



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Criminal Appeal 313 of 2008**

**FRED WANJALA NYONGESA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence of house breaking contrary to section 304 (1) and stealing contrary to section 279(b) of the Penal Code. The particulars of the charge stated that on the 20<sup>th</sup> day of November 2007, at Mwireri village, Ol'Kalou broke and entered the dwelling house of David Njuguna Kinuthia with intent to steal there-in- and did steal a VCD player and eight CDS the property of the said David Njuguna Kinuthia the said VCD player and eight CDS being of the value of Ksh.4, 500/-. The appellant was also charged with a second count of being in possession of narcotic drugs and psychotropic substances contrary to section 3(1) as read with section 3(2) of Narcotic Drugs and Psychotropic Substances Control Act of 1994.

The appellant was discharged of the second count, but was found guilty of the first count convicted and sentenced to three years imprisonment for both the offences of house breaking and stealing. The sentences were to run concurrently.

Being aggrieved the by the conviction and sentence, the appellant has appealed. In his petition of appeal he has challenged the conviction which he contends was based on insufficient and UN corroborated evidence. The learned trial magistrate was also faulted for relying on hearsay evidence by PW1 and PW2 in arriving at the conclusion that the offence against the appellant was proved to the required standards. This appeal was not opposed by the state. The learned state counsel Mr. Njogu submitted that the conviction is not safe owing to the fact that the trial court relied on the evidence of a young child of nine years old to convict the appellant. The evidence of the minor was not corroborated by any other evidence.

This being a first appeal, this Court is mandated by law to reconsider and re- evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing, this Court should bear in mind that it never saw or heard the witnesses and give due allowance for that. (See the case of *Njoroge vs. Republic 1987 KLR page 19*).

I now wish to set out albeit briefly, the evidence before the trial court which led to the conviction and sentence of the appellant. On 20<sup>th</sup> November 2007, at about 4. 00pm. Nancy Mukami Mbugua (PW2) testified that John Njoroge PW3 came to her house having been sent by a neighbor to collect money for a merry go round group. PW2 testified that she left John Njoroge to guard her house and went to the neighbor to collect the money. When she returned PW2 informed her that a stranger came while she had gone and ordered him to follow her. PW2 decided to go to his grandmother's house.

PW1 found that the VCD player makes diamond and nine CDS were missing. PW2 with her husband David Njuguna Kinuthia PW1 reported the matter to the police. PW3 testified that he had gone to PW2' house to pick some money. PW2 asked him to wait for her, that is when the appellant came and ordered him to follow PW2 and call her back. The appellant entered the house and PW3 saw him walking out of the house carrying a payer bag. On a different day, while on his way to school, he sported the appellant.

He alerted PW2 who came with the police and arrested the appellant.

The appellant was arrested by Pc Paul Locho of Ol'kalou police station on 28<sup>th</sup> November 2008. He recorded statements from PW2 who had seen the appellant commit the offence. They also searched the appellant and found him with one roll of bhang which was taken to the Government Chemist for analysis, but as at the time PW4 testified, the report from the Government Chemist had not been received. Thus the appellant was acquitted of the second count and put on his defence for the first count.

The appellant made unsworn statement of defence and denied having committed the offence. He testified that he could not recall what happened on 20<sup>th</sup> November 2007. He could only recall the day he was arrested on 28<sup>th</sup> November 2008 while working in the quarry, he only saw a young boy who pointed him to the police and he was arrested.

The learned trial magistrate in his judgment found that the appellant was positively identified by PW3 whom he deceived to follow PW2 so as to give him an opportunity to commit the offence. PW3 hid himself and saw the appellant enter the house and left carrying some items. The trial court found that the evidence of PW3 was not challenged. The appellant was found guilty and sentenced. This appeal now challenges the entire judgment.

Upon evaluation of the evidence before the trial court, I agree with the State Counsel that this conviction is not safe for reasons that the learned trial magistrate relied solely on the evidence of PW3 who is a young boy of nine years old. The record of proceedings by the trial court does not show that *voire dire* examination of the minor was conducted so that the court could assess whether PW3 understood the essence of speaking the truth. This was compounded by the fact that there are material inconsistencies found in the evidence of PW3 and PW2. PW3 testified that when the appellant came to PW2's house, he ordered him to follow PW2 and call her. When he refused the appellant held him by the color and chased him away. That is when he hid in the bush.

PW2 testified that PW3 went looking for her but did not find her, so he decided to go to his grandmother's house. Apart from these inconsistencies when the matter was reported to the police, PW3 did not record a statement and he did not give a description of the assailant. For those reasons I am satisfied that the conviction against the appellant is unsafe to sustain. The appeal is allowed. The conviction and sentence is set aside and unless the appellant is otherwise lawfully held he is to be set at liberty forthwith.

**JUDGMENT READ AND SIGNED ON 25<sup>TH</sup> JUNE, 2009.**

**M.K. KOOME**

**JUDGE**