



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 513 of 2011

(From Original Conviction and Sentence in Criminal Case No. 752 of 2010 of the Senior Resident Magistrate's Court at Taveta – C. N. Ndegwa (SRM))

JOHN KING'OTO MUTIE APPELLANT

- Versus -

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was sentenced to ten years imprisonment for the offence of Burglary and Stealing contrary to Section 304(2) and Section 297(b) of the Penal Code.

The particulars being that on the night of 12th and 13th day of April 2010 at unknown time at Burandogo Village Taveta County he broke and entered the dwelling house of Mwikali Reuben with intent to steal therein and did steal, one mattress, three bed sheets, two skirts, one blouse, one trouser, one curtain, three table clothes, two sufurias, two plastic buckets, one thermos flask, five cups, one plate, one radio, two basins and 5 pegs all valued at Kshs. 10,000/- the property of Mwikali Reuben.

The complainant's house was broken into in her absence during the night. The following day when she went to open in the morning she found the padlock had been interfered with and the door opened. Upon checking she found her household goods missing. She made a report to police at Taveta Police Station where she was shown her stolen items which she identified as hers. Exhibits Nos 1-17. She was informed by PC Kirwa that it is the Accused who was found with the stolen items.

PW3 PC James Kirwa was on patrol duties with his colleagues Cpl Ahenda and PC Rono when they received information that some suspicious people had been sighted at a place called Russia area. He rode there in a motorbike whereas his colleagues drove in a motor vehicle, he sighted the Accused carrying some items perched on his head. He stopped him but the man dropped what he was carrying and threatened to hit him with a metal bar he was carrying. Upon realizing that the Officer was armed the Accused attempted to flee but he was chased and arrested and with the help of members of public they proceeded to where he had dropped what he was carrying.

They recovered 3 bed sheets, a mattress, 2 skirts, one blouse, one trouser, three table clothes, once curtain, 2 sufurias, plastic buckets, one thermos flask, 5 cups, one plate, one radio, 2 plastic basins, 5 pegs, a metal bar, a pair of pliers and a bunch of keys. The Accused admitted having broken into a house at Bura Ndogo and took the witness there.

The complainant later positively identified her household goods. Upon investigations it was found that the Accused had used a master key to open the padlock so as to gain access.

In his defence the Accused in his sworn statement told the Court that he is a carpenter at Vumilia Taveta County and that on the 13th day of April 2010 he woke up early in the morning 6.00am to buy a matchbox. While on his way back he met (PW3 (PC Kirwa). He was pushing a motorbike. He asked him to help push the bike. Thereafter he asked him whether his case was concluded. Later he asked him to accompany him to Police Station. While there he was shown photographs of people he did not know. PC Kirwa beat him with a piece of timber. Later he was put in cells.

At around 11.00am two ladies were taken there. He was asked whether he knew them. He said he did not. Thereafter he was charged with this offence.

I am satisfied that it is the Appellant who was found with stolen items in the wee hours of the morning. These household goods were identified by the complainant in the morning when she went home from night duty and realized that the door to her house had been opened by interfering with the padlock and her household goods were missing. The doctrine of recent possession is applicable in the present case. The Accused person was found with the stolen items barely hours after the break in.

Section 303 gives the definition of breaking and entering thus-

“A person who breaks any part whether external or internal of a ‘building, or opens by unlocking, pulling, pushing,’ lifting or any other means whatever any door, window, shutter cellar flap or other thing intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another is deemed to break the building.”

The Accused herein was found with master keys with which he opened the padlock with. There is no need of falling on Section 305(1) of the Penal Code as urged by learned State Counsel.

The act of opening by way of unlocking a padlock amounts to breaking in if done without the consent of the owner. The act took place during the night hence the offence amounts to burglary.

The conviction by the trial Court was safe. The offence of burglary carries a sentence of ten years. The Appellant was sentenced to ten years imprisonment.

The prosecution had presented evidence before the Court to the effect that the Accused had been convicted on two previous occasions with similar charges of burglary and stealing. The Accused admitted the previous charges.

However, it is noted that the property stolen was recovered. It was of the value of Kshs. 10,000/-. The sentence of ten years imprisonment is harsh and excessive. It is reduced to five years imprisonment on each limb of the charge. Sentence to run concurrently.

He will now serve five years imprisonment from the date of conviction. To that extent only does his appeal succeed.

Judgement read and delivered in open Court this 29th day of May, 2013.

M. MUYA
JUDGE

In the presence of:-

Miss Ogwenko for the State

Appellant - present

Court clerk – Mr. Musundi