REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.283 & 286 OF 2012

(An Appeal arising out of the conviction and sentence of B.M. NZAKYO - SRM

delivered on 2ND November 2012 in Githunguri PM. CR. Case No.1734 of 2011)

FREDRICK MURIITHI MUGENDI.....1ST APPELLANT

JOSHUA MANDU MICHAEL.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The 1st Appellant, Fredrick Muriithi Mugendi and the 2nd Appellant, Joshua Mandu Michael were charged with three (3) counts of **Burglary** contrary to **Section 304(2)** and **Stealing** contrary to **Section 279(b)** of the **Penal Code**. The particulars of the offence were that on various nights between 20th August and 11th December 2011, the Appellants, jointly with others not before court, broke into and entered the houses of Mercy Wanjiru Wambui, Catherine Wanjira Nyawira and Rita Olesi Amunga within Githunguri township, Kiambu County with the intent to steal therein and did steal from the said houses various electronic equipment particularized in the charge sheet. The Appellants were alternatively charged with three (3) counts of the offence of **handling stolen property** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on 13th December 2011 at Githunguri township, otherwise than in the course of stealing, the Appellants dishonestly received or retained various electronic goods listed in the charge sheet, the properties of Mercy Wanjiru Wambui, Catherine Wanjira Nyawira and Rita Olesi Amunga knowing or having reason to believe them to be stolen. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted of the main charge of burglary and stealing. They were sentenced to each pay a fine of Kshs.100,000/- for the three (3) counts or in default serve seven (7) years imprisonment on each count. The 2nd Appellant was aggrieved by his sentence. He has appealed against the trial magistrate's decision on sentence. The 1st Appellant was aggrieved against the decision of the trial magistrate on both conviction and sentence.

In his petition of appeal, the 2nd Appellant filed a petition of appeal essentially pleading with the court to exercise leniency on him. He was not challenging his conviction. He stated that he was a first offender, was remorseful and is the sole breadwinner of his family. He was of the view that the sentence that was imposed on him was excessive in the circumstances and should be reduced. In particular, he stated that the sentences should be ordered to run concurrently instead of consecutively. He had learnt his lesson and was determined to be a law abiding citizen if given the chance. The 2nd Appellant reiterated the contents of his petition appeal in the submission he made before court. He urged the court to exercise leniency on him. On his part, the 1st Appellant was aggrieved by his conviction and sentence. He stated that the trial magistrate erred in law and in fact by relying on the evidence of his co-accused as a basis of his conviction. He was aggrieved that the trial court had failed to take into account the totality of the evidence

adduced which had in effect exonerated him from the crime. He fault the trial magistrate for failing to properly evaluate the evidence and thereby arriving at the erroneous determination that he was guilty of the offence that he was charged. The 1st Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, Ms. Aluda for the State conceded to the appeal filed by the 1st Appellant. She submitted that the prosecution had not adduced sufficient evidence to sustain the conviction of the 1st Appellant. She stated that the 1st Appellant had given an explanation of how he came into possession of the goods that were recovered from him. As regard the appeal on sentence by the 2nd Appellant, she left the issue to the court. She was however of the view that the sentence of 21 years imprisonment imposed on the 1st and 2nd Appellants was excessive in the circumstances.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see **Njoroge – vs- Republic [1987] KLR 19).** The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **burglary** contrary to **Section 304(2)** and **stealing** contrary to **Section 279(b)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

Having carefully re-evaluated the facts of this case, it was clear that the 2nd Appellant who was found in possession of the various electronic goods that were stolen from the complainants. According to PW4 PC Paul Mutua, then based at Githunguri Police Station, he received information that there were suspected stolen goods in the residence of the 2nd Appellant. Accompanied by other police officers, he went to the house of the 2nd Appellant and was able to recover assorted electronic goods. On interrogation, the 2nd Appellant told PW4 that he had pledged some of the electronic goods to the 1st Appellant as collateral for a loan advanced to him. The 2nd Appellant escorted the police officers to the house of the 1st Appellant. The 1st Appellant readily handed over the electronic goods pledged to him by the 2nd Appellant. The electronic goods were positively identified by the complainants who testified as PW1, PW2 and PW3. The complainants testified that the said electronic goods were stolen from their respective houses after the houses had been broken into in their absence.

The prosecution therefore proved, to the required standard of proof beyond any reasonable doubt that it was the 2nd Appellant who burgled and stole from the respective houses of the complainants the said electronic equipment. The 2nd Appellant was therefore properly convicted. The 2nd Appellant, rightly in the view of this court, chose not to challenge his conviction. As regard the 1st Appellant, this court is of the view that he was wrongly convicted. He was a victim of miscarriage of justice. The only evidence that the prosecution relied to secure his conviction is that of an accomplice. The accomplice in this case is the 2nd Appellant. He candidly explained that he had given the 1st Appellant the said stolen electronic goods as a pledge to secure a loan from the 1st Appellant. That is a reasonable explanation that therefore exonerates the 2nd Appellant from the crime of **burglary** and **stealing**. **In Asira –vs- Republic [1986] KLR 227,** the Court of Appeal held that the evidence of a co-accused cannot be corroboration of the evidence adduced against his co-accused. In the present appeal, it was clear that the trial court misdirected itself when it relied on the sole evidence of the 2nd Appellant to convict the 1st Appellant. There was no other evidence which connected the 1st Appellant with the crime. The State rightly conceded to the appeal lodged by the 1st Appellant.

In the premises therefore, the appeal filed by the 1st Appellant is hereby allowed. The conviction of the 1st Appellant is quashed. The sentence imposed on him is set aside. He is ordered set at liberty forthwith unless otherwise lawfully held. As regard the 2nd Appellant, his appeal against the sentence is partially allowed. This court agrees with the State that the sentence imposed on the 2nd Appellant was harsh and

excessive in the circumstances. The sentence imposed by the trial court is set aside and substituted by a sentence of this court consolidating all the three (3) sentences of seven (7) years imprisonment imposed on the 2nd Appellant and reducing it to one consolidated term of four (4) years imprisonment. The sentence shall take effect from the date the 2nd Appellant was convicted by the trial court *i.e*. 2nd November 2012. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JANUARY, 2015

L. KIMARU

JUDGE