

her bedroom and confirmed that her 3 mobile phones had been stolen. The phones were Alcatel OT 880 valued at Kshs 20,000/=, Samsung B 3410 valued at Kshs 9,999/= and Nokia 1280 valued at Kshs 1,800/=. Also stolen was PW 2'S daughter's uniform and sandals. The appellant left behind a pair of sandals, 2 tops and a jacket bearing a ladies pant. PW 2 then reported to the police on 5/8/2012 and handed over the said items left behind by the appellant.

On 15/8/2012 at 10.30 a.m, she identified the appellant at Usoma and he was arrested by the police. On cross examination she confirmed nothing was recovered from the appellant. She also confirmed that the bedroom where the phone were stolen from was open.

PW 3 stated that on 4/8/2012, he was at PW 1's house when his cousin Julie introduced the appellant as a maid. They had lunch together with PW 2 and at about 4 pm, he (PW 3) was sent to the shop and left the appellant washing utensils. On his way back, he met PW 2 escorting Julie.

On reaching home, he found the children asleep but the appellant was missing. He tried to call PW 3, but she was not picking the calls. When PW 2 returned home, she discovered that 2 phones had been stolen from her bedroom.

P.C Nzomo (PW 4) received complaint on 4/8/2012 at 8.30 p.m from PW 1 to the effect that his new employed maid had stolen some 3 mobile phones, pair of slippers, a T-Shirt and Kshs 2,000/= before running away. He recorded statement from PW 1 and following tips, he managed to arrest the appellant after being positively identified. He however recovered nothing from the appellant. He also confirmed that the appellant was a man who disguised himself as a lady.

In his defence, the appellant gave an unsworn evidence. He denied the offence and maintained that he was innocent. He contended that he escaped from the employer's place because people in the area knew him as a man although he was a woman.

After considering the above evidence, the trial magistrate found that the appellant was left alone in the house with minors who were asleep and therefore he had the opportunity to steal PW 2's property. The trial Court further found that the act of escaping in the absence of the employers and remaining *incognito* incriminated the appellant of the charge against him and convicted him under section 215 of the CPC and sentenced him to 18 months in prison.

GROUND OF THE APPEAL

The appellant through his advocate has appealed against the said conviction and sentence. The appellant has raised the following Grounds of Appeal;

1. The learned trial magistrate gravely erred in law and facts in failing to appreciate and make a finding that the prosecution did not prove its case beyond reasonable doubt.
2. The learned trial Magistrate erred in fact and law in his/her finding and convicting of the appellant based on circumstantial evidence fabricated to case suspicion on the appellant without putting into consideration all exculpatory evidence and scenarios.
3. The learned trial magistrate erred in law and fact in disregarding the fact that PW 3 could have stolen the phones based on the fact that he is the one who alerted PW 2 about the missing phones after allegedly going to PW 2's house and finding the appellant not there.
4. The learned trial magistrate erred in law and fact by convicting the Appellant on the basis of circumstantial evidence hinging largely on the evidence of PW 4 as no proper investigations had been conducted to establish whether PW 2 did or did not steal the phones.
5. The learned trial Judge [*sic*] erred in law and in fact in disregarding and rejecting the appellant's defence when the same was not challenged by the prosecution.
6. The learned trial Judge [*sic*] erred in law and in fact in disregarding and rejecting the appellant's defence that he had fled from his employer's residence because he was afraid of being abominable according to African cultures and that discovery would actually have resulted in the discrimination, psychological torture and/or the actual physical harm of the appellant.

7. The learned trial Judge [sic] erred in law and fact in relying on the contradictory, inconsistent, incoherent and unsubstantiated evidence of the prosecution.
8. The learned trial Judge [sic] misapprehended the law and facts and arrived at an erroneous conclusion by going on a frolic of her own in total disregard of the evidence on record.

SUBMISSIONS FOR THE APPELLANT

When the appeal came up for hearing on 14/10/2013, Mr. Odongo, learned counsel who appeared for the appellant collapsed all the above said 8 Grounds of Appeal and argued them as one ground.

He submitted that the appellant was convicted on circumstantial evidence which was not sufficient to sustain a conviction. According to the learned counsel, the fact that the appellant disappeared did not mean that he stole the mobile phone and money as alleged by the prosecution.

As regards the opportunity to steal, the counsel went on to submit that the fact that the bedroom from where the items were allegedly stolen was open, gave the opportunity to steal to other person including PW 3 who came to the house after the appellant disappeared.

On the actual value of the items stolen, the counsel for the appellant submitted that there was a material contradiction between the testimonies of PW 1,2,3 and 4. According to him, the witnesses mentioned different types of the stolen items and their total value. He also submitted that the said testimonies differed with the charge sheets. In conclusion, he faulted the trial Court for dismissing the appellant defence as an after thought.

SUBMISSIONS FOR THE RESPONDENT

Mr. Magoma, the learned counsel for the state opposed the appeal and prayed for the same to be dismissed. He submitted that PW 1, 2 and 3 corroborated each other's testimony which showed that the appellant disappeared after being left alone in the house, that he had the opportunity to steal from the house which was left open and that after his disappearance, PW 2 lost 3 mobile phones.

REVIEW OF EVIDENCE AND JUGEMENT

This being a first appeal, the Court has the jurisdiction to review the evidence adduced before the trial Court. As earlier stated, the issue for determination is; whether the circumstantial evidence relied upon to convict the appellant was enough to sustain a conviction.

In **Mwita Vs R [2004]2 KLR 60 at P.66**, the Court of Appeal said the following in relation to a conviction founded wholly on circumstantial evidence:

“...the Court must find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon other hypothesis than guilt.”

Before convicting the appellant, the trial Court considered the fact that the appellant was left alone in the house with minor children sleeping, only to find that he had the opportunity to steal. The Court also considered the conduct of the appellant of running away when his employer was away.

The Court is not convinced by the appellant's submissions that the circumstantial evidence relied upon was not sufficient to sustain a conviction in line with the Court of Appeal decision in **Mwita Vs R**. The Court is satisfied that trial Magistrate reached the right conclusion under the circumstances. The only inference to be drawn from the evidence adduced was that the appellant was guilty as charged. The reason for the foregoing as rightly pointed out by the trial Court, is that the appellant was all alone in the house with an open bedroom. He had the opportunity to steal and he indeed stole and that is explained by his conduct of running away and remaining under cover. He even changed his clothes from men's to women's.

All the foregoing facts pointed to no other hypothesis other than guilt on the appellant's part.

I reject the appellants submissions that doubt was cast in the prosecutions case when the prosecution witness differed on the actual items stolen and their value. In my view whether the stolen mobile phones were 2 or 3 or whether Kshs 2,800 or 2000 was stolen is immaterial. It is enough that some property exceeding Kshs. 100 in value were stolen by the appellant.

As regards the sentence, the appellant did not challenge it and I find that same was on the lower side since the law provides from upto 14 years imprisonment.

FINAL ORDER

Consequently, the appeal is dismissed and the conviction and sentence affirmed.

Signed and dated this 18th day of October 2013

O.N. Makau

Judge

Delivered on 24th day of October 2013

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Judge