



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NOS. 6, 7, 8, 10,12 & 13 OF 2008

(An Appeal from the Original Conviction & Sentence of B.A. OJOO Ag. Senior Resident Magistrate Baricho in Criminal Case No. 2316 of 2006 delivered on 11/1/2008 at Baricho)

KENNEDY KARIGE MAINA	1ST
APPELLANT	
CHARLES NDUHIU MURIUKI.....	2ND
APPELLANT	
JOHN WAHOME MURIUKI.....	3RD
APPELLANT	
ELIZABETH MURINGO WANGOI.....	4TH
APPELLANT	
DAVID MAINA MUINI.....	5TH
APPELLANT	
PAUL MUCHIRI MWANGI.....	6TH
APPELLANT	

VERSUS

REPUBLIC.....
RESPONDENT

J U D G M E N T

KENEDY KARIGE MAINA, CHARLES NDUHIU MURIUKI, JOHN WAHOME MURIUKI, ELIZABETH MURINGO WANGOI, DAVID MAINA MUINI, PAUL MUCHIRI MWNAGI, herein after referred to as 1st, 2nd, 3rd, 4th, 5th and 6th Appellants respectively were arraigned before the Baricho Acting Senior Resident Magistrate on 20/11/2006 charged with one count of Breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code; plus 3 counts of an alternative charge of handling suspected stolen goods contrary to Section 322(2) of the Penal Code which were preferred against the 2nd, 3rd and 4th Appellants.

The particulars of all these charges are as more particularized in the charge sheet. They pleaded not guilty to all the counts and the case proceeded to full trial with the prosecution calling a total of 3 witnesses.

On their part 1st, 3rd and 4th Appellants gave sworn statements of defence and called no witness whereas 2nd, 5th and 6th Appellants gave unsworn statements of defence and called no witness. The learned trial magistrate after considering the evidence before her found the principal count proved beyond reasonable doubt. She found all Appellants guilty and convicted them and sentenced them each to 7

years imprisonment.

I wish to point out that each appellant filed a separate appeal but they have been consolidated for purposes of hearing and judgment.

This being a first appeal it is the duty of this court to re-examine the entire evidence adduced before the trial court, analyze and re-evaluate the same and make its' own decision as to whether the same was sufficient to support the conviction against the Appellants herein (Ref: 1. *OKENO VS REPUBLIC*[1972] E.A. 32,2. *PANDYA VS REPUBLIC* [1957] E.A. 336)

I am also aware that I did not have advantage as did the trial court of hearing and seeing the witnesses Ref: *PETERS VS SUNDAY POST* [1958 E.A. 424.

In brief the evidence before the trial court was as follows;

The complainant (PW1) a businesswoman runs a boutique at Kiangai Trading Centre within Kirinyaga district. On 31/10/2006 PW1, closed her shop in the evening and went home in Karatina. The next day at 5 a.m. she got a report that her shop had been broken into. She went to the scene and confirmed the report. She found the padlock latches cut, assorted shop goods and wares stolen, security cash safe broken and Shs.26,000/= cash missing as per the inventory EXB40.

Investigations commenced and through informers the 2nd, 3rd, and 4th Appellants were arrested. They led police to the recovery of assorted items which were identified by PW1. These were EXB1-30. The 2nd Appellant was the first to be arrested. It is during interrogation that the 2nd Appellant gave names of 3rd, 6th and 5th Appellants who were arrested and recoveries made. PW2 was the one mainly involved in the recoveries.

From 2nd Appellants house were recovered: EXB 1, 2, 3, 4, 5, 6, 7 and 8a-b, 9a-c, 10,11,12,13,14,15,17,18,19,20. They were all identified by PW1.

They next went to the house of 5th Appellant but did not find him but found his wife (4th Appellant). In that house they recovered EXB 21 and 22. These were also identified by PW1. The next to be arrested was (3rd Appellant). From his house they recovered EXB. 23,24, 25, 27,28,29,30,31,2,33,34,3536,37 which were positively identified by PW1.

6th Appellant was the next to be arrested. Nothing was recovered from him. From the house of 1st Appellant's mother were recovered 10 (ten) items which were not produced. The inventory signed by the 1st Appellants' mother was produced as EXB38.

5th Appellant was later arrested. 1st appellant was the last to be arrested. PW3 had found four (4) shoes at PW1's shop. All the four had no matching partners (EXB39). The four other partners were recovered in possession of 2nd Appellant (EXB8).

PW1 had marked her items in the shop in a unique way and had been able to demonstrate to the court.

In his sworn defence the 1st Appellant denied the charges. He explained he had gone to the station to make a report about a person who had refused to pay his debt. He was thereafter arrested.

The 2nd Appellant while unsworn also denied the charges. He said he lived with PW1'S daughter and PW1 was not happy. PW1 caused his arrest because of that. He was then charged.

