



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 492 of 2010

WILLIAM KAMAU NJOGU.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.109 of 2010 of the Principal Magistrate's Court at Githunguri by S. Ndegwa – Senior Resident Magistrate)

J U D G M E N T

The appellant, **WILSON KAMAU NJOGU**, was convicted for the offence of Being in a dwelling house with intent to commit a felony **contrary to section 305 (2) of the Penal Code**.

Four (4) witnesses testified for the prosecution. They all said that the appellant was arrested inside the complainant's bedroom.

The appellant also confirmed that he was arrested inside the complainant's bedroom. However, he denied having gone to the complainant's house with the intention of stealing therefrom. He insisted that he had been called by a mechanic named Gatu, so that he could assist the said Gatu to repair the complainant's vehicle.

Gatu did not testify at the trial. The appellant's explanation for the absence of Gatu was that Gatu had declined to give evidence to support the appellant. Gatu refused to give evidence because he was a relative of the complainant.

It was the evidence of the complainant that she was seated within the compound, at the back of her house.

The complainant was talking to **PW 3**, who is her relative, and who had come to visit her.

It was the complainant's evidence that she lived alone inside her house.

Therefore, when she entered the house and found things scattered inside the bedroom, she was disturbed. The complainant had gone into the bedroom to fetch money which she used to pay the wages of Kibe Mwaura.

After paying Kibe Mwaura, the complainant continued talking to **PW 3**. Thereafter, she returned to the house to collect a document.

It is then that she noticed the appellant inside the bedroom. She promptly locked the bedroom door from outside, and then she screamed to attract attention.

The screams attracted neighbours to the complainant's house. A phone-call was made to the police and **PW 4** responded to it by going over to the complainant's house, where he arrested the appellant.

The complainant said that she lost KShs.27,000/- plus a mobile phone valued at Kshs.13,000/-. However, a search conducted on the appellant did not yield any results.

All through the case, the appellant consistently stated that he had only gone to the complainant's house because Gatu had asked him to assist with the repairs to the complainant's vehicle.

The appellant said that he had gone into the house to look for the complainant.

He said that he gained entry through the front door, which he found open.

On the other hand, the complainant insisted that the front door was always locked. Therefore, she always used the back door.

The appellant also said that he only entered the house after he heard someone answer from inside the house.

When the appellant entered the house, he did not find the complainant, as the complainant was clearly outside the house.

Thereafter, when the complainant entered the house, she found the appellant. Upon seeing the appellant, the complainant locked him inside the house, and then started screaming.

As already indicated, there is no dispute about the fact that the appellant was found inside the complainant's house. The complainant locked him inside because she had not invited him or welcomed him into the house. Indeed, she did not expect to find him there.

On the other hand, the appellant says that he had gone into the house after knocking the door, and after he heard someone welcoming him.

Given the fact that the complainant owned a vehicle; and as the said vehicle had a mechanical problem; and also because the vehicle used to be repaired by Gatu, there is every possibility that the appellant only went to the complainant's house upon invitation by Gatu.

I also note that when the complainant found her bedroom is disarray, she thought that she was responsible for disorganizing it. That brings to question the complainant's state of mind.

She said that things were scattered all over the floor. She thought that she was responsible for that, as she used to live alone.

But during cross-examination, the complainant said that;

“After getting into the house and finding it in disarray, I didn't tell Kibe or Daniel as I thought I am the one who had disorganized it. It wasn't major as it is only the bed which had been ruffled and some items removed from the dressing table.”

If the complainant even thought that she was the one who had disorganized her own bedroom, I hold the view that she may have actually left the front door open. In the event, it is possible that the appellant only entered the house because he thought that he had been welcomed to do so.

I say so because both the complainant and **PW 3** said that they had been sitting in the back-

yard. Therefore, had the appellant entered through the back door, both **PW 1** and **PW 3** would have seen him entering the house.

As the two did not see him enter the house, and because there was no evidence of any breaking into the house, the only plausible explanation is that adverted to in the appellant's defence.

In the circumstances, I find that there was no proof that the appellant's intention was to commit the felony of stealing, as suggested in the charge sheet.

I find that it would be unsafe to sustain conviction. I therefore allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi this 18th day of October, 2012.

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FRED A. OCHIENG
JUDGE