



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCRA NO. 14 OF 2015
(FORMERLY MERU HCCRA 121 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. 6 of 2014).

J U D G M E N T

1. On 2nd January, 2014, John Njeru Kathenya, the Appellant was arraigned 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 between the nights of 24th and 25th December, 2013, at Katue location in Tharaka South District within Tharaka Nithi County, jointly with another, the Appellant broke and entered the dwelling house of Joram Muthengi with intent to steal therein and did steal N 50 Solar battery, 5 core speaker, Stereo power Amplifier, Sony DVD Player, two pairs of shoes and assorted clothings all valued at Kshs.15,450/- The Appellant also faced an alternative charge of handling stolen property. The Appellant denied the charge. However, after trial, the Appellant and his co-accused were found guilty of the offence of burglary and stealing and sentenced to three (3) and two (2) years imprisonment, respectively.

2. Aggrieved by the said decision, the Appellant appealed to this court setting out various grounds which can be summarized as follows: that the trial court erred in convicting him on weak and uncorroborated evidence; that the trial court erred in failing to consider that there was no report made to the police but the chief; that the trial court failed to consider the Appellant's defence; that he had produced receipts and that there was a grudge between the Appellant and the complainant. This being a first appellate court, it behoves this court to review and re-evaluate the evidence afresh with a view to draw its own independent findings and conclusions **Okeno .v. Republic [1972] EA 32**. However, in doing so, this court must at all times consider that it did not see the witnesses testify.

3. The prosecution case was that on 24th December, 2013, Joram Muthengi (PW1) went to his local church to celebrate christmas. At around 1 am a battery was required at his church and he therefore decided to go home and collect his. On reaching home, he found his battery, (AP) solar battery, radio amplifier, speaker, 2 pairs of trousers, a bedcover, 2 bed sheets and two pairs of shoes missing. He later learnt that some stolen items had been recovered from the houses of amongst others, the Appellant. He went to Marimanti Police Station where the recovered items were and was able to identify the solar battery (P Exh 1), amplifier (P Exh 2) and speaker (P Exh 3). He produced the receipts for the said items

as PExh4 and 5, respectively. That the police did visit the scene of theft and photographed the broken window. The photographs were produced as PExh 6 (a) (b) (c) and (d)). In cross-examination, he stated that he had reported the incident to the police on 25th December, 2013.

4. PW2 was PC Joab Mohande. He told the court how he participated in a raid that was carried out on 30th December, 2013 targeting the houses of, inter alia, the Appellant. That the Appellant run away from his house wherefrom the police recovered the solar battery, the amplifier and speaker (PExh 1, 2 and 3), respectively. That the complainant identified those items at Gatunga Police Station. PW3 was PC Daniel Cheruiyot the investigations officer. He testified that PW1 did make a report at Marimanti police station on 25th December, 2013. That he went to the scene accompanied by another officer, saw the broken window and took photographs (PExh 6 (a) (b) (c) and (d)). That he commenced investigations whereby he gathered that some stolen items could be, inter alia, in the house of the Appellant. It was also alleged that the home of the Appellant's family was dangerous to access. As a result, the OCS of Marimanti and Gatunga Police Stations organized a team of officers from the said stations and with the help of AP officers from the offices of Tharaka North DC raided the home of the Appellant on 30th December, 2013. The items that were recovered therefrom were taken to Gatunga Police Station where the complainant identified P Exh 1, P Exh 2, and P Exh 3, respectively. The said exhibits were recovered from the house of the Appellant. That the Appellant later surrendered himself to Gatunga Police Station. In cross-examination, PW3 told the court that the battery (P Exh 1) had the initials of the Appellant '**JNK**'.

5. In his defence, the Appellant told the court that on 30th December, 2013 at about 1.00 am, his brother asked him to accompany him to Maragwa to follow his said brother's wife who had run there after a disagreement with her husband. That they went and negotiated a settlement. On their way back at about 10.00 am, they were accosted by the chief who was in the company of some other people whereby the chief ordered that they be shot with arrows. That his brother was shot but the Appellant managed to escape. He went to Gatunga Police Station to report the death of his said brother but was arrested and put in custody. That while in custody, he was beaten and had one of his eyes damaged leading to its removal at Meru Level Five hospital. He denied having broken into the complainant's house and stealing therefrom. He also denied that the exhibits that were produced were recovered from his house. He told the court that the case was orchestrated by the area chief who had sold the land belonging to the Appellant's deceased brother but the Appellant and his family had been able to wrestle the land back from those to whom the chief had intended they benefit.

