

IN THE HIGH COURT AT HOMABAY

CRIMINAL APPEAL NO. 12 OF 2012

BETWEEN

CALVINS OTIENO OKETCH..... APPELLANT

AND

REPUBLIC OF KENYA RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 623 of 2012 at Chief Magistrate's Court at Homa Bay, Hon. S. Ongeru, SRM dated on 14th January, 2013)

JUDGMENT

1. The appellant, **CALVINS OTIENO OKETCH**, was charged with the offence of store breaking and stealing contrary to **section 306(a)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence were that on the night of 21st and 22nd May 2012 at Homa Bay Police Station Exhibit Store, Homa Bay Location, Homa Bay District, with two co-accused, he broke into and entered a building namely, an exhibit store, and committed therein a felony namely theft and did steal 4 sacks of *bhang* with a street value of Kshs 420,000/=.
2. The prosecution called three witnesses to prove its case. PW1, a police officer testified that on the material night at about midnight he was performing general duties at the Homabay Police Station when he heard loud a bang from the exhibit store. He went there armed with his gun whereupon he saw 3 men. He threatened to shoot them but they ran away. He shot in the air. He managed to arrest the 1st accused. He did not see the other two suspects who fled.
3. PW2, a police officer, investigated the matter. On 22nd May 2012 at about 3.00 pm, the 1st accused pointed out where the appellant resides in Rongo. The appellant was spotted running away. The appellant was later arrested. PW 2 recovered a "hooper" allegedly stolen from a police officer house at the Police lines in the appellant's house. PW 3, a fisherman, testified that the 2nd accused was boasting about how he survived the shooting when he attempted to steal at Homabay Police Station. He did not know the appellant.
4. In his defence, the appellant denied having been involved in the theft as he was at home at the material time. He stated that no *bhang* was recovered from him.
5. The learned magistrate considered the matter and found the appellant guilty and sentenced him to 3 years imprisonment. The appellant appeals against conviction and sentence on the ground that there was no evidence connecting him to the felonious act. The State concedes the appeal on the ground that there was no evidence to support the conviction.
6. I have evaluated the evidence as required of the first appellate court and I conclude that this appeal must succeed. PW1 did not see the appellant on the material night. PW2 was led to appellants home by the 1st accused, an accomplice. Though a "hooper" which was allegedly stolen was found in the appellant's house, it was not produced in evidence nor was it established that it had any connection with the theft at Homabay Police Station. The fact that the appellant was seen running away could not be attributed to anything connected to the offence. In essence, the prosecution did not prove that the appellant committed the offence or was in any way involved.
7. The appeal is therefore allowed and the appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at HOMABAY this 26th day of JUNE 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Ongetti, Prosecuting Counsel, instructed by the Office of the Director of Public Prosecution for the respondent.