



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CRIMINAL APPEAL NO. 92 OF 2006**

*(From the conviction and sentence by L. ONYINA Resident Magistrate at Embu in SPM Criminal Case No. 3310 of 2004 on 15<sup>th</sup> September, 2006)*

**DAVID MUCHIRI KIMANI**.....

**APPELLANT**  
**VERSUS**

**REPUBLIC**..... **RESPONDENT**

**J U D G M E N T**

The Appellant herein was charged before the Resident Magistrate’s court Embu vide **Criminal Case No. 3310/04** with two counts of Burglary and Stealing contrary to Section 304(2) and 279(b) of the Penal Code. He also faced three alternative counts of handling stolen property contrary to Section 322(2) of the Penal Code. He pleaded not guilty. The case proceeded to full trial and he was found guilty and convicted on both principal count and sentenced to serve 7 years imprisonment on each 1<sup>st</sup> limb and 2 years imprisonment on each of the 2<sup>nd</sup> limbs. The order was that the sentences run concurrently.

And being dissatisfied with the said judgment has appealed against both conviction and sentence. He has raised 6 grounds of appeal.

- ***PW1, PW2 and PW3 were all complainants and witnesses with no independent witness.***
- ***The evidence of PW1, PW2, PW3 and PW4 was contradictory on the whereabouts of the exhibit.***
- ***No cautionary statement was taken from him or his co-accused.***
- ***The trial magistrate erred in law and fact in regarding fabricated defence of his co-accused.***
- ***PW2 lived with PW1 and PW3.***
- ***The sentence was excessive.***

In his submissions which were presented to court he raised the issue of interpretation.

- He never cross examined PW1. And the names of the witnesses were not identified.
- And that the recovery of items was done in his absence. And the owner of the house was not established.
- He was taken to court outside the 24 hours allowed by the Constitution.

The state opposed the appeal. M/s Matiru for the state submitted that contrary to what the Appellant said pg 3 of the proceedings shows that the translation was English/Kiambu and the charges are clearly laid out.

- He also cross-examined PW1 whose names are indicated.
- The few extra days he was detained at the police station did not cause him any prejudice.

This being a first appeal this court has a duty of reviewing, rehearing and reconsidering the evidence before the lower court in order to arrive at its own decision. This was the holding in:

1. **KARIUKI KARANJA VS REPUBLIC [1986] KLR 190**
2. **KIMEU VS REPUBLIC [2002] 1KLR 756**

The evidence in the lower court was that PW1 locked her house on 31/10/2004. She returned to her house the next morning to find it broken into and things thrown all over the place. Also missing were the items mentioned in the charge sheet. She called a friend of hers (PW3) who came and they headed to the station. On the way they met the Appellant and his co-accused. His co-accused was a lady wearing a dress (EXB.1) which was identified by PW1 and PW2 as belonging to PW1.

The Appellant disappeared pretending to go and call the person he had bought the dress from. The Appellant's co-accused later led PW1, PW2 and officers to the house of the Appellant from where they recovered the exhibits – EXB.4,5,6,8,9 & 10. All the recovered items were identified by PW1 and PW2. By the time the recoveries were made the Appellant was at large.

In his evidence the Appellant denied the charges saying the dress (EXB1) had been bought by him for his girlfriend. He looked for the person who had sold them this dress in Thika in vain. Upon his return he was arrested. From the evidence before the court it was not disputed that the house where PW1 and PW2 were staying was broken into, and items stolen there from.

The learned trial magistrate after evaluating the evidence and even warning himself over the incriminating evidence of the Appellant's co-accused found that the Appellant herein was guilty of the main counts of Burglary and Stealing.

The Appellant has raised several grounds of appeal

- He says he was not given a chance to cross examine PW1.

At pg 48-50 of the record of appeal and pg 26-27 of the original record, it is clearly shown that PW1, ANTONIO NAKWANZA was cross examined by the Appellant herein.

It's true the items were recovered in the Appellant's absence. It's his co-accused who took the police officers plus (PW4,PW1,PW3) to Appellants house. Besides that, PW1 and PW3 have confirmed that the Appellant is the man who was found walking with his co-accused. And he is the one who claimed to have bought her the dress belonging to PW1 which she was found wearing.

He is also the one who disappeared after telling PW1 and PW3 that he was going to get the person who had sold him the dress. PW1, PW2 and PW3 were competent witnesses contrary to the Appellants beliefs. The trial magistrate believed their evidence which was consistent.

It's true the Appellant was arraigned in court 4 days after his arrest. This issue was not raised when the Appellant appeared before the trial court. This was an occurrence before the plea was taken and one that the court had no control over. I find that the delay did not cause any prejudice to the Appellant and hence cannot nullify the proceedings. I rely on the case of **JULIUS KAMAU MBUGUA VS REPUBLIC [2010] eKLR - CR. APPEAL NO. 50/2008** to support my finding. If the Appellant really feels his constitutional rights were violated he should file a suit before the relevant forum for determination.

He also says witnesses' names were not clearly indicated. This is far from the truth because every witness's name has been indicated before the witness testifies. After re-evaluating the evidence on record I find that the learned trial magistrate evaluated the evidence well and arrived at the right decision. I have no reason of interfering with it.

The Appellant was sentenced to 7 years on each 1<sup>st</sup> limb and 2 years on each 2<sup>nd</sup> limb. The Appellant was not a 1<sup>st</sup> offender. At the time of judgment and sentence he was serving sentence for a similar offence of Burglary and Stealing vide Cr. Case No. 34/2005. In fact the learned trial magistrate

was very lenient in sentencing the Appellant to 7 years. The penalty sections call for a stiffer sentence for this kind of offence.

I find no merit in the appeal which I dismiss. The conviction and sentence of the lower court is upheld.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 8<sup>TH</sup> DAY OF DECEMBER 2011.**

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