REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 65 OF 2013

STEPHEN KAMAU MUTAMBUKI……..……APPELLANT

-VERSUS-

REPUBLIC……RESPONDENT

(Being an appeal against conviction and sentence in Murang'a Senior Principal Magistrate's Court Criminal Case No. 3777 of 2008 (Hon. I.K. Orenge) on 12th November, 2009)

JUDGMENT

The appellant was charged with the offence of office breaking and committing a felony contrary **section 306(a)** of the **Penal Code.** According to the particulars of offence, on the night of 13th September, 2008 at Mirira primary school in Murang'a District, jointly with others not before court, the appellant broke and entered Mirira primary school head teachers' office and committed therein a felony namely theft of one black and white football, three carpentry vices, three dozens of haco rulers, one advanced dictionary, one learners dictionary, one kamusi, two hundred and eighty exercise books, twenty seven copies of text books and one packet of biro pens all valued at Kshs. 23, 320/= the property of Mirira primary school.

In the alternative, the appellant was charged with the offence of handling stolen goods contrary to **section 322(2)** of the **Penal Code** the particulars being that on the night of 13th September, 2008, at pole Sita junction at Gakindu village in Murang'a District within central province, otherwise than in the course of stealing, dishonestly received one black and white football, three carpentry vices, three dozens of haco rulers, one advanced oxford dictionary, two hundred and four exercise books, one kamusi the property of Mirira primary school knowing or having reason to believe them to be stolen goods or unlawfully obtained.

After hearing the case before him, the learned magistrate found and held that the prosecution had proved its case against the appellant on both the main count and the alternative count. He however convicted the appellant on the main count of office breaking contrary to **section 306** of the Penal Code. Curiously, although the appellant was convicted on the main count only, the learned magistrate sentenced the appellant to serve five years each on both the main count and the alternative with the sentences running concurrently.

The appellant was dissatisfied with the learned magistrate's decision and has appealed to this court against the conviction and sentence.

In his amended grounds of appeal, the appellant has faulted the learned magistrate's decision on the grounds that the learned magistrate erred in law and in fact in failing to find that the appellant had been charged in violation of **sections 72(3)** and **77(1)** of the **Constitution**; that the learned magistrate convicted and sentenced the appellant in violation of **sections 142, 169(2)** and **199** of the **Criminal Procedure Code**; that the learned magistrate erred in law and in fact in convicting the appellant based on a on a defective charge sheet and charges; and that the learned magistrate erred in law and in fact by convicting the appellant without considering his defence.

This honourable court's duty, as the first appellate court, is to interrogate the evidence on record, re-evaluate it and come to its own conclusions irrespective of the trial court's decision. The only caveat in this endeavour is to be conscious of the fact that, in its appellate jurisdiction, this court does not have the advantage of seeing and hearing the witnesses and therefore limited in assessing certain aspects of evidence that was presented before the subordinate court such as the demeanour of the witnesses. This has always been the legal position in determination of appeals such as the one before court since the court of appeal decision in case **Okeno versus Republic (1972) EA 32** where it was stated that**:-**

"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36).

The starting point in this regard, following the court of appeal's decision, is to lay bare the evidence as presented in the trial court and determine whether there is any conflict in evidence and whether such conflict has any impact on the prosecution case.

Although the learned magistrate talked of four witnesses who testified for the state, it is apparent from the record that there were actually five witnesses who testified the first of whom was the arresting officer, **Rogers Bosire**, a police officer attached to Murang'a police station. His testimony appears convoluted and I can do no better than reproduce it here verbatim. This is what is recorded of this witness after he had introduced himself:-

"On the 15th October, 2008 at around 8.30 pm I received a call from Gikindu location. He told me that there were suspects of theft in the village and that one of the suspects at the villagers. One of the thieves had been killed by members of the public. I rushed to the scene with other officers. The robbery took place at 3 am. I arrived at 10 am. One of the suspects had been badly beaten and unconscious. I took possession of the exhibits and the accused to the police station. We kept the mobile phone which I have before court. The allegation of Kshs. 15,000/- is not true because he was stealing a bicycle worth Kshs. 3000/-. The public could have taken the money. The chief told me that he is not aware of the accused losing any money. The phone may be handed over to the accused."