6. Before the Appeal was heard, the state served the Appellant with a notice of enhancement of sentence. The court warned the Appellant that if his appeal did not succeed, there was a likelihood that his sentence will be enhanced. Despite the warning, the Appellant said that he had understood the consequences of his pressing with Appeal and he opted to proceed with it.

7. At the hearing, the Appellant relied on his written submissions which the court has carefully considered. The Appellant submitted that he was beaten while in custody and that he had informed the trial court of this fact. That the evidence of the complainant was improbable and that his defence should be considered. Mr. Ongige on his part opposed the appeal. He submitted that the Appellant's submissions at this stage were baseless as they were not contained in his defence; that those accused persons who were acquitted in the lower court was because there was no evidence against them. That the evidence against the Appellant was consistent and unshaken. He further submitted that the case had not been fabricated as the complainant had made a report of the loss of his items which were later recovered from the Appellant. Counsel urged that the appeal be dismissed and the sentence be enhanced.

8. The first ground was that the trial court erred in convicting the Appellant on inconsistent, weak and uncorroborated evidence. The court has considered the record. The evidence of PW1 was that on 24th December, 2013, he left his house and went to church. At 1.00 am, the church needed a battery and he offered to give his. When he went back home, he found a window to his house broken and various items which he enumerated to court stolen from the house. He reported the matter to Marimanti Police Station whereby PW4 accompanied him to his house and saw how the window to his house was broken. He took photographs of the breakage which he produced in evidence as P Exh 6 (a) (b) (c) and (d). On 30th

December, 2013, a raid was conducted on the homestead, inter alia, of the Appellant whereby three of the items that had been stolen from PW1's house, were recovered from the house of the Appellant. These were a battery (PEXh 1), amplifier (PEXh 2) and speaker (P Exh 3). PW3 who participated in the raid, testified that the three (3) items were recovered from the house of the Appellant. The complainant identified these items at the police station and produced receipts (P Exh 4 and 5) to prove his ownership of the items. This court finds that PW1 was consistent and firm in his testimony. His evidence was corroborated by the evidence of PW3 and PW4. This court does not see any inconsistent in the evidence of the prosecution.

9. The submissions of the Appellant that the items that were produced in court were not recovered from his house and that the police came with them and mixed them with his goods does not hold. While PW3 told the court that when the police struck, the Appellant ran away, the Appellant gave a version that was rather incomprehensible. That he accompanied his deceased brother to Maragwa at 1.00 am to negotiate the return of his brother's wife who had run away. It is rather difficult to understand what the urgency was for the two to leave their homes at such an ungodly hour to go and discuss the return of an adult who had run away from their homestead. Be that as it may, there was no evidence to show that the items that were produced as P Exh 1, P Exh 2 and P Exh 3 were recovered elsewhere other than from the house of the Appellant. This court's view is that the prosecution case was strong, consistent and watertight. Ground is therefore rejected.

10. The second ground was that the trial court failed to consider that the reports were made to the chief and not the police. The Appellant submitted that the chief himself did not appear to testify at the trial. The court has considered the record. PW1 told the court that he reported the offence to the police at Marimanti. This was corroborated by PW4 who told the court that on 25th December, 2013, PW1 made the report to Marimanti Police Station whereupon PW4 visited the scene and took photographs of the broken window which he produced. In this regard, the ground that the report was made to the chief and not the police has no basis. The Appellant may have confused this case with a milliard of others he was facing in the lower court in which the alleged chief featured prominently. That ground in my view, was misplaced, had no basis and is hereby rejected.

11. The last ground was that the trial court failed to consider the Appellant's defence, that the Appellant produced receipts and that there was a grudge between the complainant and the Appellant. This court has carefully considered the defence of the Appellant. There is nowhere it is indicated that the Appellant produced any receipt for any of the items he was charged for. In any event, he never claimed that P Exh 1, P Exh 2, or P Exh 3 belonged to him. His defence was that the items were never recovered from his house. In this regard, the issue of his producing any receipts in respect thereof could not have arisen consequent to which the trial court failed to consider.

