



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL CASE NO. 29 OF 2013

[Being an appeal from the judgment of S.K.NGII – RM in . Kimilili CMCR No. 1791 of 2012.]

TOM WANGILA WANYONYI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant has filed this appeal following the judgment of the Principal Magistrate in Kimilili Criminal case no. 1791 of 2012, where the accused had been charged with the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code. He was convicted and sentenced to five years imprisonment.

The particulars of the offence were that on 11th day of December, 2012 at around 2.00 a.m. at Kimilili PTC in Bungoma, jointly with others not before court, he broke and entered into a building namely PTC Kimilili and stole 21 mattresses valued at Kshs.74,500/= the property of PTC Kimilili

2. Being aggrieved by the judgment and sentence the appellant appealed against the same on the following grounds.
 - i. The learned trial magistrate did not judiciously direct his mind to the various contradictions of the prosecution evidence by PW2 & 3.
 - ii. There was no evidence to prove the appellant was the offender.
 - iii. The complainant was in bad terms with the appellant.
 - iv. He took issue with the language used in court.
 - v. He had differences with his boss.
3. At the hearing of the appeal, the appellant who was unrepresented relied on written submissions as follows,

There were contradictions in the evidence of PW2 & 3. PW2 alleged to have identified the appellant by voice, yet PW3 said he saw his upper clothing; the exhibit was not found with the appellant, the informer was not identified and finally the trial court favored the prosecution.

4. As for the state, it was submitted that the prosecution's evidence was overwhelming, and consistent; the voice of the appellant was identified by PW1, further that evidence was corroborated by that of PW2 & 3 who both saw and identified the appellant while in possession of the mattresses. PW 2 & 3 recognised and identified the clothes worn by the appellant on the material night, the language used in court was Kiswahili a language well understood by the appellant, further that the judgment and sentence were lawful.
5. The evidence of the prosecution may be summarized as follows;

PW1: Tom Mamari Makori- in charge of police training center in Kimilili recalled the night of 11.12.2010 at about 2.50 a.m. where he made security surveillance within the center, he had noise about 5m from the office. He checked and saw some mattresses behind the office. He took interest, he saw someone pull the mattresses from the store. He shouted stop, threatened to shoot but the person dared him. He then called for reinforcement. He moved near the gate and saw two people carrying the mattress outside. He once more dared to shoot and they threw stones. He was joined by 2 other police officers who gave chase. Later he realized that the voice of the person who was responding was that of the accused who was doing Community service at the center. The next morning he was taken by an informer to the accused home at 5.00 a.m. and they met him just getting home with the same clothes he wore at the time of stealing. They asked him to carry the clothes and accompany them.

PW2 Rose Kangai - recalled that on the night of 11.12.12 while asleep, she heard someone call out "mama sambusa" she knew the voice well, it was that of the accused who was a customer. Her neighbors PW3 opened the door and she heard the accused ask him to keep for him something. She woke up, opened the door and saw the appellant carrying a blue mattress. She cautioned her neighbour against keeping it and they both retreated to their houses at 6.00 a.m. in the morning another neighbor told them there was a mattress thrown on the fence. On checking, it was the same mattress the appellant had the previous night. Later they saw a police officer from PTC and they told him what had transpired.

PW3 Nicholas Lusaka Waswa -he also recalled that on 11.12.15 at 1.00 a.m. he heard one calling mama sambusa. He opened his door, he had a torch. The person identified himself as Tom Pesa, and asked the witness to keep for him a mattress he alleged he had come with from his girlfriend, the witness declined. In the morning he found the mattress in the compound. He had seen the appellant before but did not know his name. He identified a cap, T-shirt and jacket that the appellant allegedly wore the night of the incident.

PW4 Shem Sanya - police officer numbered 58298, found a report of theft on 11.12.2012, he went to PTC Kimilili and found PW1 with whom he went to the scene of crime. He saw a window broken, and a suspect had already been arrested and was at the center. They went where one mattress was recovered. The mattress MFI-7 was recovered he produced clothes recovered from accused.

6. At the close of the prosecution case, the court found the appellant had a case to answer and placed him on his defence. The appellant stated that on 11.12.13 he woke up at 6 a.m. and went to the farm on returning at 7 a.m. as he changed his clothes he was accosted by 4 police officers who arrested him and took him to the centre, thereafter he was charge with the offence.
7. The issue for consideration is whether the prosecution laid enough evidence to support the charge again the appellant. This being the first appellate court it has to consider the evidence afresh, analyze and evaluate the same in order to arrive at an independent opinion, always bearing in mind that the trial court received evidence first hand and had the opportunity to see the witnesses.
8. The appellant was charged with the offence of breaking and stealing 21 mattresses worth Kshs. 74,500/=.

The evidence of PW1 was that he saw people carrying mattresses, as his colleague's joined him when he asked for assistance and chased two people. Some mattresses were later found outside the office. The store had 50 mattresses and only 21 were found.

PW2 and 3 in their evidence said that they saw the appellant with 1 mattress the night of the incident. **PW1** did not see the alleged intruders. Later he realized the voice of the person who answered as having been that of the appellant.

9. **PW1** did not see the intruder, however he recognized his voice. PW2 and 3 saw the appellant , indeed PW2 spoke with him and was able to identify some of the clothes the appellant wore the night of the incident. The evidence of PW2 and 3 corroborates the fact that a mattress was stolen and was in possession of the appellant. What is not clear from the evidence of PW1 is how many mattresses were removed from the store, how many were carried away and how many were found outside.
10. I am in agreement with the trial magistrate's finding to the extent that the appellant broke and stole. However I do not find sufficient evidence that the appellant stole 21 mattresses. The evidence that is clear is that he was found with a mattress. In that regard I find the appellant guilty of having broken and stolen 1 mattress for PTC Kimilili. I therefore find the sentence of 5 years for stealing 1 mattress is excessive. I will set it aside and jail the appellant to a term of 2 years from the date of the initial judgment. And since he has already served this sentence I hereby set him free unless he is otherwise lawfully being held.

Dated at Bungoma this 29th day of September 2015.

ALI-ARONI

JUDGE.