REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL 153 OF 2008

ALI MOHAMED SALIM.…..…..….……...……….APPELLANT

VERSUS

REPUBLIC ……………...………………………RESPONDENT

JUDGMENT

Ali Mohammed Salim (the appellant) was convicted on a charge of store breaking and committing a felony contrary to section 306(a) of the Penal Code and sentenced to serve 4(four) years imprisonment. Appellant denied the charge, whose particulars were that on the night of 27/28 February 2008 at Kibaoni area in Kilifi District within Coast Province, he broke and entered a building namely a store of Hammid Abdalla and committed a felony therein, namely theft and did steal from therein 5 boxes of exercise books all valued at Ksh. 19,200/- the property of the said Hamid Abdalla.

After due trial in which prosecution called four witnesses, the appellant was found guilty of the offence.

Hamid Abdalla Mbarak (PW1) told the trial court that on 28-2-08 at 8.30am, Mercy his sales attendant at his shop informed him that the store had been broken into and five (5) cartons of exercise books of 200 pages stolen. He noticed a broken window and realized someone must have gone inside the store. When he reported the matter to police, Pc Gatimu told him that he had witnessed the breaking in and had seen the appellant whom he mentioned by the name Dau, further that he had seen the appellant near Kobil, with a carton of books and that Pc Odha was investigating the matter.

On 24-3-08, PW1 accompanied police in a search for the appellant who was running very fast – he was apprehended and taken to the police station. None of the stolen items as recovered.

According to PW1, appellant had a past record of similar offence. Mercy Mbeyue (PW2) who was PW1's shop attendant testified that she got information from one Juliet and Rubea, that a person had taken books from the store. She proceeded to the store and confirmed, then informed her employer (PW1). She found the bags which the intruder had left behind. She knew appellant as he used to pass by the bookshop. However on cross-examination she stated:

> ***"I did not see you breaking but I was told"***

Pc Gatimu (PW3) who was based at Kilifi Division Headquarters, testified that on 28-5-08 at 1.00am, he was coming from Pwani University where he had gone to see a friend when he met the appellant who was carrying two pieces of luggage in both hands. They exchanged greetings and PW3 walked on. Later on while at Ushirika bar, he saw appellant with more luggage – he was accompanied by a second person. Then the next day, i.e on 29th at 6.30am he met PW1 who told him about the theft and PW3 told him,

> ***"I had seen the accused carrying boxes. The accused was a suspect."***

On cross-examination PW3 stated:

> ***"on 28th, I did not ask you about the luggage …I was not interested in the boxes you carried…"***

Pc Nassir Odha (PW4) said he carried out investigations and got information from Pc Gatimu that he had seen the appellant carrying a carton of books – however he made no recovery.

On cross-examination PW4 said:

> ***"I know you stole, because I was informed by Pc Gatimu. He had known you had stolen box had been torn and books could be seen."***

Pc Odha admitted that he never visited the scene, but was confident that the door had been broken and books stolen, then he says

> ***"I found the window was open"***

In his unsworn defence, the appellant said he did not break into the shop and only saw police go to him and say he had broken herein. He pointed out no one witnessed him breaking into the shop. It was his contention that this was just malice by the complainant after appellant stopped working for him and he had vowed to teach him a lesson.

DW2, a watchman guarding the premises nearby testified that he was not aware of the bookshop being broken into nor was he aware of any theft therein.

The trial magistrate in his judgment noted that no one witnessed appellant breaking into the store but that the evidence of Pc Gatimu showed that appellant may have broken into the shop's store because he met appellant carrying cartons of books in both hands on the night when the incident took place.

Further that evidence showed that appellant having worked for the complainant was familiar with the shop where the books were stolen from and that his conduct was suspect, because after meeting Pc Gatimu, he went underground and this was because he knew police were looking for him.

The trial magistrate held that:

> ***"Although the accused was not seen breaking the complainant's store, circumstances indicate that he participated in the commission of the offence"***

The trial magistrate further stated that he had considered the appellant's defence which did not deny or explain how he was seen by Pc Gatimu carrying cartons of books at Kibaoni on the night the store was broken and that his defence witness did not even know the offence appellant had been charged with. The conclusion by the trial magistrate was thus:

> ***"I find circumstantial evidence to be overwhelming that accused committed the offence"***

The appellant challenged these findings on grounds that:

1) The trial magistrate erred in convicting the appellant on insufficient evidence
2) The learned trial magistrate erred in shifting the burden of proof onto the appellant
3) The learned trial magistrate erred in convicting the appellant based on circumstantial evidence.
4) The evidence of PW1 and PW2 was hearsay
5) The sentence was excessive
6) The trial magistrate erred in dismissing the evidence of DW1.

In his written submissions, appellant pointed out that the circumstantial evidence did not inculpably point only to him as the suspect, to the exclusion of anyone else, as there were two persons, Juliet and Rubea who relayed information about the incident to PW2. It is also to be noted that these two people never testified – he refers to **<u>Bukenya v Uganda cr. App. No. 68 of 1957</u>**

He also urged the court to consider the evidence of pW3 saying there was no mention of a carton of books by this witness – he simply said he saw appellant carrying two luggages in both hands and that infact Pc Gatimu said that it was the investigating officer who could explain about the luggage and that Pc Gatimu distanced himself from the matter – his contention is that the learned trial magistrate misdirected himself.

Also that time of offence was not indicated.

The appeal is opposed, and Mr. Naulikha submitted on behalf of the State that appellant appears to be more interested on the time of the offence took place, yet Pc Gatimu referred to the incident as having occurred at 1.00am and that the issue of time is immaterial.
Further that appellant did not deny committing the offence and he went underground thereafter and that his conduct disclosed a guilty mind.

From the record Pc Gatimu confirmed that he did not see the appellant breaking into the store and even when he met the appellant carrying the two luggages, he did not establish or find out what was in them.

It was therefore erroneous for the trial magistrate to hold that Pc Gatimu saw appellant carrying two cartons of books – that is not evidence on record and with all due respect a Mr. Naulikha, his position is misguided.

Then there is the question of circumstances of the case – no known law in this country bars one from walking at night carrying whatever number of amount of luggage. For circumstantial evidence to sustain a conviction, it must clearly point to the accused as the most likely offender, to the exclusion of anyone else. Yet in this instance, there is the mention of Juliet and Rubea, who relayed information to PW2 that the store had been broken into. When did they get to know about this breakage?
Could they have had a hand in it?
Indeed failure by prosecution to call the two named persons leaves room for speculation as to whether if called, they may have given evidence adverse to prosecution, or perhaps by their own testimony appellant would have been absolved – the case of **Bukenya v Uganda (Infra) is applicable.**

The trial magistrate also held that appellant's conduct was suspect because he fled upon seeing police and had initially gone underground after the incident. The evidence on record is that when PW1 and the police spotted appellant, he was already running very fast – that is not the same as upon seeing police he was fleeing – that holding was erroneous.

The upshot is that the appeal has merit, the conviction was unsafe and I quash it. The sentence is subsequently set aside, and I order that appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **15th** day of **February 2010** at Malindi.

H. A. Omondi
JUDGE