

excessive.

The state through State Counsel Mrs Leting opposed the appeal. The dates on the charge sheet when the offence was committed was between 20th to 22nd May, 2007 which sorts out the alleged contradictions by the Appellant. The evidence of PW2, wife to the landlord was adequate in the circumstances. The State argued that the sentence was reasonable.

On the issue of the date the offence was committed, PW1 was very clear that she left her house on 14th May 2007 for Malaba where she carries on business. PW4 is the police officer who received the report. He said PW1 left her house on 18th May 2007. For him, he only received the report from PW1 and may not have noted the correct date. PW1 the complainant had no doubt that she left her house and gave the key to PW2 on 14/5/2007. The date of return according to PW1 was 23/5/2007 at 9.00 p.m. PW3 saw the door of PW1's house ajar in the morning of 23rd May 2007. PW2 confirmed receiving the key from the complainant on 14th May, 2007. She gave it to the Appellant to do electrical repairs on 19th May 2007. The Appellant did part of the work and said some materials were required to complete the repairs. The date the Appellant returned to complete the repairs was not given. From other evidence, it must have been between 20th and 22nd May 2007. The charge gives the dates as follows:

***“On diverse dates of 20th and 22nd May 2007*”**

This means that the offence was committed between 20th and 22nd May 2007. This is supported by the evidence on record – especially that of PW2 and PW3. The issue of contradictory dates does not arise in view of the period given in the charge sheet. The trial court was not in doubt that the offence was committed between 20th and 22nd May, 2007. The destination of PW1 whether Malaba or Central Province is immaterial in this case. The trial court found PW1 a credible witness and was clear that she had gone to Malaba. The evidence of the landlord was not called by the prosecution. His wife PW2 is the one who received the key from the complainant. She is the one who handed it over to the Appellant to carry out the repairs. PW1 informed PW2 that her house had been burgled. PW4 then visited the scene and confirmed what had happened. The only part that her husband played was to instruct PW2 to hand over the key to the Appellant to do repairs. I find that the evidence of PW2 is adequate in as far as the involvement of the Appellant was. The authority of **MWANGI – VRS- REPUBLIC COURT OF APPEAL NAKURU CRIMINAL APPEAL NO.100 OF 1984** is not relevant to this case in that the evidence of the witnesses who testified was

incriminative towards the Appellant. In the above decision, the witness who was not called was a key witness. It is not always the case that the evidence of a person who was not called to testify would have been adverse to the prosecution. This was held in the case of **COLUMBUS DINDI –VRS- REPUBLIC CRIMINAL APPEAL NO.287 OF 2005 COURT OF APPEAL NAIROBI (unreported)**.

The Appellant was convicted on circumstantial evidence which the defence refers to as unsafe. In this respect, the evidence of PW2 and PW3 is very crucial. When PW2 handed over the key to the Appellant on 19th May 2007, it was never returned to her. She came to learn of the burglary and theft on 23/5/2007 after the repairs were fully done. PW3 noticed that the door was open in the morning on 23/5/2007. PW1 came the same day in the evening and found the items listed in the charge sheet missing. These three witnesses confirmed that access was gained by opening the door using a key. PW4 visited the scene and found no breakage. In his defence, the Appellant said he returned the key to PW2. The trial court believed PW2 that she was not given back the key by the Appellant. The trial court found the evidence was well corroborated despite the fact that there was no recovery. I am in agreement that the circumstantial evidence leaves no

doubt that the Appellant committed the offence during the period he was carrying out the repairs and was in possession of the key to the house.

The maximum sentence under section 304 (2) and 279 (b) is ten (10) and seven (7) years imprisonment. The sentence of three (3) years on each limb was reasonable for a first offender like the Appellant. It was neither harsh nor excessive.

For the foregoing reasons, the appeal hereby fails and is dismissed accordingly. The conviction and sentence are both upheld accordingly.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 17th day of June, 2010 in open court in the presence of the Appellant, the state counsel Mrs. Leting and Mr. Kraido for Situma for the Appellant.

F. N. MUCHEMI
JUDGE