails (PExh 9), 2 bed covers, one blanket and lessso (PExh 10). In cross-examination, he confirmed that he was part of the party that carried the 30th December, 2013 raid.

6. In his defence, the Appellant stated that the complainant did not produce any receipts for his items, that it is him, the Appellant who had produced receipts; that the complainant had been compromised by the chief (PW4); that the Appellant's father had borrowed Kshs.10,000/- from the complainant in respect of which the Appellant's father had surrendered his title to the complainant which the latter had refused to surrender back to the Appellant's father. In his view, the complainant was out to finish the Appellant's family in order for him to take their land.

7. Before the hearing of the appeal, the state filed and served the Appellant with a notice of enhancement of sentence. The court warned the Appellant that the effect of that notice was that in the event the appeal failed, there was a likelihood that his sentence may be enhanced. The Appellant indicated that he

understood that fact and indicated that he will press on with the appeal.

8. At the hearing, the Appellant relied on his written submissions which this court has considered. The Appellant submitted that the only items stolen on 13th December, 2013 were food stuffs yet the items produced in court were different; that the complainant had not reported the loss of his items to the police, but only emerged after the police raid of 30th December, 2013 to claim the recovered items that were not his. That his defence was strong enough to displace the prosecution case. Mr. Ongige Learned Counsel for the state opposed the appeal and submitted that the sentence metted out to the Appellant was too lenient and should be enhanced; that the prosecution case was consistent and not contradictory and that the case against the Appellant had been proved beyond reasonable doubt. That there was no evidence to show that any receipts had been produced by the Appellant. Counsel urged that the appeal be dismissed.

9. The first ground was that the trial court erred in convicting the Appellant on weak evidence which had not proved the prosecution case to the required standard. The record shows that on 14th December, 2014 on his way home, the complainant received a call from his wife informing him that their house had been broken into and things stolen. He rushed home and when he arrived, he found that some neighbours had arrived. The neighbours joined him in following the foot prints and motor cycle tyre marks upto river Thananto. They never crossed the river as the prints and motor cycle marks entered the home of the most feared family in the area, that of Appellant. He reported the incident to the sub area and to the police according to the evidence of PW5. He stated that very many items were stolen among them food stuffs and clothes. The complainant gave to the police a long list of those items. There was a second theft on 19th December, 2013 when two houses were broken into and everything stolen. Amongst the items stolen was the complainant's lockable bed wherein he had kept receipts for the purchase of items. There was then a raid on the homes of, amongst others, the Appellant on 30th December, 2013 whereby various items were recovered. The complainant identified, P Exh 1 to 11 as being his items that had been stolen from his houses.

10. The complainant's testimony was corroborated by PW2 who told the court that in the morning of 14th December, 2013 he heard the screams of the complainant's wife. He rushed to the home of the complainant and found that the complainant's house had been broken into. They followed the foot prints and motor cycle marks to the home of the Appellant but could not cross river Thananto for fear of reprisals from the Appellant's family. He stated that the complainant informed those present that some of the items stolen were food stuffs, spanners and weighing scale. PW5 the investigations officer told the court that he participated in the police raid of 30th December, 2013. That the police recovered from the house of the Appellant PExh 2, 3, 4, 5, 6, 7, 8 and 9.

11. In this court's view, the evidence produced by the prosecution showed that the complainant's houses were broken into on 14th and 19th December, 2013 and various items stolen therefrom. That in a raid conducted by PW3 and PW5 on 30th December, 2013, various items were discovered from the Appellant's house and the complainant identified some of his items that had been stolen. It may be correct that it is not clear from the evidence as to what was stolen on 14th December, 2013 as opposed to the 19th December, 2013. This is so because according to the testimony of the complainant there were two thefts, one on the 14th the other on the 19th December, 2015. It is not specified whether the schedule of items attached to the charge sheet were the items stolen on 14th December 2013 for which the Appellant was charged.

12. That notwithstanding however, the complainant stated in his testimony that a lot of things were stolen on the 14th December, 2013 including food stuffs and clothes. That he gave a long list of the items to the police. PW2 when testifying of the theft of 14th December, 2013 specifically mentioned the weighing machine (PExh 3) and spanners (PExh 8). In this regard, the Appellant's submission that the only items stolen on 14th December, 2013 were the food stuffs and that the rest of the items produced in court had not been stolen was not correct.

