REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 173 & 169 OF 2009

MELVIN BARASA
WALUTSACHI.....APPELLLANTS

CALVIN ASEWE OTIENO
VERSUS
REPUBLIC.....RESPONDENT

J U D G E M E N T

Both appellants herein were charged before the Baricho court with the offence of housebreaking and stealing contrary to Section 304(1) as read with 279(1) of the penal code. They both pleaded not guilty to the charge and the matter proceeded to full hearing. They were found guilty and convicted after a full hearing. They were each sentenced to serve 7 years imprisonment on each limb of the offence. The sentences were ordered to run concurrently.
Being aggrieved by the said conviction and sentence; they each filed an appeal but both Appeals were consolidated and heard together.

They filled home made grounds of appeal and tendered written submissions at the hearing. They have both urged the court to quash the conviction and set aside the sentence.

Learned counsel for the state opposed the appeal and maintained that the Appellants were properly convicted. She urged the court to dismiss the Appeal.

I have considered the said grounds and submissions. The evidence before the trial court was that the complainant's dwelling house was broken into on the date in question. All the property listed in the charge sheet valued at 126,000 was stolen from therein. She reported the matter to the police station but no arrests were made then.

About 1 week later, there was a break-in in another flat in the neighbourhood. The Appellants were arrested and taken to the police station. On interrogation, they are said to have admitted that the are the ones who had broken into the dwelling house of the complainant herein and stolen the listed items. They are said to have offered to take the complainant and police officers to Nairobi where they had sold the items. According to PW2 and PW3, the Appellants led them to Nyamakima Area in Nairobi where they pointed to a house said to belong to one Boaz. He was not present but the officers broke the door in order to gain entry. They found several electronic items strewn all over the floor.

PW2 – the complainant's husband is said to have identified one VHS tape which was inside a video deck

as one stolen from his house. Nothing else was recovered. According to PW2 and PW3, they were able to identify the tape because it had "some rubbings" on top which had been made by PW1.

I did not definitely see the said tape to see the 'rubbings' but they in my view were not marks that were exclusive to the complainant and any other person could have put them on the tape.

The Appellants in their defence denied having broken into the house and stolen the said items. The learned trial magistrate in his judgment said that he disbelieved them. He conceded in his judgment that "***the said tape was the only item that links the Accused to this offence."***

He nonetheless held that since they were the ones who led the police to the recovery, they must have stolen it from the complainant.

This Appeal is in my considered view about whether that shred of evidence was sufficient to support the conviction or not.

Having re-evaluated the evidence before the trial court, I am inclined to find that the evidence fell too short of the required standard to support the conviction.
Firstly, a look at the charge sheet shows that the stolen items are listed as

"a video deck, VCD machine deck, 6 remote controls, DSTV decorder, a bedcover, 4 pairs of shoes and one radio cassette."

This list does not include the VHS tape that is said to have been recovered from Nairobi which the complainant identified as hers. As stated earlier, the identification of the tape was not itself foolproof as it did not have any sign that was peculiar to the complainant.
Secondly, the fact that the said Boaz was not found in his house left the matter hanging. There was nobody to confirm that indeed the tape in question was taken there by the Appellants. That linkage was important to prove the charge.

This being the only evidence against the Appellants, my view is that the conviction against the appellant was unsafe. I therefore allow the appeal herein, quash the conviction and set aside the sentence of 7 years imprisonment. The Appellants be set at liberty unless they are otherwise lawfully held.

W. KARANJA

JUDGE

Delivered, dated & signed in open court at Embu this 18th day of November 2010.

In presence of:- Both Appellants & Ms. Matiru for the State.