REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCRA NO. 61 OF 2012

Originally Eldoret Chief Magistrate's Criminal case No. 2954 of 2011

JAMES BUSAKA …...APPELLANT

VS

REPULIC..RESPONDENT

(Being an appeal from the judgment of E.A. Obina, Senior Resident Magistrate, in Eldoret Chief Magistrate's Court, Criminal Case No. 2954 of 2011 delivered on 10 March 2011)

J U D G M E N T

The appellant was charged with the offence of Burglary and Stealing Contrary to Sections 304(2) and 279(b) of the Penal Code, Chapter 63, Laws of Kenya. There was an alternative count of Handling Stolen Goods, contrary to Section 322(1)and(2) of the Penal Code. He pleaded 'not guilty', and after a full trial, was convicted of the main offence. He has now appealed to this court against his conviction and sentence. As the first appellate court, this court has a duty to re-evaluate the evidence and determine whether the trial court arrived at a correct finding.

PW-1 was the complainant who testified that he was at his place of work on the 19th of August 2011. He went back to the house only to find it had been broken into and various items missing. These were a 3 1/2 inch mattress, his identity card, his ATM card (Equity Bank) , a Kintes radio, a Nokia phone, and a National Bank Card. On 22nd August 2011, he received information from the sub-chief of the area that his properties had been recovered and he duly identified them.

PW-2 testified that that the accused, on the day after the incident, was seen with a mattress, which he claimed he had purchased from one Mama Tabitha, but the said Mama Tabitha refuted this.

PW-3 testified that on 22nd August 2011, a meeting was held in the neighbourhood of the complainant, to determine who had stolen from the complainant. The accused was confronted about the mattress but he appeared shifty and the neighbours became convinced that he was the burglar. They attempted to lynch him but PW-3 rushed to the police who came and arrested him together with the mattress.

PW-4 was the assistant chief of the area. He testified that he was called by an aunt to the accused who informed him that the accused had been arrested with a mattress and was about to be lynched but was saved by the police. The assistant chief went to the scene and called the police who came. Together, they opened the house of the appellant and found the stolen items.

PW-5 was the investigating officer. He testified how he first went to the scene when the appellant was about to be lynched and how he arrested him with the stolen mattress. He later visited the scene after PW-

4 had called the police. Together with PW-4, they found the stolen items in the house of the appellant.

The appellant gave an unsworn statement in his defence. He stated that he had a disagreement with his neighbor, one PN, because he (the appellant), had an affair with the girlfriend of PN. The appellant further stated that on 23rd August 2011, PN and other members of the public, attacked him accusing him of having stolen a mattress. He stated that it is then that he was arrested and charged.

In his judgement, the trial magistrate was of the opinion that there was overwhelming evidence to support the main count. The trial court was of the view that the appellant must have broken into the complainant's house and stolen the items. The appellant was then duly convicted of the main count and sentenced to 5 years in prison.

Mrs. N.K. Orina for the appellant, argued that the conviction was unsafe, as the said Mama Tabitha, was never called as a witness. She further argued that it was never confirmed that the house in which the items were found was the appellant's house and that the appellant was not present when the police entered his house. She argued that these items could have been planted. She further contended that the appellant could not have attended the security meeting if at all he was guilty. She pointed out that there was no eye witness to the burglary and that all the evidence was circumstantial. She also argued that the evidence of the appellant, that he had a grudge with a neighbor, was never tested and no reason was given as to why it was rejected.

Mr. Omwenga for the State, was of a contrary opinion. Inter alia, he argued that the stolen items were recovered from the house of the appellant. He averred that a failure to call Mama Tabitha as a witness was not prejudicial to the appellant. He was also of the view that the evidence of a grudge with PN was an afterthought as it was never raised during the prosecution's case.

I have considered the evidence on record and the rival arguments tendered by counsels for the appellant and for the State. I agree with Mrs. Orina that the judgement of the trial magistrate does not show that the trial magistrate evaluated the evidence of the appellant. There is indeed no reason given in the judgement as to why the trial court declined to accept the explanation by the appellant. The trial court only stated as follows :-

"I have carefully considered the evidence. There is overwhelming evidence to support the main count. The accused must have broken into the complainant's house and stolen the complainant's property. I convict him in Count 1…"

Section 169 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, provides as follows :-

69. Contents of Judgment

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1. *Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point of points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court and the time of pronouncing it.*
2. *In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.*
3. *In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.*

It will be seen that Section 169(1) above, provides that the trial court ought to give reasons for the decision. No reason was given as to why the evidence of the appellant was not convincing to the court. That in my view was an error on the part of the trial magistrate.

That said, I do not think that the error occasioned any miscarriage of justice and is curable by Section 384

of the CPC which provides as follows :_

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

Although the appellant alleged of a grudge, he never stated in evidence that the items were not found in his house. Neither did he give any explanation as to how the stolen items came to be in his house. The explanation about purchasing the mattress from Mama Tabitha was also not convincing. Although Mama Tabitha was not called as a witness by the prosecution, the appellant had the opportunity to call her as his defence witness if indeed he purchased the mattress from her. He never did so.

The arguments by Mrs. Orina that the items may not have been in the appellant's house is not convincing. If this was so, all that the appellant needed to say, was to state whose house they were found, since from the evidence, it appears as though the neighbourhood is a closely knit group. He could also have described his house in defence and demonstrated that where the items were taken from, was not his house. The appellant cannot also argue that the items were not found in his house, and again assert that they were planted in the house. The latter argument obviously negates the first.

I do not think that the appellant rebutted the evidence of the prosecution in his defence. I am of the view that the appellant was properly convicted.

Let me now go to sentence.

The maximum sentence for housebreaking is 7 years. If the offence is committed at night, it is termed as burglary, and the sentence is 10 years. These are contained in Section 304 of the Penal Code. The offence herein seems to have been committed during the day and the maximum sentence would therefore be one of 7 years. The appellant was also charged for stealing under Section 279 (b) which provides as follows :-

***279.** If the theft is committed under any of the circumstances following, that is to say -*

(b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house… the offender is liable to imprisonment for fourteen years.

The maximum sentence for the combined offence of burglary and stealing is therefore 14 years. The appellant was sentenced to 5 years imprisonment. The sentence is therefore not illegal, although slightly harsh, as the appellant was a first offender. But I believe that such offences are not taken lightly and ought strongly to be discouraged. I therefore see no reason as to why I should disturb the sentence. I uphold the same. Hopefully, the appellant will learn, through this punishment, that crime does not pay.

In the premises and for the reasons given herein, this appeal is hereby dismissed.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JANUARY 2014

JUSTICE MUNYAO SILA

DUTY JUDGE

HIGH COURT AT ELDORET.

Delivered in the presence of:

Appellant – present

Miss J.J. Ngelechei holding brief for Mrs Orina for appellant,

Mr. Munene for the state.