13. The Appellant submitted that the complainant did not produce the receipts for the items claimed and

that it is him, the Appellant, who had produced receipts. The complainant testified that amongst the items stolen was his lockable bed wherein his receipts were. When the said bed was recovered from one of the houses of the Appellant's brothers, it had been broken into and there were no receipts. In his defence, the Appellant did not claim that the items recovered were his. He neither produced any receipt for any of the items as he submitted.

14. As regards the Appellant's submission that no report of the loss was made to the police, that submission is misplaced as PW1 told the court that he reported the breaking into his house and theft to the police. PW5 corroborated that testimony. Accordingly, this court finds that the prosecution's evidence was watertight and proved its case beyond reasonable doubt. The first ground is rejected.

15. The second ground was that the Appellant's defence was not considered and that it had displaced the prosecution case. This court has considered the trial court's judgment. The court notes that the trial court observed that unlike in the other series of cases facing the Appellant wherein he had adopted what the trial court termed as "a standard defence", in this case, the Appellant gave a different defence. The court considered the same and rejected it. On its part, this court has considered the Appellant's defence. The Appellant did not tell the trial court where he was on the night of 14th December, 2013. He likewise did not explain how PExh Nos 1 to 11 found their way to his house on 30th December, 2013. He neither claimed the items nor produce any evidence to show that they belonged to him. He sought to show that the complainant intended to take the land belonging to the Appellant's father for some alleged Kshs.10,000/- advanced by the complainant to the Appellant's father. Firstly, when these allegations were put to the complainant in cross-examination, he vehemently denied the same. Secondly, it was neither disclosed when the alleged Kshs.10,000/- was advanced by the complainant nor the title number disclosed. Thirdly, the Appellant's father was an accused before the trial court, he was not called to testify on behalf of the Appellant and verify those allegations. Accordingly, I find that the Appellant's defence was so weak and was properly rejected by the trial court.

16. The state applied that the sentence be enhanced. The trial court sentenced the Appellant to three (3) years and two (2) years imprisonment for burglary and stealing, respectively. Under sections 304 (2) and 279 (b) under which the Appellant was convicted, the maximum sentences given are ten (10) and fourteen (14) years, respectively. This court has jurisdiction under section 354 of the Criminal Procedure Code to enhance a sentence metted out by a trial court. Some of the circumstances under which this court will interfere with the discretion of the trial court and enhance a sentence may be where; the trial court mettes out a sentence without considering whether there are mitigating factors; where the sentence is illegal such as being below the minimum provided by law. Before metting out a sentence, the court must consider the purpose of sentencing which includes punishment, retribution and safe guarding the society from persons who are a threat to the social fabric.

17. In the present case, PW1 and PW2 told the trial court that the search party feared to cross river Thananto and go to the Appellant's home where the footprints and motor cycle marks disappeared to because they feared the Appellant's family. PW3 told the court that there was an outcry by the public against the Appellant's family because of the latter unbecoming conduct. The Appellant's family had become a threat to the community. PW3 told the court that a police officer was once killed in the homestead of the Appellant's father (where the Appellant has his house) while following items that had been stolen from Marimanti. The Appellant had a conviction in Marimanti **PM Cr. Case No. 225 of 2014**. The Appellant refused to mitigate and had not regretted his conduct. In my view, the circumstances of this case required a deterrent sentence. The society must be safeguarded from the Appellant. The trial court never considered all these factors in metting out its sentence. The sentence was too lenient in the circumstances.

18. Accordingly, the appeal is without merit and the same is dismissed. The sentence is hereby enhanced to ten (10) years for burglary and seven (7) years for stealing, respectively. The sentences are to run concurrently.

DATED and DELIVERD at Chuka this 26th day of May, 2016.

A.MABEYA

JUDGE

Judgment read and delivered in open court in the presence of all parties. Right of appeal within 14 days.

A.MABEYA

JUDGE

26/5/2016