



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRA NO.22 OF 2013**

*(From original conviction and sentence by Hon.B. Kasavuli in Lamu PM Cr. no.275 of 2012)*

**FAIZ MOHAMED ABDALLA**

**alias BASANGA.....APPELLANT**

**VRS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence 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 the appellant together with others on the night of 29 and 30<sup>th</sup> of May 2012 at Garden area in Lamu West District within Lamu County, jointly with others not before court broke and entered the dwelling house of Nayma Shee Mohamed with intent to steal therein and did steal from therein one T.V, Make LG 21 inch, one mattress high density (5x6), twenty one pieces of curtains, four bed sheets, one traveling bag assorted clothings, one handbag, a bunch of keys, one receiver, one air fan and one DVD player all valued at Ksh.44,650/= the property of the said Nayma Mohamed.

The appellant was convicted and sentenced to serve 5 years for each count of the offence. The grounds of appeal are that the case was not proved and requires, that the trial court did not consider the relevant law and that no investigations were carried out. It is also stated that his sworn statement of defence was not considered. The appellant filed submissions and relied on them. The submissions mainly elaborate on the above grounds.

Ms Mathangani, State Counsel, opposed the appeal. Counsel submitted that the appellant was seen carrying a bag which contained the stolen items. The appellant ran away when he saw the complainant in the company of police officers. PW2, saw the appellant with the stolen items. The appellant went to PW3's shop to test a DVD which had been stolen. PW4 investigated the matter and charged the appellant.

**Najma Mohamed** was the complainant. On the 29/5/2012 she closed here house at garden area in Lamu Island. She went back the following day and found her house has been broken into and several items stolen. This included mattress, T.V., curtains, clothes, DVD player, air fan among others. She went to report at Lamu Police Station. After about 30 minutes, she was called by one Abdul who informed her that the appellant together with others had been seen carrying items on a donkey. She went there with police officers and the appellant and his colleagues dropped the bag which belonged to her and ran away with the donkey. She opened the bag and recovered some of her stolen items including clothes and a fan. She was once again called by PW2 **Amina Mohammed** who informed her that the appellant had left a mattress at her place. She went there and identified it to be hers. It is her evidence that the stolen items were worth Ksh.44,600/=.

PW2 **Amina Mohamed** testified that on 30/5/2012 at about 11.30 a.m the appellant and two others took a mattress to her to keep it. One of them by the name Ali is her brother. PW1 had gone to her place with police officers 30 minutes before the mattress was taken to her looking for her items. She called PW1 who went there and identified the mattress to be hers. PW3 **David Kaberia** is a shop keeper. On

12<sup>th</sup> June 2012, at about 6.00 p.m police went to arrest him on allegations that he knew someone who had taken a DVD to him. He mentioned the appellant as he had gone to his shop asking him to use his electricity to test the DVD.

PW4 **P.C. Charles Mwai** was based at Lamu police station and he investigated the case. He went with the complainant on 30/5/2012 after having received information that some people were seen carrying some items. They met the people who threw away a bag and ran away with a donkey. PW1 identified the bag to be hers and they recovered some of the stolen items. PW2 called them and they went there and recovered a mattress. The appellant was arrested and charged with the offence.

In his sworn defence, the appellant denied committing the offence. He was arrested on 31/5/2012 while herding his goats. He was assaulted and taken to Lamu Police Station. PW1 went there and wanted to know where one Jangura was. He stayed at the police station for seven days and was later charged with the offence. PW3 was with him at the station but his mother paid Ksh.5,000/= for his release.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence shows that PW1's house was broken into and several items stolen. According to PW1, they were informed that the appellant had been seen ferrying items with a donkey in the company of other people. PW1 went with PW4 and saw the appellant who dropped a bag and ran away. According to PW2, her brother and the appellant took a stolen mattress to her home. PW1 identified the mattress to be hers. PW3 testified to the effect that the appellant went to his shop and asked to use his electricity to test a DVD. One of the stolen items stolen from PW1 is a DVD. The defence evidence mainly gave information as to how the appellant was arrested. It does not raise doubt on the prosecution case.

Given the evidence on record, I do find that the prosecution proved its case beyond reasonable doubt. The grounds of appeal do not raise any other issue for consideration by the court. The record of the trial court shows that the appellant is not a first offender. He was convicted in Criminal Case no.288 of 2012 and sentenced to serve five (5) years in prison. I do find that there is no need to vary the sentence imposed by the trial court. The appeal lacks merit and is hereby disallowed.

Dated, signed and delivered at Malindi this 25<sup>th</sup> day of June, 2015.

**SAID CHITEMBWE**

**JUDGE**