



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

**AT MOMBASA**

**Criminal Appeal 63 of 2007**

**MOHAMED ONYANGO ALIAS ANGAWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant together with two others were charged with four main counts of house breaking and stealing contrary to section 304 (1) and 279 (b) of the Penal Code. He also faced an alternative count of handling stolen property. His co-accused also faced alternative counts of handling stolen property contrary to section 322 (2) of the Penal Code. After a full trial the appellant was convicted on the main counts and sentenced to serve five years imprisonment on the limbs of house breaking and three years imprisonment on the limb of stealing. The sentences were to run concurrently. The particulars of the 1<sup>st</sup> count were as follows:-

That the appellant and his co-accused, in March 2006, at about 4.00 p.m., at Bura Ndogo village in Taita Taveta District, within Coast Province, jointly broke and entered the dwelling house of Kyengo Kakumi with intent to steal therein and did steal from therein one radio cassette player make Naiwa, one curtain and cash Kshs. 1,000/= all valued at Kshs. 1,840/= the property of Kyengo Kakumi. The second count carried the following particulars: That the appellant and the co-accused, on 5<sup>th</sup> May 2006, at an unknown time at Bura Ndogo village in Taita Taveta District, within Coast Province, jointly broke and entered the dwelling house of Paul Mathenge with intent to steal therein and did steal from therein one Radio cassette player make Nova, one mobile phone make Motorola, one VCD machine make Miyota, 5 VCD discs, one basket and cash Kshs. 20,000/= all valued at Kshs. 33,250/=, the property of the said Paul Mathenge. The particulars of the third count were that the appellant and the co-accused, on 8<sup>th</sup> May 2006, at about 11.00 a.m., at Bura Ndogo village in Taita Taveta District, within Coast Province, jointly broke and entered the dwelling house of Philemon Hamisi with intent to steal therein and did steal from therein 2 dozens of cups, 2 dozens of plates, 12 spoons and one torch all valued at Kshs. 2,260/= the property of the said Philemon Hamisi. The fourth count carried the following particulars:- That the appellant and the co-accused, on the 9<sup>th</sup> May 2006, at an unknown time at Bura Ndogo village in Taita Taveta District, within Coast Province, jointly broke and entered the dwelling house of Peter Pondo Owiti with intent to steal therein and did steal from therein two bed sheets, two long trousers, two pairs of leather shoes, one pair of sports short, one small radio make Rising, one hurricane lamp, one petticoat, one panty, two sufurias, two kilos of rice and a traveling bag all valued at Kshs. 6,000/=, the property of the said Peter Pondo Owiti. The handling count had the following particulars: That the appellant, on 18<sup>th</sup> May 2006 at about 11.00 a.m., at Taveta Police Station in Taita Taveta District, within Coast Province, otherwise than in the cause of stealing, dishonestly retained one long trouser knowing and having reason to believe it to be stolen.

The appellant and his co-accused appeared before J. M. Githaiga, Senior Resident Magistrate, at Taveta in Criminal Case No. 295 of 2006 on 22<sup>nd</sup> May 2006 and pleaded not guilty. A total of seven witnesses testified on behalf of the prosecution and at the end of their evidence, the Learned Senior Resident Magistrate ruled that the appellant and his co-accused had a case to answer and placed them on their defence. The appellant chose to give an unsworn statement. In his judgment dated and delivered on 31<sup>st</sup> August 2006, the Learned Senior Resident Magistrate found the appellant guilty of the main counts of house breaking and stealing and sentenced him as already stated. The appellant then appealed to this court against his conviction and sentences on six grounds. The gist of the appeal is however, that the Learned Senior Resident Magistrate erred in convicting him on insufficient and conflicting evidence. The appellant further complains that the sentences imposed upon him are harsh.

Mr. Onserio, the Learned State Counsel opposed the appeal and submitted that the appellant was convicted on sound evidence which included findings of recent possession and actual possession of the items stolen from the houses of the complainants on the appellant.

This is a first appeal. That being the position, the appellant is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination and of course an independent decision on the same bearing in mind that this court did not see and hear the witnesses testify. (See **Okeno – v – Republic [1972] Ea 32** and **Mwangi – v – Republic [2000] 2 KLR 28**). In summary the prosecution case was that on various dates, the complainants' houses were broken into and various items stolen from therein. PW 1, Philemon Hamisi, was then informed by a neighbour that the appellant had been seen entering his house. He mounted a hunt for the appellant. On 16<sup>th</sup> May 2006, he met the appellant near the house of Kyengo Kakumi (PW 3) wearing a long trouser belonging to Peter Pondo (PW 2). He duly informed PW 2 of that fact. The two then pursued the appellant without success. In due course, they were joined by Paul Mathenge Kimani (PW 4) in the hunt. They entered a house from where the appellant had escaped and recovered a radio cassette player. They were informed that the appellant was residing with the 3<sup>rd</sup> accused and her son the 2<sup>nd</sup> accused. They visited the house and recovered another radio cassette player which Paul Mathenge identified as his. Also recovered were two bed sheets and a pair of trousers which Peter Pondo identified. The 3<sup>rd</sup> accused informed them that she had been informed that the items had been taken to her house by the appellant and the 2<sup>nd</sup> accused. The search party went to Kisumu Ndogo and found the appellant outside the house of one Suleiman but he escaped arrest. A search at the house of Suleiman yielded a VCD machine which Paul Mathenge identified as his and plates which Philemon Hamisi (PW 1) identified as his. In the course of investigation, PW 5, James Ndigila was found with a radio make Rising which he had been given as security by the appellant. The radio was identified by Peter Pondo as his. The appellant and his co-accused were arrested and charged with the offences stated at the beginning of this judgment.

