



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NUMBER 64 OF 2013**

**BETWEEN**

**JOHN NJIRU NJUE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Embu Criminal Case No. 200 of 2013 by Hon. R.O. Oigara, Ag SPM on 16<sup>th</sup> October, 2013)***

**JUDGMENT**

1. The appellant was convicted of the offence of burglary contrary to **section 304(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and stealing contrary to **section 259(b)** of the **Penal Code**. The particulars of the charge of burglary were that on the night of 10<sup>th</sup> and 11<sup>th</sup> day of March, 2013 at Kevote village in Embu Municipality within Embu County, he broke in and entered into the dwelling house of one SM with the intent to steal and did steal therein 6 T-shirts, 3 pairs of shoes and slippers, 2 torches, one dress, one sweater, one trouser, one shirt or two exercise books all valued at Ksh 15,000/= the property of the said Samuel Mugendi. The offence of stealing related to the theft of the same items. An alternative charge of handling stolen goods contrary to **section 322(2)** of the **Penal Code** was also preferred.
2. The prosecution called four witnesses. The appellant elected to give a sworn statement in his defence. He was duly convicted and sentenced to serve four years in prison on the burglary charge and three years on the charge of stealing. He now appeals against the conviction and sentence.
3. The evidence before the trial court was that PW 1, the complainant, received a call from an employee of his mother, PW2, on 11<sup>th</sup> March, 2013 at about 10 a.m. He was informed that his house had been broken into. At about 2.00 a.m, he proceeded to the house, confirmed that the window to his bedroom had been cut through the door was intact. He found several items of clothing missing. He recorded a complaint or statement at Kevote Police Station. On 12<sup>th</sup> March 2013, he was called by an officer who informed him that a person had been arrested wearing shoes he had described. He went to the police station immediately where he identified the shoes as his and also the T-shirt the appellant was wearing. He accompanied the police to the appellant's house where a search was conducted and all items he recorded as stolen were recovered except the stove jiko or charcoal.

4. PW 2 called PW 1 to inform him that the house had been broken into. He testified that he did not know the appellant. PW 3, a police officer, testified that the appellant was brought to the station in connection with house breaking. He accompanied the appellant to his house where the stolen items were recovered. PW 4, another police officer, confirmed that PW 1 reported the burglary and theft. He testified that while on patrol with another officer at Kevote, they met the appellant who ran away when he saw them. They pursued him and arrested him. He wore white shoes and a T-shirt that resembled those described by PW 1 when he lodged the complaint. He arrested the appellant and was present when the search, which led to recovery of the stolen items, was conducted at the appellant's house.
5. In his defence, the appellant denied committing the offence. He stated that he was arrested while doing business and that the reason for his arrest is that he failed to pay protection fees to officers hence his arrest and prosecution on framed up charges.
6. On the basis of the evidence outlined the learned magistrate concluded that the prosecution had established its case beyond reasonable doubt.
7. In his petition of appeal filed on 25<sup>th</sup> October, 2013, the appellant challenges the judgment and conviction on the following grounds:
  1. *That the Learned Trial Magistrate erred in both points of law and facts when he failed to consider that accused had pleaded not guilty to the charge.*
  2. *That the Learned Trial Magistrate erred in both points of law and facts in failing to consider that no inventory form was produced before the subordinate court so as to support the recovery of the alleged exhibits.*
  3. *That the Learned Trial Magistrate erred in both points of law and facts by failing to consider the no independent witness was called so as to witness the said recovery from the appellant during the arrest.*
  4. *That the learned Trial Magistrate further erred in both points of Law and facts when he failed to consider that no photograph was taken in respect of the said exhibit alleged to be recovered from the appellant to support the said recovery.*
  5. *That the Learned Trial Magistrate still erred in both points of Law and Facts in when he failed to consider that the appellant was not arrested at the scene of crime.*
  6. *That the Learned Trial Magistrate finally ended in rejecting accused's defence on weak reasons and thus violated Section 169(1) of C.P.C.*
8. The State opposed the appeal and supported the appellant's conviction and sentence. This is a first appeal and the duty of the court is to evaluate the outlined evidence and come to an independent conclusion bearing in mind that it did not see or hear the witnesses (See ***Njoroge v Republic [1987] KLR 19*** and ***Okeno v Republic [1972] EA 32***).
9. I have reviewed the evidence and it points to the appellant's involvement in the felonious acts for which he was accused. PW 1 and PW 2 confirmed that PW 1's house was broken into. PW 1 testified that the same items he reported lost were found in the appellant's house after a search. Furthermore, PW 1, PW 3 and PW 4 all confirmed that the appellant was wearing PW 1's shoes and T-shirt when he was arrested. Taking into account the fact that the burglary occurred on the night of 10<sup>th</sup> – 11<sup>th</sup> March 2013 and on 12<sup>th</sup> March 2013, the appellant was found with the same property that was stolen leads to an irresistible inference that the appellant was involved in the burglary and theft. In the circumstances, there was no need for an independent witness to establish that the appellant committed the burglary and theft. The appellant did not give any explanation for his possession of the items which were stolen. In the case of ***James Tiokoi Koitoi v Republic, Nyeri CA Criminal Appeal No. 138 of 2003 (unreported)***, it was stated that, "Where an accused person is found in possession of goods recently stolen during a robbery, the trial court is at liberty to draw a presumption that the accused was one of the robbers unless the accused properly accounts for their possession." The circumstantial evidence against the appellant was therefore overwhelming.

10. In light of the prosecution evidence, the defence proffered by the appellant could not stand. There was no connection established between PW 1 and PW 2 who testified and the officers the appellant accused of framing him. Like the Learned Magistrate, I dismiss the defence.
11. The appellant complains that no photograph was taken or inventory produced to support the recovery of the items produced in evidence. In my view, photographs, in the circumstances of this case were not necessary as the stolen items were recovered, positively identified and produced in court as evidence. Furthermore, the appellant was caught wearing the stolen shoes and T-shirt. In ***Stephen Kimani Robe and 2 Others v Republic Nairobi Criminal Appeal No. 236 of 2012 [2013]eKLR*** the Court stated that, “*The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence.*” I hold that even though an inventory was not produced, the chain of evidence from the search, recovery of the items and identification in court did not undermine the prosecution case.
12. In light of my findings, I find that the conviction was sound and based on the evidence, the sentence is neither harsh nor excessive. In the circumstances, the appeal is dismissed.

**DATED, SIGNED and DELIVERED at EMBU this 30<sup>th</sup> day of April 2014**

**D.S. MAJANJA**

**JUDGE**

**Appellant in person.**

**Ms Ing'ahidzu, State Counsel, instructed by the Directorate of Public Prosecutions for the Respondent.**