REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL APPEAL NO.30 OF 2011

(Appeal from Senior Resident Magistrate Hon. R. O. Oigara in Kimilili court in criminal case no.803 of 2010)

ALEX WANYONYI SIMIYU :::::::::::::::::::::::::: APPELLANT

~VRS~

REPUBLIC :::::::::::::::::::::::::: RESPONDENT

JUDGMENT

The Appellant was convicted of burglary and stealing contrary to sections 304 (2) and 279 (b) of the Penal Code and sentenced to 4 years in jail on 1st limb and 3 years in jail on 2nd limb and the sentences ordered to run concurrently. The particulars of the charge were that on the night of 24th/25th July 2010 at Kapkateny market in Mt. Elgon District of the Western Province he jointly with others not before the court broke and entered the dwelling house of Mary Mukhaye Wepukhulu (PW1) with intent to steal and stole from therein one Husquara power saw s/no.9656816-00, 082810720, one suitcase, two handbags and assorted clothings all worth Ksh.100,000/= the property of PW1. He was aggrieved by the conviction and sentence and preferred this appeal.

The prosecution evidence was that on 24/7/2010 at 6.00 pm PW1 left home to go and see her sick sister and returned the following morning at 6.00 p.m to find the house broken into through the main door and the properties above missing. She had left her two children, aged 17 and 7 at home but they did not know the perpetrator. She suspected the Appellant who is her neighbour. She went to his house at 7.00 a.m. He was not there but his wife was. She told PW1 that the Appellant had not slept at home. PW1 was assisted by the Appellant's wife to conduct a search. In the compound they found the power saw, a suitcase and clothings that had been stolen from her house. Later that day her two handbags, Barclays ATM card and other items were recovered in the maize plantation. At about 1.30 p.m the Appellant was found in his maize plantation listening to PW1's radio. He was arrested and charged along with his brother Eliud Wanjala who was acquitted following trial.

The Appellant gave unworn defence and denied all the prosecution evidence. The trial court believed the prosecution evidence and convicted him on the basis that he was following the burglary and theft found with the stolen property. The court found there was sufficient circumstantial evidence on which to convict him.

The complaint by the Appellant was that he was convicted on insufficient and contradictory evidence; that the items were found in their family farm and not with him.

In order to justify the inference of guilt in a case dependent on circumstantial evidence the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt **(James Mwangi v. Republic [1983] KLR 327).** There must be no other co-existing circumstances which would weaken or destroy the inference. Secondly, where it is proved that the accused was found with property soon after its theft he is presumed either be the thief or person who has feloniously come by them unless he ran reasonably account for the possession **(Maina & 3 Others v. Republic [1986] KLR 301).**

I have considered the evidence on which the Appellant was convicted. Anything that may have been said by the Appellant's wife against him would be inadmissible now that she did not testify. The Appellant, according to PW2 Y.K, was staying in the same home with his parents and siblings. The complainant's items found in the home can therefore be attributed to the Appellant but also to any member in the family. It is notable that the items came from the compound or the maize plantation here, and not from the Appellant's house.

The prosecution evidence was, however, that the Appellant was found in the maize plantation listening to PW1's radio. PW1 was not there when the radio was recovered. PW3 P. C. Anord Okach of Kapkateny Police Station was one of those who arrested the Appellant. He said they traced him in the maize plantation. He did not say the Appellant had a radio, or any item. PW4 P.C. Jackson Kosgei testified that:

"At say 1.30 p.m on the same date got information that Alex was inside some maize plantation by the time we reached he had been apprehended by members of the public who took him to police station who conducted the case charged the accused."

There was no reference to radio or any time that the Appellant may have been found with. The evidence of PW3 and PW4, both police officers, materially differs with that of PW2 who stated that he was one of the villagers who found the Appellant listening to PW1's radio in the maize plantation. The conflict in the evidence of these prosecution witnesses can only be resolved in favour of the Appellant.

There is something else about the evidence of PW2. He was 17 and in class 7. He was a witness who was a minor. The court found that he was a witness who was possessed of sufficient intelligence to justify the reception of his evidence, he knew the value of telling the truth and could give sworn evidence. The trial court was required to conduct a *voire dire* examination of PW2 before his evidence was received, on oath or otherwise. In the case of **Johnson Muiruri v. Republic [1983] KLR 445** it was held by the Court of Appeal that it was important for the court conducting the examination to set out thequestions and answers so that the appellate court is able to decide whether the issue of the evidence of a minor was rightly decided. In other words, the trial court did not rightly deal with PW2 and therefore the value of his evidence cannot be properly appreciated.

The result is that there wasn't convincing and conclusive evidence that the Appellant was found with any of PW1's stolen property. The conviction was not safely entered and is quashed. The sentence is set aside and the Appellant ordered to be set at liberty immediately unless he is otherwise being lawfully held.

Dated and delivered at Bungoma this 19th day of March, 2012.

A. O. MUCHELULE
JUDGE