

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 39 OF 2013

(APPEAL AGAINST CONVICTION AND SENTENCE FROM THE JUDGMENT OF [H. WANDERE, P.M.] IN THE SENIOR RESIDENT MAGISTRATE'S COURT MUMIAS IN CRIMINAL CASE NO,205 OF 2012)

PATRICK ECHESA ODUORI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

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**. The particulars of the offence were that the appellant *on the nights of 8th and 9th of March 2012 at Bukhali village in Matungu District within Kakamega County broke and entered the dwelling house of NATHAN ODHIAMBO with intent to steal therein and did steal therein, seven blankets, two hot pot dishes and four glasses all valued at KShs. Seven thousand and one hundred shillings (KShs.7,100/=) the property of NATHAN ODHIAMBO.*

The appellant was also charged with an alternative charge of handling stolen goods contrary to **section 322(2)** of the Penal Code. The particulars were that the appellant on the night of 9th March 2012 *at Bukhali village in Matungu District within Kakamega County otherwise than in the course of stealing dishonestly received or retained one blanket, two hot pot dishes and four glasses knowing or having reason to believe them to be stolen goods.*

The appellant was convicted and sentenced to serve seven (7) years imprisonment for each count. The court did not indicate whether the sentence was to run concurrently or cumulatively. The grounds of appeal are that he did not plead guilty, the charge sheet was defective, he was not found in possession of any stolen property, no proof of ownership of the alleged stolen property, he was a victim of the circumstances, the arresting officer failed to testify, those who were alleged to have arrested him did not testify, his mitigation was not considered and the sentence is harsh. The appellant filed written submissions which merely give statements on the grounds of appeal and expound them. Miss Opiyo, State Counsel, opposed the appeal and submitted that the appellant was identified by PW3 who knew him. The appellant was also found in possession of the stolen items. The sentence is not harsh.

Four witnesses testified for the prosecution. **PW1 NATHAN SIANGA ODHIAMBO** testified that he comes from Buguka village in Matungu District. On the 9.3.2011 he received a phone call from his mother (PW3) that his house had been broken into and some items had been stolen. He went home and found that the house had been broken into and seven blankets, set of dishes and glasses had been stolen. He went to Mumias police station and was shown the accused who had been arrested with one blanket, two plates and four glasses. He was told that the appellant had been arrested by members of the public. He identified the items to be his.

PW2 STEPHEN WANZALA MAGERO is the village elder who informed the court that on the night of 8th and 9th March 2012 he was asleep when PW3 who is his relative went to knock on his door. She informed him that somebody had stolen from her home and a suspect had been arrested. He went out and found the appellant with a large crowd. He knows the appellant as his house is 500 meters from his home. The appellant was arrested with the exhibits as per the charge sheet. He took the appellant to

Mumias AP post. It was at about 3.00 a.m. The next morning the appellant was taken to Mumias police station.

PW3 PRISCAH NANZALA ODHIAMBO is the mother of PW1. On the 8.3.2012 she was asleep when she heard the door to PW1's house being broken. Nobody sleeps in PW1's house. She woke up and went to check when she somebody running away. She screamed for help as she saw a man carrying a luggage coming from PW1's house. She saw that person and recognized him as the appellant who is a neighbor. People went to the scene and the appellant was arrested. He was found with some items in a paper bag. One blanket, two dishes and four glasses were recovered. According to PW3 the appellant was with other people who escaped. The appellant was taken to the village elder and later to the Mumias police post. He was later taken to Mumias police station the following morning and charged with the offence. **PW4 PC JOHN MUNYAO** was based at the Mumias police station and investigated the case. The appellant was taken to the station on the 9.3.2012 at about 8.37 a.m. by the village elder and APs from Mumias AP post. The appellant was also having the recovered items. The appellant denied any involvement but was charged with the offence.

The appellant was put on his defence and he exercised his constitutional right of remaining silent.

The main issue for determination is whether the appellant committed the offences. The evidence on record does prove that PW1's house broken into on the night of 8th and 9th March 2012. It is clear that nobody was living in that house. The grill door was cut and some items stolen. According to PW3 she heard the commotion from her house which is in the same compound and went to find out. She saw the appellant carrying a luggage. She screamed and people went to the scene and arrested the appellant. According to PW2 he was woken up at night and found a crowd who had arrested the appellant. The appellant contends that none of those people who arrested him testified. He denies that he was found in possession of the alleged stolen items.

According to PW2 he found the appellant arrested. This is line with the evidence of PW3. It is clear that PW3 could not have arrested the appellant alone. The fact that those who assisted in arresting the appellant did not testify does not disprove the prosecution evidence on the manner in which the appellant was arrested. According to PW4 the stolen items were taken to him by the APs and the village elder. The charge sheet was not defective and the appellant was arrested immediately after the burglary incident. There was no defence to raise any doubt on the prosecution evidence. The trial court called for a social inquiry report and it was shown that the appellant had been imprisoned several times. He was living in the neighborhood and was known. PW3 recognized him.

From the evidence on record, I am satisfied that the prosecution proved its case beyond reasonable doubt. The conviction is proper and the appeal lacks merit. The appeal is hereby disallowed. The appellant shall serve seven (7) years imprisonment for each count as sentenced by the trial magistrate. The sentence shall run concurrently.

Delivered, dated and signed at Kakamega this 26th day of June 2014

SAID J. CHITEMBWE

J U D G E