



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL NO. 51 OF 2012**

**ANTHONY MAINA KIAMA.....APPELLANT**

**-VERSUS-**

**REPUBLIC .....RESPONDENT**

***(Appeal from the original conviction and sentence in Criminal Case Number 609 of 2012 in the Resident Magistrate's court at Baricho – HON. S. JALANG'O (SRM))***

**JUDGMENT**

The appellant herein **Anthony Maina Kiama** had been charged with the offence of **Burglary and stealing** Contrary to **Section 304(2)** and **Section 279(b)** of the **Penal Code** with an alternative charge of **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code**

In the principal count, the prosecution alleged that on the night of 3rd and 4th day of June 2012 at Baricho Estate in Kirinyaga County Jointly with others not before the court, the appellant broke and entered the dwelling house of **Andrew Githinji Githae** with intent to steal and did steal from therein one Television set make Elector , one decoder, one hoover, one meko make , K-gas , two blankets, two mattresses, 50 assorted CDS, three extension cords all valued at kshs 34,250 the property of the said **Andrew Githinji Githae**.

In the alternative count, the particulars thereof alleged that on the 9th day of June 2012 at Umbui village in Kirinyaga West District within Kirinyaga County, other than in the course of stealing, the appellant dishonestly retained two blankets and two mattresses knowing or having reason to believe them to be stolen goods.

After full trial, the appellant was convicted of the alternative charge and was sentenced to three years imprisonment.

Being aggrieved by the conviction and sentence, the appellant lodged this appeal raising seven grounds in which he basically complained that he had been convicted on the basis of insufficient evidence and that the trial magistrate erred in failing to consider his sworn defence .

When the appeal came up for hearing, the appellant elected to rely on what he referred to as written submissions but which turned out to be supplementary grounds of appeal.

The appeal was opposed by the state. Learned state counsel Mr Sitati supported the conviction submitting that the stolen goods in question had been recovered from the appellants house; that the prosecution

called competent and reliable witnesses and that the appellant was properly convicted. He also submitted that the term of three years imprisonment imposed on the appellant was very lenient considering that the offence for which he was convicted attracted a maximum sentence of 14 years imprisonment. He urged the court to dismiss the appeal for lack of merit.

Briefly, the case for the prosecution is that the complainant **Andrew Githae Githinji** securely locked his house at Baricho Estate with a padlock before proceeding to his home at Sagana. He worked as a laboratory technician at Baricho Health Centre but was on leave from 31st May 2012. On 4th June 2012, he received a telephone call from one Charles informing him that his house at Baricho Estate had been broken into. He proceeded to the house and confirmed the information. He noted that the door's padlock was missing as well as the items mentioned in the charge sheet. He reported the matter at Baricho police station. On 8th June 2012, he received information from **Lilian Nyawira** that there were suspicious items in the appellant's home. He was led by **Nyawira** (PW3) accompanied by **Benson Muthie** (PW2), **Peter Mureithi Rino** (PW4) and **P.C. Luka Rotich** to the appellants home where they recovered two mattresses and two blankets.

According to PW1, the mattresses and blankets had been part of the property stolen from his house. He found them spread on a bed in a house PW3 identified to be appellant's house. The recovery was made in the appellant's absence. The appellant was subsequently arrested and charged with the offence for which he was tried and convicted. The recovered mattresses and blankets were produced in court as exhibits in support of the prosecution case.

The appellant in his defence did not make any reference to the mattresses and blankets allegedly recovered from his house. He denied having committed any offence claiming that he was arrested and framed for the offence for having accused PW3 his wife of child neglect and taking away their child.

This being a first appeal, this court is duty bound to analyse and re-evaluate all the evidence adduced before the lower court to draw its own independent conclusions bearing in mind that it did not see or hear the witnesses-see

- **KIILU AND ANOTHER VRS REPUBLIC (2005) KLR 175**
- **KINYANJUI V REPUBLIC (2004)2 KLR 364.**

Having re-examined the evidence on record, I find that the evidence tendered by the prosecution regarding how the two mattresses and blankets were allegedly recovered from the appellants house was contradictory in a way that raised doubts as to the credibility of the prosecution witnesses.

While PW1, PW3, PW4 and PW5 claimed that the recovery was made in the appellants house, PW2 who was also in their company claimed that the recovery was made in the appellants brother's house. PW3 who appeared to be the prosecution's star witness and who led the rest of the witnesses to the appellant's house contradicted all the other witnesses when she claimed that the mattresses and blankets were found on the floor while the other witnesses claimed that they were spread on a bed. These different accounts given by people who claimed to have been together during the said recovery and who ought ideally to have witnessed how the actual recovery was made if at all raises serious doubts whether the items were actually recovered in the appellants house as alleged.

Secondly, even if the said items were actually recovered in the appellant's house as alleged, no evidence was adduced before the trial court to prove that the mattresses and blankets were in fact part of the property which had been stolen from PW1's house. PW1 in his evidence did not point to any special marks or features that would have helped him identify them to be part of his stolen property.

For the prosecution to successfully prove a charge of handling stolen goods, it must prove beyond any reasonable doubt the key elements of the offence which are that the goods in question were as a matter of fact stolen and that the person accused of the offence dishonestly handled or retained them knowing or having reasons to believe that they were stolen goods.

In this case my analyses of the evidence presented before the trial court leads me to the conclusion that the prosecution failed to prove beyond any doubt that the mattresses and blankets were infact stolen property and that they had been recovered from the appellant's house.

I find that the learned trial magistrate failed to carefully evaluate the evidence on record and consequently erred in making a finding that the prosecution had proved beyond doubt that the appellant had been found in possession of the mattresses and blankets which were stolen property. The trial magistrate failed to appreciate the inconsistencies in the evidence tendered by the prosecution witnesses and the fact that PW3 who by her own admission was having matrimonial differences with the appellant could have been motivated by reasons other than the pursuit of justice in having the appellant implicated with the commission of the offence.

In view of the foregoing, I am satisfied that the appeal is merited and it is hereby allowed. I hereby quash the appellant's conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

**C.W. GITHUA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 20<sup>TH</sup> DAY OF MAY 2014**

in the presence of:-

The appellant

Sitati for state

Mbogo Court Clerk