



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CRIMINAL APPEAL NO 453 OF 2013**

**MOSES MACHARIA KIARIE .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from original conviction and sentence in Kigumo SPM Criminal Case No 1210 of 2011 - B Khaemba, Ag SRM)**

**J U D G E M E N T**

1. The Appellant was charged (as 1<sup>st</sup> accused, along with 2 others) with the offence of **house-breaking and stealing** contrary to **sections 304(1) (b) and 279(b)** of the **Penal Code**. It was alleged that on diverse dates in February 2010 and also on 7<sup>th</sup> October 2011 at Iruguini village, Kigumo location in Murang'a County, they jointly broke and entered the dwelling house of one **John Maina Kiarie**, and stole from therein assorted household goods (which were listed separately) all valued at KShs 188,900/00, the property of the said John Maina Kiarie. The Appellant faced another count of **going armed in public** contrary to **section 88** of the Penal Code. The particulars of this second count were that on 7<sup>th</sup> October 2011 at Iruguini village, Kigumo location in Murang'a County, without lawful excuse, he went armed with two kitchen knives in a public place, to wit, **Highland Bar**, in such a manner as to cause terror to one **Michael Mburu Gitau**.

2. The three accused persons pleaded not guilty and were tried. The Appellant's co-accused were acquitted. The Appellant was acquitted of the offence in count II, but he was convicted of the offence in count I. He was sentenced to serve 5 years imprisonment on each limb of the offence, the sentences is to run concurrently. He has appealed against both conviction and sentence.

3. The Appellant's petition of appeal filed on 22<sup>nd</sup> March 2013 discloses two specific complaints regarding the convictions as follows -

- i. **That the alleged stolen items were not produced in evidence before the trial court.**
- ii. **That the main prosecution witness (PW2) had given hearsay evidence.**

iii. **That neither the arresting nor the investigating officers were called to testify.**

Regarding the sentence, the Appellant complains that the same is manifestly harsh and excessive.

4. Learned State Counsel for the Respondent supported both conviction and sentence. She submitted that

the four prosecution witnesses led credible evidence that the Appellant broke into the house of his brother and from therein stole various items which he later sold to some people who testified. Learned counsel further submitted that the evidence of PW3 proved that the complainant's house was indeed broken into; that the Appellant led police to the people he had sold the stolen items to; and that the stolen items were recovered from these people.

5. It was the view of learned counsel therefore that the Appellant's defense which was given in an unsworn statement was properly rejected by the trial court. That defense was that the charges against him were trumped up by his elder brother (the complainant) who had sworn to have him jailed so that he, the complainant, could inherit more land from their father's estate.

6. As for the sentence, learned counsel submitted that the same was not manifestly harsh or excessive as the maximum allowed by law for one of the limbs of the offence was 14 years imprisonment.

7. I have considered the Appellant's submissions (he was unrepresented) as well as those of the learned State Counsel. I have also carefully read through the evidence placed before the trial court in order to assess it on my own and arrive at my own conclusions regarding the same, as is my duty as the first appellate court. I have borne in mind however that unlike the trial court, I do not have the advantage of having observed the witnesses as they testified, and have given due allowance for it.

8. The complainant testified that he was alerted by his mother about the breaking-in and theft. She called him on the phone and informed him that the Appellant had entered his house through the roof-top and was inside stealing items. Upon that information the complainant called the local assistant chief (PW3) who visited the complainant's home where he found the complainant's mother and a house-girl. He did not find the Appellant there. The mother and the house-girl showed PW3 where in the roof access into the house had been gained. He then went away to look for the Appellant. He found him at a shopping centre in a bar and arrested him. He recovered from him 2 knives which formed the basis for the charge in count 2. These knives were never identified by the complainant as part of his stolen properties. PW3 apparently did not recover anything else from the Appellant. He then handed him over to the police at **Kigumo Police Station**.

9. Neither the mother of the complainant nor the house-girl testified. No reasons were given for their failure to testify. These were two persons who were alleged to have witnessed the Appellant breaking into the complainant's house and stealing from therein. They were vital witnesses for the prosecution. They were competent and compellable witnesses.

10. The rest of the prosecution case appears to be that the Appellant led police officers from **Kigumo Police Station** to PW2 and PW4 to whom he had allegedly sold some of the stolen items, and from whom the police recovered those stolen items. No police officer from that police station or anywhere else testified. The investigating officer of the case never testified and the alleged stolen items were never produced in evidence as they should have been.

11. There was thus no good evidence of recovery of the stolen items properly linking the Appellant to them. In criminal trials the chain of evidence and sanctity thereof is absolutely important. In the present case a proper chain of evidence is lacking. To begin with, the persons who allegedly saw the Appellant breaking into the complainant's house never testified, and no reasons were given why they did not. Secondly, the police officers who arrested the Appellant, and whom the Appellant allegedly led to the stolen items, never testified. Again no reasons were given why they did not testify. Thirdly, the allegedly stolen items that were recovered were never produced in evidence before the trial court. The investigating officer who should have produced them never testified.

12. It is also to be noted that there is no evidence of the complainant's positive identification as his of the alleged stolen items that were recovered. They were all common household and personal goods readily available to anyone.

13. With all the lacunas highlighted above, it is clear that the offences in count 1 were not proved against

the Appellant beyond reasonable doubt. He should have been acquitted.

14. I will allow this appeal in its entirety. The convictions are quashed and the sentences imposed upon the Appellant set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED SIGNED AND DELIVERED AT MURANG'A THIS 21<sup>ST</sup> DAY OF NOVEMBER 2014**

**H.P.G. WAWERU**

**JUDGE**