

premises as he (PW1) went to work in Turkana District. PW1 used to come to Amagoro sometimes and relieve the accused to go to his home. In the premises, he had several electronics valued at Ksh.191,500/= which he left intact on 06/03/2006 in the custody of the Appellant. On 30/03/2006 PW1 was informed that his business had been broken into and his property stolen. Police arrested the Appellant after the landlord reported the incident.

PW2, the landlord testified that on 29/03/06 around 4.00 p.m, he met the Appellant at complainant's studio which was next a bar. The Appellant told him that he had been informed of a plan by one electrician namely Okello that there was a plan by people from Bungoma to burgle out the studio. PW2 asked the Appellant whether he had informed the complainant and the Appellant answered in the negative. It was the following day on 30/03/2006 when PW2 received information that the studio had been broken. PW2 went to the scene and confirmed. The Appellant is the one who kept the keys to the premises. The padlock to the door was on the ground but intact in a locked position. PW2 checked inside and confirmed the studio was empty save to one speaker, a computer monitor and a musical keyboard. According to PW2, the Appellant used to sleep in the studio. There was a room in the studio where PW2 and PW1 kept some items. PW2 kept the key to that store which was not broken into or even opened. PW2 reported the matter to Malaba Police Station.

PW3 CPL Mike Opicho visited the scene on 30/03/2006 after receiving the report of the theft. He observed that there was no actual breaking into the premises. The padlock and its holder were intact with the padlock was on the floor. The door lock to the studio was intact. The complainant came and visited the scene on 02/04/06 and found the padlock hold holder had been cut.

The accused in his unsworn statement of defence said that he went to his rural home on 28/03/06 around 8.00 p.m. He was informed while at home 300 metres away from Amagoro that the studio had been broken into. He went to the scene and confirmed that the premises were broken into. The padlock latch had been broken and property stolen from inside. He reported the matter to Malaba Police Station.

It was the evidence of PW1 that he left the Appellant to work for him in the studio and that PW1 could relieve the Appellant to go home when he (PW1) was at the premises. He had given the Appellant a place to sleep within the premises. This was confirmed by PW2 who said that the Appellant slept in the studio. He was provided with facilities like the kitchen and bathroom. PW2 and PW3 said it is only the Appellant who kept the keys to the studio. The barman kept the one key to the gate on the ground while the accused kept the other. The studio was on the 2nd floor of the building and the only person who had the keys to the main gate and studio was the Appellant. PW3 visited the scene and his observation was that there was no physical breaking in. The padlock was on the floor and it was intact. The padlock holder had not been cut. PW3 observed that access was gained by someone who had the keys to the house. The evidence of PW3 about the scene was reliable and credible. He visited the place the following day after the theft in the presence of the Appellant. PW1 was away and was informed on phone. He traveled to Amagoro and arrived on 01/04/06 which was three days later. On 02/04/06, police visited the scene and found that the padlock holder had been tampered with. PW3 explained that the tampering was done after he visited the scene. The complainant was not there on 30/03/06 during the first visit. There was no contradiction on what the witnesses found at the scene. PW1 and PW3 visited at different times. The tampering with the padlock holder was done after PW3 had left by someone who wanted to destroy evidence. There was another store shared by PW1 and PW2 within the studio. PW3 said that particular store had items which were property of the two witnesses. He kept the key and the Appellant did not have a spare one. The store was found intact. Property was therefore stolen from the studio rooms to which the Appellant had the keys. An ordinary thief and a stranger for that matter would have broken into the studio and the store of PW1 and PW2 to try his luck on any valuable property. The theft in this case was well planned and it targeted only the things in the studio. It is only the Appellant and the complainant who knew what items were in the studio. The complainant was far away from Amagoro at the material time. Even if he was there, he would not steal his own property.

The circumstantial evidence is corroborated by that of PW2 who was told by the Appellant a day before that there were people

from Bungoma who were planning to steal the property from the studio. The word of the Appellant came true the same night in that the complainant's property was stolen in a stage-managed break in. PW2 advised the Appellant to report the matter to the police but he failed to do so. The Applicant argued that it was the duty of PW2 to report to the police. I disagree with that line of argument. The Appellant was working for PW1 in the studio and was also left in charge of the properties therein. He had a duty to report to the police if he had any information of that kind. He was also better placed than PW2 to brief police on the source and details of the information.

The trial court found that there was overwhelming evidence to the effect that only the Appellant had the keys to the premises from where the goods were stolen. The magistrate observed that when PW3 first visited the scene, the padlock holder was not cut. It is later that the cutting of the latch was done. The court observed further that access was gained by opening the locks or padlocks using the keys. The court did not believe the defence and regarded it as an afterthought.

The Appellant was the servant of PW1 and stole from him as demonstrated by the evidence. I find that the finding of the court was correct and founded on the evidence on record. I totally agree with the said finding which led to a safe conviction.

There is the issue raised by the State Counsel about the Appellant being cross-examined on his unsworn evidence. It was wrong to allow cross-examination on unsworn evidence. The accused was represented and it appears the matter escaped the attention of both the trial magistrate and the defence counsel. The question here is whether the Appellant was prejudiced by the act of that cross-examination. After evaluating the evidence on record, I find that no prejudice was caused. This is because, the answers he gave on cross-examination did not change or affect the overwhelming evidence of the prosecution.

In my evaluation of the evidence and defence, I treated the cross-examination as non-existent. That notwithstanding, I have arrived at the same finding as the trial court. The misdirection did not prejudice the Appellant or cause any miscarriage of justice. It is therefore not a mistrial.

On the sentence, the maximum provided is seven (7) years imprisonment. The sentence of a fine of Ksh.20,000/= and in default two (2) years imprisonment is not only reasonable but lenient.

This appeal has no merit. I uphold the conviction and sentence.

F. N. MUCHEMI
JUDGE

Judgment delivered and dated on the 27th day of July, 2010 in the presence of Mr. Ocharo for the Appellant and Mr. Ogoti the State Counsel.

F. N. MUCHEMI
JUDGE