



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.244 OF 2012

(An Appeal arising out of the conviction and sentence of Hon T. Mwangi - SRM delivered on 28th September 2012 in Makadara PM. CR. Case No.1629 of 2011)

JOHN

OKWARO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, John Okwaro was charged with the offence of **burglary** contrary to **Section 304(2)** and **stealing** contrary to **Section 279(a)** of the **Penal Code**. The particulars of the offence were that on 10th April 2011 in Nairobi County, the Appellant broke and entered into the dwelling house of B A with intent to steal therein and did steal therein one suitcase containing assorted clothes valued at Kshs.4,000/- the property of the said B A. The Appellant was further charged with **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally attempted to cause his penis to penetrate the vagina of J A, a child aged 12 years. He was alternatively charged with **committing an indecent act** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant committed an **indecent act** on J A, a child aged 12 years by touching her private parts, namely vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the first count and on the main count of **attempted defilement**. In respect of the first count, he was sentenced to serve four (4) years imprisonment on each limb of the offence. In respect of the second count, he was sentenced to serve ten (10) years imprisonment. Both sentences were ordered to run concurrently. The Appellant was aggrieved by his conviction and sentence and filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the first count of **burglary** and **stealing** in the absence of any evidence establishing that he had indeed broken into the complainant's house. He complained that the trial magistrate failed to appreciate the fact that the charge brought against him had been fabricated by the complainant due to a grudge that existed between them after they had separated. He faulted the trial magistrate for failing to take into account the fact that the circumstances in which the **attempted defilement** is said to have occurred did not point to his guilt. He accused the trial magistrate of shifting the burden of proof. He was concerned that his defence had been ignored. He was aggrieved that the trial magistrate had failed to take into consideration the fact that there were no independent

witnesses who were called to corroborate the complainant's testimony thus raising doubt as to their credibility. The Appellant was aggrieved that he had not been given an opportunity and time to prepare for his defence. For the above reasons, the 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, the Appellant presented to the court written submission in support of his appeal. He urged the court to acquit him. Mr. Kabaka for the State opposed the appeal. He made oral submission to the effect that the prosecution had established its case on the charges brought against the Appellant to the required standard of proof. He urged the court to dismiss the appeal.

What are the facts of this case?

PW3 B A is a resident of *[particulars withheld]* village. The village is within Nairobi County. PW3 resided with her two children, namely V O (PW2) then aged 14 years and PW1 J A then aged 12 years. According to PW3, on the material night of 9th April 2011, she left her home to go to church. She left her home at about 10.00 p.m. She left her two children alone in the house. PW1 testified that at about 1.00 a.m. when they were asleep, they were woken up by a bang. Someone was trying to gain access to the house through the door. The door however held firm. The person went through the widow and gained access to the house. He strangled PW1 before attempting to sexually assault her. According to PW1, the man attempted to remove her underpants but she resisted. The struggle caused her brother, PW2 to wake up. He started screaming. The man abandoned his mission and jumped out through the widow. As he was escaping, he carried a suitcase which had clothes. PW1 and PW2 did not identify their assailant.

They made a decision to report the incident to the police. They also informed their neighbours. At 6.00 a.m. PW3 arrived home. She was told what had transpired during the night. PW3 requested the neighbours to assist her to conduct a search in nearby incomplete houses. During the search, they saw the Appellant leave the incomplete house with a suitcase. They gave chase and arrested the Appellant. PW3 positively identified the suitcase and the clothes that were in the suitcase. The suitcase and the clothes were the ones which were stolen from her house the previous night. The Appellant was taken to Soweto Police Station where he was detained. PW5 Dr. Zephaniah Kamau of the Police Surgery examined PW1 on 12th April 2011. He noted that PW1 had scratches on the lower part of her throat above the sternum. She had small wound around the left lower toe. He formed the opinion that PW1 had indeed been assaulted and injured. The P3 form was produced as prosecution's exhibit in the case. PW4 PC Samuel Barasa was assigned to investigate the case. After concluding his investigations, he formed the opinion that a case had been made for the Appellant to be charged for the disclosed offences. PW4 produced the clothes and the suitcase that were found in the Appellant's possession as exhibits during trial.

When the Appellant was put on his defence, he denied committing the offences. He reiterated that the charges were actuated by a grudge that existed between him and PW3. He stated that PW3 used to be his lover before they separated in 2010. He testified that their separation occurred when he found another man in PW3's house. Although the Appellant claimed that he knew PW3 prior to the incident, in her testimony, PW3 denied being acquainted with the Appellant.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a fresh evaluation with the ultimate objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither heard nor saw the witnesses as they testified and must therefore give due regard in that respect (see **Okeno –vs- Republic [1972] EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charges that were brought against him.

It was clear from the evidence adduced by the prosecution witnesses that the Appellant was convicted essentially on the evidence of recovery of the stolen items a few hours after it had been stolen. This is the doctrine of recent possession. In **Malingi –vs- Republic [1989] KLR 225** Bosire J (as he then was) held as follows:

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his

possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”

In the present appeal, it was the evidence of PW1 and PW2 that they did not identify the person who broke into their house and attempted to defile PW1. They further testified that the person who broke into the house stole a suitcase which had clothes in it. After alarm was raised, the man ran away. They did not manage to apprehend him. The robbery incident took place at about 3.00 a.m. Although PW1 and PW2 testified that the electric light had been switched on in the house, they were emphatic that they were not able to register the facial and physical features of the man. They however testified that the man wore a particular colour of clothes. This court was not convinced by their testimony in regard to the colour of clothes that the man wore. It was improbable that the said witnesses identified the colour of clothes that the man wore without registering his physical description. It was clear from the evidence of the three witnesses that they had not met with the Appellant prior to the incident. It was clear from the evidence adduced that the two witnesses who were in the house did not identify the assailant.

According to PW3, the suitcase and the clothes were recovered in the Appellant's possession the following day when a search was conducted in some incomplete houses in the neighbourhood of her residence. The suitcase and the clothes were positively identified as having been stolen from PW3's house. That the suitcase and the clothes belonged to PW3 is not in doubt. Where this court has doubt is whether it was the Appellant who stole the clothes from PW3's house. It was not clear from PW3's evidence if other people resided or took refuge in the incomplete houses. It was fortuitous that PW3 mobilized her neighbours to search the incomplete house and found the Appellant. From the evidence adduced, it was not clear what the distance was between PW3's house and the incomplete houses. This court finds that reasonable doubt is raised in regard to whether the Appellant was the real perpetrator of the crime. There was a possibility that the Appellant picked up the suitcase and the clothes, the same having been abandoned by the real perpetrator.

The Appellant's defence was not helpful in the circumstances. This court will however not judge this case on the basis of the weakness of the Appellant's defence but rather on the strength of the prosecution's case. The gaps identified by the court in the prosecution's case leads this court in the conclusion that there exists doubt that it was the Appellant and the Appellant alone who could have perpetrated the offence. The fact that he was found with the suitcase is not a sufficient evidence to connect him with the attempted defilement of PW1 in the absence of any other evidence connecting him with the crime. Since PW1 and PW2 did not identify him, this court cannot in the circumstances reach a conclusion that the prosecution proved its case on the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt.

For the above reasons, the Appellant has established a case for this court to interfere with his conviction. His conviction is quashed. The sentences imposed upon him are set aside. He is acquitted of all charges. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF MAY 2015

L. KIMARU

JUDGE