

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 21 OF 2013

RASHID SHIKUKUAPPELLANT

V E R S U S

REPUBLICRESPONDENT

(Appeal against conviction and sentence from the original Criminal Case No. 1997 of 2011 in the Chief Magistrate's Court at Kakamega from the judgment of {P. N. ARERI, SRM} dated 1.3.2012)

J U D G M E N T

The appellant was charged with the offence of burglary contrary to **section 304(2)** and stealing contrary to **section 279(b)** of the Penal Code. He was also charged with another count of stealing to **section 275** of the Penal Code. Each of the two counts had alternative count of handling stolen property contrary to **section 322(2)** of the Penal Code. The summary of the particulars of the offence are that the appellant broke into the house of **FATUMA MITUNGU** and stole three hens and one sufuria that contained maize and beans and later on another date stole a steel gate valued at KShs.20,000/= which was the property of **FATUMA MITUNGU**.

The appellant was convicted and sentenced to serve 4 years imprisonment. His grounds of appeal are that the sentence is harsh, he is a first offender, he is remorseful and his mitigation was not considered. He filed written submissions and contends that his co-accused who was his brother pleaded guilty and was sentenced. The sentence is harsh and seeks the court's leniency. Mr. Okoth, State Counsel opposed the appeal and submitted that the sentence is proper and the appellant's behavior should not be encouraged.

Three witnesses testified for the prosecution. **PW1 FATUMA MITUNGU**, was the complainant. On the 6.6.2011 she went to sleep and in the morning she discovered that a sufuria that contained maize and beans which she had left cooking was missing. She informed the village elder but nothing was recovered. On the 29.9.2011 at about 6.00 a.m. she discovered that her gate was missing. She again reported to the village elder, the assistant chief and Makunga police station. After one week the appellant differed with his wife and the wife went to inform them that it is the appellant who had stolen the steel gate and was cutting into pieces so as to sell it a scrape. The chief was informed and the appellant was arrested. Her sufuria that contained the maize and beans was found in the appellant's house and the appellant was found cutting the steel gate into pieces.

PW2, ABDI MKAME KHATOKWA is the husband of PW1. On the 30.9.2011 he found his steel gate missing. The matter was reported to the police. seven days later they got information that it was the appellant who had stolen the steel gate. The appellant was arrested and he had cut the gate into pieces and was putting the pieces into a sack. **PW3, PC EDWARD ANAMPIU** was based at the Makunga police patrol base. On the 7.10.2011 he was instructed to go and arrested the appellant who was suspected of having stolen a steel gate. They found the appellant with another person with pieces of the gate which they had already cut. They also recovered a sufuria which was identified by PW1 to be hers. The appellant was arrested and later charged with the offence.

In his defence, the appellant gave unsworn evidence. His stated that on the 7.10.2011 he was in his house with his wife when police officers who had arrested his brother went there. The officers removed

metal pieces from his brother's house and they were taken to the police station. They were charged and his brother admitted the charge.

The main issue is whether the prosecution proved its case. The evidence of PW1 is that she lost her items. The items were later traced at the home of the appellant. According to PW3 they recovered the sufuria and the pieces of the steel gate at the home of the appellant. Given the evidence on record it is established that the appellant was found in possession of the stolen items. The appellant is a neighbor to the complainant. Although the initial theft of a sufuria occurred three months before the item was recovered, the steel gate was recovered one week after it was stolen in the appellant's compound. It is clear that it is the appellant who used to steal from the complainant's home. The sentence is proper and the court correctly convicted the appellant. I do find that the appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 18th day of February 2014

SAID J. CHITEMBWE

J U D G E