REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 38 OF 2015

AYUB MURIITHI……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(***An Appeal from the Judgment and conviction of L.N. MESA - SRM made on 3/9/2015 in Marimanti Principal Magistrate's Court Criminal Case No. 250 of 2014).***

J U D G M E N T

1. Ayub Muriithi, the Appellant herein was on 28th April, 2014 arraigned before the Principal Magistrate's Court, Marimanti with the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. It was alleged that on the night of 18th February, 2014 at Tunyai Location in Tharaka South district within Tharaka Nithi County, jointly with others at large, while armed with dangerous weapons namely pangas, the Appellant robbed Isaiah Mugambi of his mobile phone make Tecno T. 390 valued at Kshs.2,400/- and cash of Kshs.10,300/- and during such robbery threatened to cut the said Isaiah Mugambi with a panga.

2. The Appellant denied the charge but after trial he was found guilty, convicted of the offence and sentenced to serve three (3) years for burglary and two (2) years imprisonment and stealing, respectively. Aggrieved by the said decision, the Appellant appealed to this court citing three grounds of appeal which were argued as one namely, that the prosecution case was not proved to the required standard.

3. At the hearing of the Appeal, Mr. Muriithi Learned Counsel for the Appellant submitted that the trial court reduced the charge of robbery with violence to that of burglary and stealing because there was no evidence of anything having been stolen from the complainant; that the reduced charge was never proved; that the complainant did not identify any of the robbers; that there was a belated report of the alleged theft; that the phone that was allegedly stolen was not identified by the complainant that there was evidence of an existing grudge between the Appellant's father and the complainant as well as PW3. On his part Mr. Momanyi, Learned Counsel for the state opposed the appeal and submitted that the prosecution proved its case to the required standard. That the complainant identified the Appellant on the material night; that PW1 and PW2 identified the Appellant as the one who sold the Techno 390 mobile phone stolen from the complainant; that the phone had a tracking device which led the police to PW2 and that the ingredients of the offence of burglary were proved. Counsel further submitted that the alibi put forward by the Appellant was asham and therefore he urged that the appeal be dismissed.

4. This being a first appellate court, it behoves the court to re-evaluate the facts afresh and draw its own independent conclusions and findings see **Okeno .V. Republic [1972] EA 32.** However, in doing so, the court has always to keep in mind the fact that it did not see the witnesses testify.

5. The prosecution case was that on the night of 15th February, 2014, the complainant (PW1) was in his house when three (3) people broke the window and entered his house. They stole from him Kshs.10,300/- and a mobile Phone Techno No. T 390. That he identified one of the thieves as the Appellant who was living not far from his house. That through a tracking device, the phone was recovered from one Gibrian Karauki Nyaga (PW2). In cross-examination, he admitted that he did not identify any thief on the material night and that he saw the Appellant the following day but he took no action Gibrina Karauki Nyaga (PW2) told the court that sometimes in March, 2014, Josphat Kilonzo Musya (PW3) brought the Appellant to her whereby she bought from him a mobile phone Techno 390 for Kshs.500/-. She denied that she is the one who led the police to arrest the Appellant on his part, Josphat Kilonzo Musya (PW3) told the court that sometimes in March, 2014 he led the Appellant to PW2 whereby the Appellant sold her a Techno T390 phone for Kshs.500/-. He also denied that he is the one who led the police to arrest the Appellant.

6. Corporal Stanley Ngeno (PW4), the investigating officer, told the court that the complainant made a report to the police on 23rd February, 2014. That the theft took place when the complainant was extremely drunk. He produced a mobile phone Techno T 390 as PExh 1 that was allegedly recovered from PW2. He confirmed that the complainant did not produce any receipt for the stolen phone. In his defence, the Appellant told the court that he was in Mombasa between 9th November, 2013 until 29th February, 2014 when he returned to Tunyai. That he was then arrested on 29th April, 2014. He indicated that there was a long standing grudge between his father and the complainant.

7. The court has carefully considered the record, and the able submissions of the counsels. The only ground raised was that the prosecution case was not proved to the required standard. In order to answer that ground vis a vis the issues raised I think the court should try and answer the following questions: What is burglary? Were the ingredients of burglary proved? Was there any theft from the complainant's house on 18th February, 2014?, put in another way was a mobile phone make Techno T- 390 stolen from the complainant's house on the 18th February, 2014?