Following his evidence, the learned magistrate made a ruling to the effect that no money had been taken from the appellant and his complaint against the police was malicious and an afterthought.

As an arresting officer, this witness' evidence was not restricted to the complaint made against him by the appellant but was pertinent to the entire prosecution case against the appellant. It is partly for this reason that, upon the application of the prosecutor, this witness was recalled to produce the inventory of the property that had been stolen.

When the witness was cross-examined by the accused person, he said that he was informed of the incident by an assistant chief at around 6.15 am and he got to school at 7 am. He found the property which had

been stolen at the police station. The witness said that the property had been found at Gachihigu which was said to be about one and a half kilometres away from the school.

Maina Mwangi (PW2) testified that he had been employed as a watchman at Mirira Primary School for five years at the time material to this case. He was on duty on 13th day of September, 2008 when thieves entered the school, cut him with a slasher and stole school property. He said that he fainted after he had been cut. He was locked outside the office where he was removed the following day by good Samaritans. All the school offices were broken into and school books and equipment were stolen. The witness could not tell who amongst the thieves cut him.

PW3 Simon Njuguna who apparently was a teacher at Mirira Primary School said that he was at his home on 13th September, 2008 when the assistant chief called and informed him that the school had been broken into and the watchman injured. He found his office broken into and that papers were strewn all over the place. A Somali sword was found on the floor. According to this witness the watch man had been cut on the forehead and he is the person who took him to the hospital and also reported the matter to the police. His testimony was that the property stolen was well worth Kshs. 120,000/=.

The assistant chief, Mirira sub-location, **Bernard Kagoto**, testified as the fourth prosecution witness though the record erroneously indicated him to be the third prosecution witness. In his evidence, he told the court that he was asleep at his home when he was called by one Mwangi at 2 am and informed that there had been theft at Mirira Secondary School. In an apparent move to waylay the thieves, he summoned his neighbours and went to wait on the road at Gakindu. According to him at around 4 am he saw two people riding on two bicycles. The witness asked them to stop but rather than stop as ordered these people fled into a thicket. The assistant chief and his group pursued them to the thicket. One of these people who had fled was killed at around 6 am. Later another person was arrested on a road. This person is said to have surrendered a wallet and two keys described by the witness as master keys. This is the appellant whom this witness identified in the dock as one of the thieves he had confronted on the material night. He told the court in cross-examination that he had identified the accused person's face using a torch light.

The last prosecution witness was police constable **Pascal Otieno** who was the investigating officer. He told the court that on 13th September, 2008 he was called by the OCS Murang'a police station who informed him that the appellant had been arrested at Mirira. He proceeded to the scene with people he did not identify and found the appellant together with the items that had been stolen. The witness asked the court to admit the items as exhibits. He did not, however, specify the exhibits item by item as listed in the charge sheet. He also said that the bicycle was an exhibit in a different case.

That is as far as the prosecution case went. When the appellant was put on his defence, he opted to give a sworn testimony. He said that on the morning of 13th September, 2008, he boarded a motor cycle to take him to Makutano where he was to collect some goods for delivery in Nairobi. While on their way, the motorcyclist was called back and as he was walking towards the highway, he met people who identified themselves as police officers. These people searched him and took his money and a cell phone from his pockets. He said that these same people screamed to attract other people who eventually came. When he was still at the scene, a motor vehicle carrying a body arrived; he boarded this vehicle which took him to a school and later to Murang'a police station. He was charged thirteen days later with the offences for which he was convicted and sentenced. The record shows that prosecutor did not cross-examine the appellant although he gave a sworn testimony.

Looking at the entire evidence as recorded, there appears to be material inconsistencies in the evidence of the prosecution witnesses not only as between one witness and another but as within testimonies of particular individual witnesses. Take the example of the first prosecution witness was said it was on 15th October, 2008 at around 8.30 pm that he received a call of the theft in issue. He went to the scene with other officers. This would imply that the offence was committed on 15th October, 2008 before 8.30 pm and not on 13th September, 2008 as stated in the charge sheet and as alluded to by the rest of the prosecution witnesses. The witness neither identified the person who called him nor the officers who

accompanied him to the scene. The identity of these people and possibly their testimony would have provided the necessary corroborative element in the prosecution case.

