REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 39 OF 2015

KELVIN MUNENE…..... APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of three years imprisonment on the first limb and and two years imprisonment on the second limb of the composite charge, imposed upon him by the court of Senior Resident Magistrate at Runyenjes on 27th March, 2015 in respect of the offences of house breaking contrary to section 304 (1) (a) and stealing contrary to section 279 (b) both of the Penal Code (Cap 63) Laws of Kenya.

2. He has raised seven grounds in his petition to this court.

3. The state through Ms Mbae has supported both the conviction and sentence.

4. This is a first appeal. According to the Court of Appeal in ***Pandya v R (1957) E.A 336***, a first appeal court is required to re-assess the evidence produced at trial. Thereafter the court is required to make its independent findings, while deferring to the trial court on findings based on credibility. The reason is that the trial court had the advantage of assessing the demeanour of the witnesses an advantage that is not possessed by this court.

5. The appellant was convicted on the direct (eye witness) evidence of Beatrice Karimi Mugendi (PW1), the complainant and that of Aquilino Ndwiga (PW2). The appellant testified by giving sworn evidence in which he prayed for forgiveness in respect of this offence.

6. In his grounds of appeal, he has stated that the trial court failed to consider that he was mistaken to be the person who committed the offence. According to him, the person who committed the offence is still at large. In this regard the evidence, which the trial court believed was that the appellant was identified by the complainant during the commission of this offence. The offence was committed during broad day light. According to the complainant, she saw the appellant in her compound while she was outside her shop.

7. Upon seeing the complainant, the appellant ran away. As a result the complainant called for people to assist her. She then went to her compound and found an axe outside the house. She had put this axe inside her house. Furthermore, she found that her kitchen which she had originally closed was open. She also found that two wooden planks had been removed from her timber walled house. There is also the evidence of PW2 who joined PW1 in chasing the appellant. The sworn evidence of the appellant is that he prayed for forgiveness in respect of this offence. In view of this evidence which the trial court

believed I find that the appellant was the person who broke and stole the items of the complainant. This ground of appeal is without merit and is hereby dismissed.

7. In ground 2, the appellant has faulted the trial court by failing to consider that none of the stolen items were recovered from him. The evidence upon which he was convicted was based on identification of the appellant by PW1 and PW2. He was not convicted on the basis of being found in possession of the items that were stolen from the complainants house. Furthermore, there is his own prayer for forgiveness in respect of this offence. In the circumstances, this ground of appeal (2) is without merit and similarly dismissed.

8. In ground 3, the appellant has faulted the trial court for failing to consider that he was mistaken for the real thief. This ground is basically similar to ground 1 which I have already considered and have found that the appellant was positively identified. The circumstances favoured his identification. He was identified during broad day light. Thereafter, he was chased and arrested the same day. He also confessed to committing this offence in his sworn evidence. This ground is without merit and is hereby dismissed.

9. In ground 4, the appellant faulted the trial court by failing to consider that the appellant's names were not given to the police when the initial report was made to them concerning this offence. In this regard, it is important that the evidence of the police officer No. 69398 Corporal Charo Kazungu is that the appellant was taken to the police station on 2/04/2015. It therefore follows that there was no initial report to be made to the police. This ground of appeal is similarly dismissed for lacking merit.

10. In ground 5 the appellant has faulted the trial court for rejecting his defence evidence which he alleges is violation of section 169(1) and 212 of the Criminal Procedure Code. In this regard, the judgment of the trial court is very clear. That court framed the issues for determination as being whether or not the complainant house was broken into and secondly whether it was the accused who broke and stole the complainants items. It is also important to point out that the appellant confessed committing the offence.

11. The court went on to analyze the evidence and concluded that the prosecution evidence proved beyond reasonable doubt that the offence charged had been proved. The foregoing clearly shows that the provisions of section 169 of the Criminal Procedure Code were complied with. The provisions of section 212 of the Criminal Procedure Code are inapplicable in this case. Those provisions permit a prosecutor to call evidence in rebuttal, where an accused has adduced evidence which the prosecutor could not by the exercise of reasonable diligence have foreseen. This ground of appeal is similarly dismissed for lacking in merit.

12. In ground 6 the appellant has faulted the trial court for failing to consider that the appellant was not arrested at the scene of crime. In this regard, it is important to point out that the prosecution case was that the appellant was seen at the scene of crime and ran away from that scene and was arrested elsewhere . In other words, this ground of appeal is irrelevant and lacks merit, and it is therefore dismissed.

13. Finally in ground 7, the appellant has faulted the trial court on relying on evidence which was contradictory and inconsistent, which he says violated Section 163 of Evidence Act (Cap 80) Laws of Kenya. Section 163 is in relation to impeachment of the credit of witness. I have considered the evidence of the prosecution witnesses and I find that it was truthful. I further find that it was not impeached in anyway. In the circumstances, this ground lacks merit. I therefore dismiss it.

14. I have re-assessed the evidence produced in the trial court and I find that the appellant was convicted on ample evidence. The conviction on both limbs of the composite charge is hereby confirmed.

15. As regards the sentence, the maximum sentence provided for in the first limb of the offence is 7 years imprisonment and 14 years imprisonment is the maximum sentence provided for in the 2nd limb of the offence charged. In sentencing the appellant, the trial court found that the appellant was not remorseful. He then proceeded to impose a sentence of three years imprisonment in the 1st limb and 2 years imprisonment in the second limb , which were ordered to run concurrently. Thereafter, it ordered the

exhibits namely the axe and two wooden planks to be released to the complainant. It is also important to point out that the appellant did not advance any mitigating factors. He has also not done so in his petition of appeal. However, it is important to point out that the appellant was a first offender and the stolen items were recovered. After considering the mitigating and aggravating factors I find that the sentence imposed was merited and is hereby confirmed.

16. After sentencing the appellant the trial court ordered the exhibits to be released to the complainant. These exhibits consisted of an axe and two wooden planks. It was a misdirection in point of law for the trial court to have done so. Such an order should have been made to take effect after the expiry of the 14 days appeal period, so that if the appellant appealed as he did in this case, the exhibits may be required by the appeal court during the appeal hearing. Their release at that stage might prejudice the appellate proceedings, should they become an issue in the appeal court. However, I find that in this case their release has not occasioned a failure of justice in terms of section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

18. The outcome of the foregoing is that the appellant's appeal is dismissed in its entirety.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this 18th day of May **2016**

In the presence of the appellant and Ms Mbae for the State/Respondent

Court clerk Njue

J.M BWONWONGA

JUDGE

18.05/16