REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCRA NO. 231 OF 2005 AS CONSOLIDATED WITH 232 OF 2005

LESIIT J

JARSO DUBA GUYO...1ST APPELLANT
WAQO SORA..2nd APPELLANT

VERSUS

REPUBLIC...RESPONDENT

From Original Conviction & Sentence of Marsabit Resident Magistrate's Criminal Case No.187 of 2007J.N NJUKI, S.R.M.)

JUDGEMENT

The appellants were charged with two others with one count of house breaking and stealing contrary to section 304(1) and 279 of the Penal Code. They also faced an alternative charge of handling property contrary to section 322(2) of the Penal code. The two appellants were convicted in the main count of housebreaking and stealing. They were sentenced to an imprisonment of 3 years on each limb with orders that the imprisonment terms should run concurrently. They were aggrieved by the findings of the learned trial magistrate and have therefore filed this appeal.

The appellants have raised 3 grounds of appeal as follows:

1. The learned magistrate erred in law and facts in convicting the appellant of an offence that was not disclosed

2. The learned magistrate erred in law and facts in convicting the appellants on insufficient and contradicting evidence.

3. The learned magistrate erred in law in convicting the appellants excessively under the circumstances of this case.

The appeal was argued by Mr. Kiara for both appellants. The counsel consolidated the first two grounds of appeal and urged that the offence was not proved because the evidence adduced disclosed the offence of malicious damage to property and not the offence charged of house breaking and stealing. Counsel also urged that the evidence of the prosecution was contradictory because non of the witnesses saw the appellants commit the offence and yet the investigating officer claimed in his evidence that the appellants were seen carrying the iron sheets.

Mr. Kiara urged the court to discharge the appellants because the proceedings in the lower court were flawed since the leaned trial magistrate did not record the coram of the court on the 7th May 2005 the date the trial began. Counsel relied on the case of **EKIMAT VS REPUBLIC CA 151 OF 2004** for the preposition that the proceedings before the learned trial magistrate were vitiated. Finally Mr. Kiara submitted that the sentence of 3 years imprisonment was excessive.

This appeal was opposed by the State. Mr. Musau learned counsel for the State submitted that the case against the appellant was overwhelming as the appellants were caught in the act by the police and the complainant. Counsel submitted that the offence was committed in broad day light and there was nothing to prevent the identification. Counsel also submitted that the appellants were also found with some of the complainant's stolen items.

On the issue of the coram Mr. Musau urged the court to find that the omission did not cause any prejudice to the appellants and that it did not cause a miscarriage of justice.

I have carefully considered this appeal and the grounds raised by the appellants, together with the submissions of the learned State Counsel and the appellants counsel. I have carefully analyzed and evaluated afresh the evidence adduced before the learned trial magistrate as is required of this court as a first appellant court.

In the case of **OKENO V. REPUBLIC [1972] EA 32**. the role of a first appellate Court is given as follows:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

The appellants have challenged the evidence adduced by the prosecution and have alleged that it does not support the charge. I have considered the evidence afresh. The complainant's testimony was that he had abandoned his home area due to tribal clashes. That on the day in question he received a report that his house was being vandalized. He therefore reported to the police and was given two Police Officers, PW2 and 3, with whom he visited his home. The evidence of the 3 witnesses i.e. the complainant, PW2 and 3 is consistent and corroborative that they found the appellants and others on the roof of the complainant's house pulling out iron sheets. It was in broad day light, being 3pm. When the appellants and his company saw the Police Officers and the complainant they climbed down from the roof, and ran away carrying their loot, which were iron sheets from the complainants house. The policemen were able to arrest the two appellants. The 1st appellant were arrested with a crow bar while the 2nd appellant was arrested with a hammer. Both implements were adopted for the use of pulling out nails from the iron

sheet roofing. They were also found with the iron sheet roofing which they had carried with them as they ran away. Both the crow bar and the hammer and the iron sheets were adduced in evidence as exhibits.

In their defence both appellants denied the charge and stated that the case was fabricated and that they were arrested for no reason at all. The learned trial magistrate considered the defence of the appellant before convicting them for this offence.

I find that the evidence adduced by the prosecution supports the charge. The appellants were not just merely demolishing the complainants roof but were pulling out the nails in order to steal the iron sheets from the roof of the house. In my view there was the evidence of taking which was proved by the fact that the appellants came down from the complainant's house and started running away with iron sheets removed from that house. The limb of house breaking was also proved in that, in order to get onto and to climb out of the roof of the house the appellants had to break in and break out of the house. The house breaking cannot be taken into its literal sense the offence of house breaking is completed if it is shown that in order to commit the offence charged the person accused had either to get into a dwelling house or to get out of a dwelling house after stealing it. Nothing turns on that point.

Mr. Kiara submitted that there was contradiction on the prosecution evidence and that there was no eye witness for the offence. That is far from the truth. There were 3 eye witnesses for this offence, the complainant and the two Police Officers. The appellants were caught in the act in that they were found in the process of uprooting iron sheets from the roof and carrying them away. They were apprehended at the scene as they tried to escape while carrying the iron sheets. They were also found with crow bar and hammer which were adopted to uproot nails from the iron sheets in order to enable the theft of the iron sheets. The evidence against the appellant was therefore water tight. In regard to the allegation that the coram of the court was not indicated on the 7thth May 2005 when the trial began before the learned trial magistrate. I have perused the proceeding of the court and I have confirmed that the prosecution evidence was heard on the 13th September 2005. On 7th May 2005 the matter came up for mention and on that day no evidence was taken. It is true that the coram of the court was not indicated on that day. However, since it was a mere mention of the case, no prejudice was suffered by the appellants and there was no miscarriage of justice. I therefore find that nothing turns on this point.

Regarding the sentence under Section 304 of the Penal Code a person convicted for house breaking is liable to imprisonment for 7 years. A person convicted for stealing under section 279 of the Penal Code is liable for imprisonment for 14 years. Given those circumstances the sentence of 3 years imprisonment is not excessive. The appellants were treated as first offenders. I think that the learned trial magistrate properly addressed his mind to all the circumstances of the case before sentencing the appellant to the sentence of 3 years. In the result I find no merit in these appeals and dismiss them.

Dated Signed and delivered at Meru this 17th day of March 2011

LESIIT, J

JUDGE