The appellant as already stated gave an unsworn statement. He testified that he traveled to Voi on 10<sup>th</sup> March 2006 and remained there upto 10<sup>th</sup> May 2006. While there, he bought a pair of long trousers and when he returned to Taveta, he quarreled with Philemon Hamisi, PW 1. He then testified regarding his arrest and denied committing the offences in the charge sheet.

The Learned Senior Resident Magistrate found the prosecution witnesses credible and their testimony consistent. With respect to the first count, the Learned Magistrate found that a radio cassette player, make Naiwa, stolen from the house of Kyengo Kakumi (PW 3) was found in the house the appellant had visited. On that basis, he found that the appellant was in constructive possession of the radio cassette player and was one of the thugs who broke into PW 3's house and stole from therein the items given in the first count which included the radio cassette player.

With respect to the second count, the Learned Senior Resident Magistrate, found that a radio cassette player and a VCD machine stolen from PW 4, Paul Mathenge were respectively found in a house where the appellant was residing and in Suleiman's house where the appellant had escaped from. Since the recovery was made within two weeks of the breaking-in, the Learned Senior Resident Magistrate concluded that the appellant was in the party which broke into the house of PW 4 and stole the items stated in count two.

With regard to count three, the Learned Magistrate found that the items stated therein namely, plates and cups were found in the house where the appellant had escaped from. The Learned Magistrate found that the appellant was in constructive possession of those items and was therefore the one who broke into PW 1's house and stole the items.

With respect to the 4<sup>th</sup> count, the Learned Senior Resident Magistrate found that the items stolen from the complainant (PW 2), in that count i.e., a radio make Rising, two bed sheets and two pairs of long trousers were, after a week of the breaking in recovered as follows: A long trouser was recovered on the person of the appellant. Two bed sheets and another long trouser were found from the house where the appellant was residing and the radio, make Rising, was recovered from PW 5, James Ndigila who testified that it had been given to him as security by the appellant. The Learned Senior Resident Magistrate found that the evidence implicated the appellant in the breaking in and stealing from PW 2's house.

On my own independent re-evaluation of the evidence on record, I am satisfied that the appellant was convicted on sound evidence. Kyengo Kakumi, PW 3 was the complainant in count 1. He testified that indeed his house had been broken into on 29<sup>th</sup> March 2006 and the items stated in the charge sheet stolen. He clearly identified the radio cassette player Naiwa which was produced in court. The radio was recovered from a house the Learned trial Magistrate found had been used by the appellant. He accepted the testimony given before him that the radio cassette player had been taken to the house by the appellant.

The complainant in count two was Paul Mathenge. He testified as PW 4. He confirmed that indeed his house was broken into on 5<sup>th</sup> May 2006 and items stated in count two stolen from therein. In the house owned by the 3<sup>rd</sup> accused and where the appellant also resided, PW 4's radio cassette player was found and so were two bed sheets and a pair of dark long trousers. PW 4, testified that the items had been taken to the house by the appellant according to the 3<sup>rd</sup> accused. In another house at Kisumu Ndogo belonging to one Suleiman PW 4 recovered his VCD machine which he identified in court. The appellant was also found at the house and when he saw the search party he escaped.

The evidence on count three was given by Philemon Hamisi, PW 1. He testified that indeed his house was broken into on 8<sup>th</sup> May 2006 and the property stated in count three stolen. PW 1 received information that the appellant had been seen entering his house. He mounted a hunt for the appellant which led to Kisumu Ndogo where they found the appellant who escaped arrest. In the house where he had been, PW 1 recovered cups and plates which he identified as his. Those items were produced in court. PW 4 also corroborated that evidence.

The complainant in count four was Peter Pondo Owiti. He testified before the Senior Resident magistrate as PW 2. He told the court that his house had indeed been broken into on 9<sup>th</sup> May 2006 and the items in count four stolen. At the house of the 3<sup>rd</sup> accused, PW 4 recovered a long trouser and two bed sheets. The 3<sup>rd</sup> accused stated that the items had been taken to the house by her son, the 3<sup>rd</sup> accused, and the appellant. PW 4 later at the police station saw the appellant wearing his long trouser which he identified.

The Learned Senior Resident Magistrate made findings of fact regarding the identification of the stolen items and concluded that the complainants positively identified those items stolen from their houses. Those findings clearly implicated the appellant in the commission of the offences he was charged with. With respect, after my re-evaluation and reconsideration of the evidence, I have come to the conclusion that the findings of the Learned Senior Resident Magistrate cannot be faulted. There is no basis for interfering with those findings.

From the foregoing, I find and hold that the appellant's conviction was based on credible and sound evidence.

With regard to the sentences imposed by the Learned Senior Resident Magistrate, I find that the same were neither harsh nor excessive in the circumstances. I therefore find no merit in this appeal and order that the same be and is hereby dismissed in its entirety.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF JUNE 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

The Appellant and Mr. Onserio for the Republic.

**F. AZANGALALA**

**JUDGE**

**9<sup>TH</sup> JUNE 2009**