8. Section 304 of the Penal Code, Cap 63 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 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".

It is clear from the foregoing that, burglary is committed when a person breaks and enters into any building with intent to commit a felony, and, such breaking has to take place in the night. In this regard, there must be prove that a building is broken into with intent to commit a felony therein or that once a felony has been committed in a building, a person breaks out of such building.

9. The evidence before the trial court was that PW1 was in his house on 15th February, 2014 when three thieves broke a window and entered. They stole from him Kshs.10,300/- and a Phone Make Techno T. 390. He said in his examination in chief that he identified the Appellant as one of the robbers. In cross-examination, he retreated and stated that he did not identify any of the robbers. Indeed, this is what the Appellant told the police in his initial report. He also told the police that he was very drunk that night. Despite the breaking in allegedly taking place on the night of 15th February, 2014, no report was made to the police until eight (8) days later, on the 23rd February, 2014.

10. The first issue that arises is, where did the trial court find the evidence of breaking into the house of the complainant? The court itself held in its reasons under section 210 that:

> ***"PW4 told the court that complainant reported that he was excessively drunk on the night the offence was committed. No evidence of forced entry was tendered. Without evidence of forced entry it is open for the court to speculate the complainant may have even forgotten to lock his door."***

Once the court made the finding to the fact that there was doubt of the breaking in, there was no justification whatsoever later on to make a finding that the Appellant broke into the house of the complainant to steal therein. To this court's mind, there was no evidence that was produced to show that there was any breaking into the house of the complainant and burglary.

11. Was anything stolen from the complainant on the 18th February, 2014? A serious irregularity occurred in the trial. While the charge sheet talked of the offence occurring on the 18th February, 2014, the testimony of the complainant is that the alleged breaking into his house and theft occurred on 15th February, 2014. When the court substituted the robbery with violence charge with that of burglary and stealing, it is not clear when the latter offences were committed for which the trial court convicted the Appellant. Was it 18th February, 2014 as per the charge sheet or 15th February, 2014 as per the testimony of the complainant, a breaking in and theft which he never reported to any police station. I think section 179 (2) which the trial court relied on to substitute the charges does not permit the court to do so when the evidence produced does not align itself with the charge sheet. That provision presupposes where the evidence proves a different offence committed on the date or day and or on the same transaction or the events alleged as particularly put forth in the charge sheet. Put in another way, the offence must be in line with the facts put forth on the charge sheet and not otherwise. In the present case, the evidence of the alleged burglary and stealing of 15th February, 2014 was not borne by the charge sheet.

12. The second issue is that the complainant stated that what was stolen from him on the night of 15th February, 2014 was a mobile phone make Techno N 390. He never produced a receipt for the same. Neither did he identify it in court. Secondly, the charge sheet alleged that what was stolen was a mobile phone make Techno T- 390. The question that begs is, are the two mobile phones, that is, Techno N 390 and Techno T 390 the same? There was no any evidence to that effect. Thirdly, whilst neither the complainant nor PW2 from whom the alleged stolen phone was recovered did not identify the alleged phone in court, PW4 produced a completely different phone from the one specified in the charge sheet or the one the complainant alleged to have been stolen from him. PExh 1 that PW4 produced, was a Techno T9. The question that arises is whether the mobile phone make Techno T9 is the same as Techno N 390 or Techno T 390. With such evidence, can it be said that there was anything stolen from the complainant's house? This court doubts. However, if there was such theft, it was not clear what type of phone was stolen.

13. It is not clear how or who led to the arrest of the Appellant. PW2 denied that she led the police to the Appellant. PW3 likewise denied leading the police to arrest the Appellant. However, PW4 alleged that it is PW2 who led the police to arrest the Appellant. In the circumstances, who is to be believed? From the foregoing, I think I have said enough to show that there existed enough doubt as not to sustain the charges that had been preferred against the Appellant. The prosecution's case in my view was not proved beyond reasonable doubt as required by law. This appeal must succeed. Consequently, I allow the appeal. The conviction is hereby quashed and the sentence set aside. The Appellant is to be set free forthwith unless otherwise lawfully held.

DATED and DELIVERED at Chuka this 9th June, 2016.

A.MABEYA

JUDGE

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

A.MABEYA

JUDGE

9/6/2016