



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL 99 OF 2011

FANUEL OLUKO NGONGAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case number 1180 of 2010 of the Senior Resident Magistrate's Court at Bondo – Mr. P. Mutu)

JUDGMENT

The Appellant and another were charged with the offence of Breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code. This offence occurred on the night of 28th – 29th June 2010 at Bondo Township and the premises belonged to one **Mary Atieno Okoth**. He was further charged with being in possession of Narcotic drugs (bhang) contrary to Section 3 (1) as read with Section 3 (2) (a) of the Narcotic and Psychotropic Substances Control Act Number 4 of 1994.

He was acquitted on the alternative counts of handling stolen property and the third count of preparing to commit a felony. However in the other two counts he was sentence to three (3) years and 1 year imprisonment respectively.

He then filed his petition of Appeal dated 27th June 2011 wherein he argued inter alia that the prosecution did not prove their case beyond reasonable doubt and therefore the trial court misdirected itself; that the landlord and other key witness were never called to testify and that the trial court failed to evaluate his evidence.

The brief facts of this case are that **PW1 Mary Atieno Okoth** runs a bar known as Apiyo Gardens. On 28th June 2010 at around 11:00 p.m, she closed her business and went to sleep. The following day very early in the morning she was awoken by PW2 her employee who had gone to open up the business but discovered that the same had been broken into. She told the court that she went and reported the matter to the police who came to the scene and began to carry out their investigations.

Later on 30th June 2010 she was called to go to Bondo Police Station where she found that the police had recovered some items which included hers. She identified all the items that were produced as evidence during the trial.

PW2 Grace Akoth Onyango is the employee of PW1. She told the court that when she opened the business the following morning she found that the same had been broken into and several items

stolen. She went and reported to her employer PW1. Later the police came and carried out their investigations.

PW3 P. C. David Barno told the court that on 1st July 2010 at around 4:00 a.m. acting on a tip off they raided a certain house. They recovered several items which the occupants were unable to explain their ownership. He told the court that they took them to the police station and arrested the occupants of the house. Later the owners identified the said items which included those of the PW1. He also produced an inventory form signed by both accused persons.

PW4 is the OCS Bondo police station. He told the court that there had been several robberies at Bondo area and acting on a tip off they raided a house wherein they managed to recover some items and arrested some people who included the occupants. Later the recovered items were brought to the station and were identified by their owners.

When put on his defence the appellant denied the charged. He told the court that on the material night he went to the house of Nyar Alego to take alcohol and that is where she was arrested together with others. He further said that he was forced to sign the inventory form.

I have perused the entire proceeding as well as the judgment. The fundamental point to determine is whether the house which the appellant was found in belonged to him or not. I have no doubt that the complainant's premises was broken into on the material night. I have no doubt that the goods were stolen and that the same belonged to the complainant as she positively identified them and even went ahead to produce the relevant purchase receipts.

In the cause of cross examination the appellant said that the said **Nyar Alego** also known as **Mary Ongonga** was not his wife. However the 2nd accused told the court that the said Nyar Alego was his cousin and he had gone to visit her and spent the night there. The trial court rightfully granted an opportunity to the appellant to cross examine the 2nd accused on that allegation but he chose not to.

Ordinarily, the court ought to warn itself of such evidence as it might implicate an accomplice so as to serve a purpose of his own. This was clearly stipulated in the case of **Bakari & Another vs Republic 1987 (KLR) 173.**

I am however satisfied that the trial court warned itself of such danger. The appellant however by choosing not to cross examine his co-accused confirmed that Nyar Alego was the 2nd accused's cousin and therefore his wife.

Having found so therefore I can reasonably conclude that the premises which the goods were found that early morning belonged to the appellant. Further it matters not that the landlord was not called to testify. The appellant was the current occupant of the premises.

Having established that, the next issues to determine is whether the charge against the appellant were proved. The goods stolen and found at the appellant premises were stolen from the PW1's business premises. That bar had been forcefully broken. The event had occurred in less than 48 hours or thereabouts. The items stolen were traced to the appellant's custody. I do find that in the absence of any other explanation by the appellant under the provisions of Section 111 of the Evidence Act Chapter 80 Laws of Kenya the appellant was indeed among the people who forcefully gained entry into the complainant's premises and stole the items which were traced to his house.

I do I not therefore find any merit in this appeal. The goods and the bhang were found under the care and custody of the appellant and he offered no plausible explanation on how he came into possession of the same. The appeal is dismissed.

Dated, signed and delivered at Kisumu this 24th day of September 2012

H. K. CHEMITEI
JUDGE

In the presence of:

Mr. Meroka for State Counsel

In person Appellant

HKC/aao