Apart from the discrepancy in the dates of the alleged offence, it is not clear from the testimony of the 1st prosecution witness as to the time this offence was committed. While the witness said that the he received a call of the alleged crime at 8.30 pm, he proceeded to state that the alleged robbery took place at 3 am and though he claimed that he "rushed" to the scene after the call, he said that he arrived at the scene at 10 am, almost seven hours later. This delay is inconsistent with the meaning of the word "rush" as literally understood.

The story seemed to have changed when he was cross-examined; in answer to the appellant's questions the witness said that he was informed of the incident by an assistant chief at around 6.15 am and he got to school at 7 am.

On the property that had been stolen this witness was categorical in his examination in chief that "I took possession of the exhibits and the accused to the police station" yet when he was cross-examined he said that he found the property which had been stolen at the police station.

This witness' testimony was self-contradictory and also in conflict with the rest of the evidence from other prosecution witnesses.

The investigations officer who ought to have shed more light on the prosecution case had very little to offer. All he told the court was that he proceeded to the scene of crime on instructions of the OCS where he found the appellant and the stolen items which he did not even particularise in his evidence. It is also intriguing to note though the appellant and his accomplice are alleged to have abandoned the bicycles they were riding none of those bicycles was produced in court as an exhibit in evidence. The investigating officer only spoke of one bicycle which he alleged that it was an exhibit in another case against the appellant. This was not a sufficient reason not to produce it in the case against the appellant in so far as it was relevant to the case before the trial court. Even if the reason given by the investigations officer was accepted, there is no explanation for the omission to produce in court the second bicycle. The gaps in the evidence by investigations officer were too wide to be ignored.

The apparent failure on the part of the investigations was also manifested in the evidence of PW2, the school watchman and PW3 **Simon Njuguna**. The school watch man said he was cut by one of the attackers; though this evidence was corroborated by the **PW3, Simon Njuguna,** a teacher at the school, who said that a Somali sword was found at the scene there was no medical evidence to prove the injury and neither was the Somali sword produced as an exhibit in court. This omission was not explained.

The last aspect of the prosecution case which was more crucial and which the learned magistrate should have given due consideration in his judgment is the question of identification of the appellant. Evidence of the identity of the appellant was by a single witness **PW4 Bernard Kagoto**. The witness said that he was able to identify the appellant with the help of flash light or a torch. According to this witness, the appellant and his accomplice were riding on bicycles and they immediately fled when he asked them to stop. They were people he did not know before and he never attempted to give any description of how the appellant or his accomplice looked like. In my view, the circumstances under which the appellant is said to have been identified were not favourable; the appellant cannot be said to have been positively identified under those circumstances. In a recent court of appeal decision in the case of **Peter Maina Mwangi & Another versus Republic (2013) eKLR** the court considered the question of a single identification witness. It said at paragraph 24;

"It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. A court must always satisfy itself that in all circumstances it is safe to act on such identification, particularly where circumstances favouring a correct identification are difficult."

The court made reference to its decision in the case of **Wamunga versus Republic (1989) KLR 424**

where it stated**;**

"…it is trite law where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that he circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of conviction."

The only way that the trial court would have been convinced that the identification of the appellant by a single witness was free from error was through an identification parade. The learned magistrate fell into error when he held that the appellant had been positively identified by a single witness without subjecting that identification to a mandatory legal test.

The learned magistrate also erred in law and in fact when he held that the appellant had been found in possession of master keys which were neither produced in court as exhibits nor proved to be the type of keys which they were alleged to be.

The final issue in this appeal relates to the sentencing of the appellant. The learned magistrate convicted the appellant on the main count of office breaking contrary **to section 306** of the Penal Code yet he proceeded to sentence him on both the principal count and the alternative count. This was erroneous because one can only be sentenced on the offence for which he was convicted. Section 215 of the Criminal Procedure Code states:

215. The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law or shall acquit him.

The import of this section is that a conviction precedes a sentence and a sentence without a conviction is contrary to the law.

For the reasons that I have given the appellant's conviction was not safe. There is merit in the appellant's appeal and accordingly, it is allowed. The conviction is quashed, the sentences set aside and the appellant is set free unless he lawfully held.

Signed, dated and delivered in open court this 14th day of January, 2014

Ngaah Jairus

JUDGE