



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 257 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 229 of 2009 of the Senior Resident Magistrate's Court at Taveta: C.N. Ndegwa – S.R.M.)

HAMISI RASHID APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **HAMISI RASHID** has filed this appeal against his conviction and sentence by the subordinate court on a charge of **HOUSE BREAKING AND STEALING CONTRARY TO SECTION 304(1) AND SECTION 279(b) OF THE PENAL CODE**. The Appellant pleaded '**not guilty**' to the charge and his trial commenced on 27th July 2009 at which trial the prosecution called a total of three(3) witnesses in support of their case. **PW1 CECILIA WAITHIRA** told the court that on 2nd March 2009 at about 2.00 p.m. she was in her home in Bura Ndogo Village. The Appellant who was her brother-in-law came and abused her. She then went into the house to avoid him. The Appellant took a stone and broke the window. He entered the house and stole a mattress, plate and cup. **PW1** reported the incident to her mother-in-law **ZAINABU TUWA** who testified as **PW2**. **PW2** told the court that she was away in Nairobi when the incident occurred. She traveled back to her home in Bura Ndogo. She found the door of her home had been broken into and certain items including a mattress missing. The matter was reported to police who arrested the Appellant and later charged him.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence and opted not to make any statement in defence. On 23rd October 2009, the learned trial magistrate delivered his judgement in which he convicted the Appellant and after listening to his mitigation sentenced him to serve six (6) years imprisonment on each limb of the offence all to run concurrently. It is against this conviction and sentence that the Appellant now appeals.

The Appellant who was not represented at the hearing of this appeal chose to rely entirely upon his written submissions which had been duly filed in court. The Respondent State was represented by the learned State Counsel **MR. ONSERIO** who made oral submissions opposing the appeal.

I have carefully considered the grounds raised by the Appellant which include –

- (1) Breach of fundamental rights
- (2) Insufficiency of evidence

The Appellant submits that having been arrested on 9th April 2009, he was not arraigned in court until six (6) days later on 14th April 2009. This he argues amounts to a breach of his constitutional right as provided by S. 72(3) of the old Constitution. Whilst it is true that the Constitution provided that a suspect be brought to court within 24 hours of his/her arrest, the five (5) day delay is not a ground for an automatic acquittal. The Appellant cannot seek to evade a trial on merit by citing this delay. This was the ruling of the Court of Appeal in the case of **JULIUS KAMAU MBUGUA –VS- REPUBLIC CRIM APPEAL 50 of 2008**. This ground of appeal therefore has no merit and I do hereby dismiss the same.

The evidence is clear that the Appellant's actions of house-breaking and theft were witnessed by none other than his sister-in-law **PW1**. The incident occurred in broad daylight at 2.00 p.m. when conditions were conducive for a positive identification. The Appellant was a relative of **PW1** and was therefore well known to her. Such evidence of recognition was held in the case of **ANJONONI & OTHERS –VS- REPUBLIC [1980] KLR 59** to be *“more assuring, and more reliable, than identification of a stranger”*. The evidence of **PW1** was duly corroborated by that of **PW2** who was infact the mother of the Appellant. She testifies that after receiving the report of the incident from **PW1** she rushed back home from Nairobi and confirmed that indeed her house had been broken into and items including a mattress were missing. **PW2** being the biological mother of the Appellant it is highly unlikely that she would fabricate evidence against him. The evidence is in my view water-tight. There is no possibility of a mistaken identity. The witnesses gave cogent and reliable testimony. I find that the prosecution have indeed proved their case beyond all reasonable doubt and I hereby confirm the conviction of the Appellant on both limbs of the offence.

With regard to the sentence, the records indicated that the Appellant was a repeat offender. The Appellant made his statement in mitigation which was duly considered by the trial court, in which he confirmed the correctness of his previous record. The six (6) year terms of imprisonment imposed were both lawful and appropriate in the circumstances and I will not interfere with the same. Finally this appeal fails in its entirety. The conviction and sentence of the lower court are confirmed and upheld.

Dated and Delivered at Mombasa this 7th day of March 2011.

M. ODERO
JUDGE

In the presence of:
Appellant in person
Mr. Onserio for State