



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 189 of 2011

BENARD OKOTH WAGULO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 727 of 2011 in the Senior Resident Magistrate's at Bondo)

J U D G M E N T

The appellant was charged with the offence of house breaking contrary to section 304 (1) of the penal code.

The particulars of the offence are that on the 28th day of September 2011 at Bondo township in Bondo district within Nyanza province jointly with others not before court broke and entered the dwelling house of **Wilson Otieno Onyango** with intent to commit a felony namely theft.

The appellant was convicted and sentenced to 7 years imprisonment. He has filed this appeal citing several grounds. The main grounds are that there were no eye witnesses who saw him committing the offence, the trial court did not comply with section 211 of the Criminal Procedure Code and that the exhibits were not properly handled or identified.

PW1 Wilson Otieno Onyango, the complainant told the court that on the material day at around 4 pm he received information that somebody who had broken into his home had been arrested within his compound, when he reached there he found someone who had been severely beaten. He also saw the grills in his kitchen window that had been damaged and inside the kitchen he saw footprints but nothing was stolen. The OCS had taken the person away.

PW2 Dickson Okoth Okoth, claimed that he saw the appellant attempting to break the complainant's window. He called the OCS and went to inform the complainant's wife who was at Discount Supermarket. The said witness further told the court that he found a group of people assaulting somebody at the scene. The police came and arrested the appellant.

PW3 P.C. Shadrack Melly, told the court that he was called by the OCS to go to a scene where somebody was allegedly breaking into a house. He told the court that he found the appellant having been arrested by members of public. He recovered the metal bars which he produced in court as exhibit. The accomplice to the arrested person was murdered. He told the court that the appellant did not enter the house.

PW4 Susan Akinyi Orai, is the wife to PW1. She told the court that somebody came and told her that thieves had broken into her house. As she was heading to the house she met three people who had arrested the appellant. They went back to the house where she discovered that the window to the kitchen had been broken into and there were footsteps inside the kitchen.

At the close of the prosecution case the appellant contrary to his ground of appeal was given opportunity to state his defence after section 211 of the Criminal Procedure Code was complied with and the appellant chose to remain silent.

I have evaluated the entire evidence on record as well as listen to the oral submission by both the state and the respondent. This court is enjoined to reach a fresh and independent decision at this juncture by evaluation of the evidence on record.

What is not in dispute however is that the appellant was arrested on the material day. The place of arrest is not very clear from the proceeding and who in particular arrested him.

PW1 said that he saw somebody who had been severely beaten. He nevertheless, on cross-examination said that he did not see the appellant being arrested.

PW2 on the other hand said: **“I saw one of them trying to peep and I suspected that they were not good people. I moved nearer and I saw two people with bars trying to break the window. I then called OCS Bond. I went to discount supermarket and informed the wife of PW1 about what was happening in her home. I then found a group of people beating up somebody at the scene. The wife of PW1 arrived and she found the people still beating up somebody, the police officers from Bondo came and found somebody being beaten by a mob”**.

PW4 told the court: **“I went to my house when I was just about to reach a group of three men stopped me and showed me the accused person. He is in court. We went to the scene together with the accused person....”**

From the above quotation I have no doubt in my mind that the appellant was arrested at the scene. Although nobody testified on how he was arrested the circumstantial evidence showed otherwise. PW2 triggered the exercise by notifying the OCS Bondo and PW3 at the same time. Although, none of the 'mob' turned out to testify against the appellant there is no other exonerating evidence showing that he was arrested elsewhere.

Further, the time frame from when PW2 saw the appellant and his accomplice attempting to break the house seemed to have been so short to remove any shadow of doubt.

Equally I do not see any other compelling reasons why members of the public could descend and arrest the appellant without any sufficient cause.

The two metal bars were recovered from the scene. The same are the ones which PW2 saw the appellant and his accomplice used in breaking the window.

The witnesses further established that it was raining and that they saw muddy footprints inside the kitchen. This evidence of the rain and footprints were not disputed by the appellant and I am therefore satisfied that there was all probability that after gaining entry into the kitchen through the window the appellant went inside but were unable to accomplish their mission before they were arrested.

I do not find that the trial magistrate misdirected herself in any way. As earlier on alluded section 211 of the Criminal Procedure Code was well complied with.

On sentencing, although the court gave the maximum sentence of seven years as provided, I do not see the reason to disturb the same. The appellant had barely exhausted his probation period for another criminal offence when he committed the current one.

In the final analysis the appeal ought to be dismissed. The seven year period is sufficient to enable hopefully the appellant reform.

Orders accordingly.

Dated, signed and delivered at Kisumu this 21st January 2013.

**H.K. CHEMITEI
JUDGE**

In the presence of:

.....for state

.....for appellant

HKC/va