3rd Appellant sworn denied the charges. He says he was betrayed by a person he had declined to offer a job in his workshop. He was then arrested. Police took things from his brother's house and threw

out his mothers' clothes.

4th Appellant says PW2 was behind her arrest because she had ended their relationship. She did not know the other Appellants.

5th Appellant unsworn denied the charges. He said he was a mechanic. After finishing his days' business he was arrested by two officers who demanded for a bribe but he refused. He was later charged with robbery with violence and this charge.

6th Appellant worked as a matatu tout. On the day of his arrest there was certain items recovered from the vehicle he was working. The owner of the items was arrested. He too landed at the police station and was later charged after he refused to be a prosecution witness.

The trial magistrate considered all this evidence and found that the evidence of the prosecution witnesses was credible, honest and not impeached. She found each Appellant's statement to be fabricated lies designed solely to mislead the court. She dismissed all the defence statements as a sham.

She also found that the complainant's recovered items in possession of the accused were properly and positively identified by the complainant. She therefore convicted the Appellants.

Being aggrieved by the said judgment the Appellants filed this appeal. Common grounds were raised which number about 8. Basically they contend that the conviction against them was against the weight of the evidence adduced. They say they were not found in possession of any goods belonging to the complainant and that PW2's evidence was not corroborated.

They also say there was contradiction in the prosecution evidence.

On her part the learned state counsel supported both conviction and sentence. She said items were recovered from 1st, 2nd, 3rd and 4th Appellants and the same were properly identified by PW1. She said the defences raised by the Appellants were not relevant to the case.

I have very carefully considered the evidence adduced before the trial court in its entirety plus the submissions on the appeal by the Appellants and the learned state counsel.

Having done so I do observe that the offence took place on the night of 31/10/2006. PW1 only learnt of it the next morning. There was no eye witness to the incident. The Appellants were arrested following reports from informers who for obvious reasons did not testify. After the arrest of the 2nd Appellant and recovery of various items the rest were arrested through the mentioning of names, and further recoveries.

The trial court found that the evidence linking the Appellants with this offence was the recovery of the stolen items on them. She found as a fact that 3rd, 4th, 2nd and 1st Appellants were found in custody or possession of items positively identified by the complainant as her stolen items. This was the evidence of PW2 who was accompanied by PW1 during the recoveries. The items recovered were in large quantities save for those found with the 4th Appellant.

The court believed PW2 when he said the 4th and 5th Appellants were husband and wife. There was no other witness called to corroborate this important evidence yet there were several people living in the neighbourhood. This is coupled with the fact that 4th and 5th Appellants were not found in the same house at the time of arrest.

I would have expected there to be evidence to really confirm that, that house was occupied by the 4th and 5th Appellants. The land lord/lady or other tenants would have been of great assistance. The 5th Appellant was not found in any actual possession of anything, belonging to the complainant.

The 6th Appellant was not found in possession of any item belonging to the complainant (PW1). The learned trial magistrate in convicting him relied on what he allegedly told PW2 in form of a confession which is not admissible as it had not been properly taken.

The conviction of the 5th Appellant was also based on hearsay as there was no tangible evidence to confirm that he was the husband of the 4th Appellant and that they lived together in the house where EXB21 and 22 were recovered.

The 1st Appellant was also not found in actual possession of any of PW1's items. PW2 said some of PW1's items were found in one of the rooms in the house of 1st appellant's mother who told PW2 that these items belonged to the 1st Appellant. The old lady allegedly signed an inventory. This old lady was never called as a witness. The learned trial magistrate relied on this hearsay evidence from PW2 to convict the 1st Appellant.

A look at the charge sheet shows that the 1st, 5th and 6th Appellants were never charged with the alternative count of handling stolen goods. And they were not found in possession of any these items. It has not therefore been shown how they were later on connected with the principal count of Burglary and Stealing.

I therefore find that there was no evidence at all to sustain a conviction against the 1st, 5th and 6th appellants. I quash their convictions and set aside the sentences imposed against them.

The evidence against 2nd, 3rd, and 4th Appellants is overwhelming. The complainant (PW1) was able to identify her marks on the items in possession of 2nd, 3rd and 4th Appellants. The recovery of these items was just about a week after the burglary and stealing at her shop.

They were each sentenced to serve 7 (seven) years imprisonment on 11/1/2008. This is the minimum sentence provided for by statute and this court cannot interfere with it. I therefore uphold the convictions and sentences in respect of 2nd, 3rd and 4th Appellants.

Appeals in respect of 1st, 5th and 6th Appellants allowed. 1st, 5th and 6th Appellants shall be released unless otherwise lawfully held under separate warrants.

Orders accordingly. Right of appeal explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 27TH DAY OF OCTOBER 2011.

**H. I. ONG'UDI
JUDGE**