12. As regards the issue of an alleged existing grudge between the Appellant and his accusers, this court has noted that when the complainant in this case Joram Muthengi, testified, he was never questioned about any alleged existing grudge between him and the Appellant. In cross-examining the complainant, the Appellant made no insinuation whatsoever of any such alleged grudge. In his defence, the Appellant did not disclose or allege that the complainant had made any claim on the alleged land of the Appellant's deceased's brother or that the complainant was one of the alleged losers in the alleged saga. Accordingly, the allegation of an existing grudge was a far fetched issue since the alleged chief was neither a complainant nor a witness in the case facing the Appellant.

13. With regard to the defence, the Appellant sought to show that he was not at home during the raid of 30th December, 2013. He also sought to show that he had been framed because of a land dispute between his family and the area chief. That, the chief had sold the land belonging to the Appellant's deceased's brother to one Kithinji. In the opinion of this court, whether or not such a land dispute existed, there was nothing to show that it had anything to do with the complainant's loss of his goods and consequent recovery from the Appellant's house. There was no nexus between the alleged land dispute and the complainant. The Appellant never told the court where he was on the night of 24th December, 2013 when the subject burglary was committed. His defence also did not displace the evidence of PW3 and PW4 as to the recovery of the complainant's goods from his house on 30th December, 2013. In this regard, this

court has confirmed that the trial court considered and properly rejected the Appellant's defence. That ground also fails.

14. As regards the Appellant's complaint about the alleged beatings he received at Marimanti Police Station which led to the removal of one of his eyes, this court observes that there was no confession in this case. The alleged beatings did not in any way lead to his conviction and cannot help him in any appeal. The best advise this court can give him is to lodge a legal claim against those involved for both disciplinary action as well as for compensation.

15. The state through Mr. Ongige applied that the sentence metted to the Appellant be enhanced. The Appellant had been sentenced to three (3) years and (2) years for burglary and stealing, respectively. There are various issues which a court has to consider when metting out sentence to a convicted person. An appellate court will rarely interfere with the discretion of a trial court in metting out sentence. However, the appellate court, has the power and jurisdiction to do so under Section 354 of the Criminal Procedure Code which provides:-

“354 (1)At the hearing of the appeal the appellant or his advocate may address the court in support of the particulars set out in the petition or appeal and the respondent or his advocate may then address the court.

(2) The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address,

(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-

(a) in an appeal from a conviction-

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) in an appeal against sentence, the increase or reduce the sentence or alter the nature of the sentence;”

16. In my view, the circumstances in which an appellate court will interfere with a sentence may be where the trial court; has either metted out an illegal sentence or where it has metted out a sentence without considering the relevant factors that go into sentencing. Some of the factors to be considered may be; the mitigation of the convicted person, the seriousness of the offence, the previous record of the convicted person, the purpose of such sentence such as to protect the society from habitual or persons who are a threat to the social fabric amongst others.

17. The record shows that the Appellant was convicted on 5th September, 2014 in Marimanti Principal Magistrate's **Cr. Case No. 225 of 2014** to five (5) years without an option for a fine for the offence of handling stolen property. The court however decided to treat him as a first offender. When asked for his mitigation, the Appellant was neither remorseful nor regrettable. He is recorded as telling the court “***I urge the court to make the sentence concurrent if it opts to imprison me***”. There was the evidence of PW3 and PW4 that it took a large number of police officers from two police stations, Gatunga and Marimanti, to mount the raid on the Appellant's home because the Appellant was considered as dangerous by the local community. The judgment in the trial court was but one out of other six (6) related cases then facing the Appellant. There is nothing to show that the trial court considered any of

these issues when it sentenced the Appellant. Section 304 of the Penal Code provides:-

“ 304 (1) Any person who-

(a) Breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

(b) Having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years”.

18. The maximum sentence allowed for the offence of burglary is ten (10) years whilst for stealing under Section 279 (b) of the Penal Code Cap 63, Laws of Kenya is fourteen (14) years. Having found that the trial court failed to consider the matters stated above this was a fit case to mette out the maximum sentence.

19. Accordingly, the Appellant’s appeal is without merit. The same is dismissed. For the aggravating circumstances set out above, the sentence of the trial court of three (3) years for burglary and two (2) years for stealing are set aside and replaced with a sentence of ten (10) years for burglary and five (5) years for stealing. The sentences will run concurrently.

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

A.MABEYA

JUDGE

Judgment read and delivered in open court in the presence of all parties.

A.MABEYA

JUDGE

26/5/2016