REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 75 OF 2014

DENNIS MUGENDI MUNYI …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGEMENT

The appellant has appealed against his conviction and sentence of four years imprisonment on the first limb of house breaking and three years imprisonment on 2nd limb which were imposed upon him by the court of the Acting Senior Resident Magistrate on 23rd December 2014. Both sentences were ordered to run concurrently.

He has listed seven (7) grounds of appeal in his petition. Ground 1 is that he did not plead guilty to the offences. Ground 2 is that the trial court erred in law and fact by failing to consider that the appellant was not mentioned in the initial report made to the police. Ground 3 is that the trial court erred in Law and fact by acting on the evidence of recognition, which was not positive. Ground 4 is that the trial court erred in Law and fact in sentencing him by shifting the burden of proof to the appellant, which is contrary to section 107 (1) of the Evidence Act (Cap 80) Laws of Kenya. Ground 5 is that the trial court erred in law and fact by failing to observe that essential witnesses were not availed contrary to section 150 of the Criminal Procedure Code (Cap 75) Laws of Kenya. And in doing so the prosecution did not prove their case beyond reasonable doubt. Ground 6 is that the trial court erred in law and fact by not giving the defence evidence adequate consideration, which he states is in violation of section 169 of the Criminal Procedure Code. Ground 7 is that the appellant has urged the court to allow him to be present during the hearing of his appeal.

This is the first appeal. As a first appeal court, I am required to re-assess the evidence produced at trial and come to my own conclusions, while deferring to findings on credibility made by the trial court generally. This is according to the Court of Appeal in ***Pandya vrs R (1957) EA 336.***

I have re-assessed the evidence produced at trial and I find that the appellant was found in the house of the complainant (P.W.1) by James Nyaga (P.W.3). PW. 3 entered the house of the complainant and found the appellant placing flour in a sack. The time was 3.00 p.m during day light. He went and informed the complainant and together they found the padlocks of the house had been damaged. The complainant found that her maize, beans, sugar,and cooking oil, folk jembes and hammer were missing. They reported the matter to the police (P.W.2) who then arrested the appellant. According to the police the stolen items were not recovered.

When he was placed on his defence the appellant made unsworn evidence. In that statement he described himself as a carpenter. He stated that on the date when the house of the complaint was broken into he

was not at home. According to him there was a dispute between his parents and the complainant. On 4th October 2014 he was at Kathangeri when his uncle arrived drunk. The uncle started to abuse him and slapped him. In response the appellant also slapped him. The uncle went home and told his mother that the appellant had assaulted him. Finally he stated that on 6the October 2014 he was arrested by two police officers and charged with this offence.

I have re-assessed the evidence produced by the prosecution and the defence. and have come to the conclusion that the conviction is sound. The appellants was convicted on the evidence of an eye witness being, P.W.3. The identification of the appellant by P.W.3 was positive. The circumstances favoured his identification. The offence was committed during broad day light. Ground 3 of his petition of appeal that he was not positively identified his without merit and is hereby dismissed.

According to the police officer No. 77193 PC James Karanja the complainant went to the police station and reported that the appellant had broken into her house and stole the properties mentioned above. On 10th October 2014 they managed to arrest the appellant. It is clear that the name of the appellant was given to the police in the initial report made to them. Ground 2 in the light of that evidence his without merit and is similarly hereby dismissed.

The appellant in ground 3 has stated that the trial court erred in law and fact by relying on the evidence of recognition which was not positive. In this regard it is important to point out that the appellant was positively identified by P.W.3. According to PW 3 the offence was committed during broad day light at 3.00 pm. In the circumstances I find that his recognition was positive. There was no mistaken identity of the appellant. This ground of appeal fails and and is hereby dismissed.

Furthermore the appellant in ground 4 has stated that the trial court erred in law and fact in shifting the burden of proof which he says is contrary to section 107 (1) of the Evidence Act.(Cap 80) Laws of Kenya. It is clear from the judgment appealed against that the defence evidence of the appellant was fully considered together with that of the prosecution. And in conclusion the court stated that the prosecution had proved its case beyond reasonable doubt. This ground of appeal also fails and is hereby dismissed.

In ground 5 the appellant has complained that the trial court erred in law and fact by failing to observe that the essential witnesses were not availed, which he says is in violation of section 150 of the Criminal Procedure Code (Cap 75) Laws of Kenya. According to him this failure on the part of the prosecution showed that they had not proved their case beyond reasonable doubt. The provisions of that section authorize the court to call witnesses on its own motion, if it appears that their evidence is essential to a just decision of the case. According to the evidence of of No. 77193 PC James Karanja there was a potential witness by the name James Munene whom the prosecution intended to call but in the end he was not called. In the light of the evidence produced by the prosecution the failure to call this witness has not occasioned a failure of justice. The reason being that there is ample evidence in support of the conviction. This ground of appeal is hereby dismissed.

As regards ground 6 the appellant has complained that his defence was not fully considered by the trial court. A perusal of the judgment of the court shows that the evidence of the appellants was fully considered and was found to be without merit. The trial court in this regard stated as follow:

"*The accused's defence that he fought with his uncle and that is why he was arrested does not hold water and I hereby reject the same. I say so because I have not seen or deduced any malice in the evidence of the prosecution witnesses."*

In view of this finding by the trial court it is clear that the defence evidence was considered and properly rejected. This ground of appeal also fails and is hereby rejected.

I have re-assessed the entire evidence produced at trial. I have to the conclusion that the appellant's conviction is sound. There is ample evidence upon which the conviction was based.

In sentencing the appellant the court took into account that he was a first offender and proceeded to sentence him to four years imprisonment in the first limb of the composite charge and then imposed three years imprisonment on the 2nd limb of stealing, which sentences were ordered to run concurrently. These sentences was merited in view of the circumstances of the case.

The upshot of this is that the appellant appeal is hereby dismissed in its entirety.

JUDGEMENT DATED, SIGNED AND DELIVERED in open court at EMBU this 25th day of NOVEMBER, 2015.

In the presence of the appellant and the respondent

Court clerk Nyaga

J.M. BWONWONGA

JUDGE

25.11.15.