



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO.60 OF 2010

EDWIN NDEGWA JUSTUS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made by the learned Senior Principal magistrate at Nyeri court (Hon. J. Kiarie ESQ) in Nyeri Chief Magistrate's court criminal case No.651 of 2008 on 10/03/2010)

JUDGMENT

EDWIN NDEGWA JUSTUS, the appellant herein, was tried on a charge of house breaking contrary to **Section 304(1)** and stealing contrary to **Section 279(b)** of the **Penal Code**. At the end of the trial, the appellant was convicted and sentenced to a fine of Kshs.60,000 in default to serve one (1) year imprisonment. Being dissatisfied, the appellant preferred this appeal.

On appeal, the appellant put forward the following grounds in his petition:

1. **The learned Resident Magistrate erred in law and fact in not holding that the prosecution had not discharged the very heavy burden of proof beyond all reasonable doubt that the appellant had broken into a house and stolen and a miscarriage of justice thereby occasioned.**
2. **All the ingredients of the offence charged, to wit, house breaking and stealing as listed in the charge sheet were not proved or established. A miscarriage of justice was thereby occasioned.**
3. **In so far as there were grave contradictions in the evidence of the prosecution, the learned Senior Resident Magistrate erred in not considering the same and attaching to the same due weight in such a serious charge and a miscarriage of justice was thereby occasioned.**
4. **The learned Senior Resident Magistrate erred in law in not finding and holding that there were doubt in the prosecution case which doubt ought to have been resolved in favour of the appellant. A miscarriage of justice was thereby occasioned.**
5. **Considering all the evidence on record and the circumstance of the case the sentence meted out is manifestly harsh, excessive and against the weight of the evidence adduced.**

When the appeal came up for hearing Mr. Ombongi, learned advocate for the appellant argued the first four grounds together and abandoned the fifth ground, Miss. Kitoto, learned State Counsel strenuously opposed the appeal. Before delving deeper into the merits of the appeal let me first set out in brief the

case that was before the trial court. The prosecution presented the evidence of five witnesses in support of its case. It is the evidence of **Daniel Maina Mukiri** (P.W.1), that on diverse dates between 5th January, 2008 and 6th May 2008, he and his wife lost various sums of money from his locked house without any evidence of house breaking in. A report was made to the police and a trap was set up for four days. On the fourth day, **Paul Kiragu Muthigwa** (P.W.2) the person who lay in the wait inside P.W.1's house, witnessed the accused enter the house through a trap door in the ceiling. The accused is said to have entered P.W.1's bedroom where P.W.2 lay in wait managed to hold him. He noticed the intruder (accused) as the neighbour's son. P.W.2 called P.W.1's wife **Ruth Jackline Njeri** (P.W.3) to inform her of his new catch. P.W.3 informed the police who together with her visited the house. P.W.3 had apparently locked the door from outside. The accused's mother negotiated with the complainant to refund the stolen sum and executed a written agreement. The appellant was then released from custody on the promise that the money would be repaid to the complainant and his wife (P.W.3). The appellant and his mother reneged on the agreement thus prompting the complainant to report to the police. The appellant was then apprehended and charged with the offences he was later convicted for. The appellant denied committing the offence. He claimed that he was at home during the material day when he heard a commotion in the neighbour's house prompting him to check on what was happening therein. At the window, the appellant alleged he saw a young man who requested him to use his mobile phone but he refused to return the same claiming he had gone to the neighbour's house. The appellant later saw their neighbour's wife come with police to arrest him. He further alleged that his mother prevailed upon him to admit the charge with a promise that she would pay the complainant the stolen sum. The appellant further averred that he was re-arrested and charged when his mother failed to raise the money. He stated that P.W.2 lied when he said he held him. The trial Magistrate considered the evidence and came to the conclusion that the prosecution had proved the case against the accused to the required standards beyond reasonable doubt.

Having stated the case that was before the trial court, let me now consider the substance of the appeal. It is the submission of Mr. Ombongi, that the trial court convicted the appellant on uncorroborated evidence of P.W.2 and P.W.3. It is pointed out that the police did not carry out any investigation on the house to create the link between the appellant and the offence. Miss. Kitoto, was of the view that the evidence of P.W.3 corroborated the evidence of P.W.2. On my part, I have re-evaluated the evidence of P.W.2 and P.W.3. It is the evidence of P.W.2 that he was requested to stay in P.W.1's house to lay a trap. It is while he was inside that house that the appellant came in. P.W.2 claimed he managed to subdue the appellant after a struggle. He called P.W.3 who came with the police. It is P.W.2's evidence that P.W.3 and the police came and found them inside that house. P.W.3 on her part said that she took policemen to her house when P.W.2 informed her that he had nabbed the appellant. She claimed she opened the door which she had locked from outside and therein they found the appellant and P.W.2. P.C.George Odhiambo (P.W.5), the investigating officer of the case contradicted the evidence of P.W.3. He stated that he was one of the police officers who accompanied P.W.3 to the house where he found P.W.2 and the accused (appellant) had already left the house. He further stated that P.W.2 had come and found the appellant inside the house. This later piece of evidence also contradicted the evidence of P.W.2 who had earlier stated that she first went to the police who accompanied her to her house. In view of the serious contradictions I have entertained some doubt. The evidence of P.W.2 and P.W.3 cannot therefore be believed and relied upon. With respect, I agree with the submissions of Mr. Ombongi that there is need to corroborate the evidence of P.W.2 and P.W.3 because the duo are relatives whose evidence needed corroboration to avoid prejudicing the appellant's rights of a fair trial.

The appellant has also argued that his defence was not considered and that the trial Magistrate shifted the burden of proof to the appellant. Miss Kitoto did not address me on this later submission. The appellant had specifically stated that there was a woman who was washing some clothes whom P.W.2 had sent to him. The trial Magistrate stated that he should have summoned that woman to testify to corroborate his story. I do not agree that the trial Magistrate shifted the burden of proof. I have carefully re-evaluated the evidence and I am convinced that the police did not carry out any investigation of this case. The police treated this case casually and heavily relied on the story of the complainant and his witnesses. I expected the police to visit and thoroughly inspect the house and satisfy themselves that indeed there was an opening to gain entry into the complainant's house. It would appear the police was satisfied by the appellant's mother's written agreement in which she pledged to repay the money allegedly

stolen from the complainant's house. That was not sufficient. This case will fail because of poor investigation.

In the end, the appeal is allowed. The appellant's conviction is quashed and the sentence set aside. The appellant is hereby set free forthwith. If any fine imposed had been paid, the same be refunded forthwith.

Dated, Signed and delivered in open court this 20th day of February, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. Ombongi for the Appellant

Mr. Cheboi for Director of Public Prosecution