REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 114 of 2005

ISAAC MUTUNGA …….....……. APPELLANT

VERSUS

REPUBLIC ……... RESPONDENT

(Being an appeal against the whole judgment of the Resident Magistrate at Machakos, Mr S.M Mwendwa dated 15/11/2005 in Criminal Case No. 450 of 2005)

JUDGMENT OF THE COURT

1. The appellant ISAAC MUTUNGA was arraigned before the Resident Magistrate's Court at Machakos on a charge of house breaking contrary to section 304 (1) of the Penal Code. It was alleged that he committed the offence on 7/09/2005 at the dwelling house of EUNICE KATUMI MBEVI.

2. The facts of the case are that on 7/09/2005 at about 7.00 a.m, the complainant herein left for work and locked her house before leaving. When she returned to the house at about 3.00 p.m, she found the appellant whom she did not know, and one ESTHER KAVATA, the complainant's neighbour. That the appellant had been found in the house by ESTHER KAVATA despite the fact that the complainant had locked her house before leaving for work at 7.00 a.m. On finding that the appellant had broken into her house, the complainant with the help of ESTHER KAVATA escorted the appellant to Athi-River Police Station where he was arrested and subsequently charged.

3. The appellant denied the charge. The prosecution called 3 witnesses. The appellant gave an unsworn testimony but called no witnesses.

4. PW1 was EUNICE KATUMI MBEVO who stated that on 7/09/2005, she locked her house and left for work at about 7.00 a.m. That when she came back from work at about 3.00 p.m, she was informed by EUNICE KAVATA NGUU (PW 2) that she (PW2) had found the appellant inside the complainant's house. That the appellant who was found in the company of PW2 at the plot where the complainant stayed introduced himself to the complainant as ISAAC MUTUNGA from Sultan Hamud. PW1 stated that after receiving the information from PW2, she and PW2 escorted the appellant to Athi-River Police Station where the police arrested him and later charged him with the present offence.

5. PW2 was EUNICE KAVATA NGUU an employee of EPZ Athi-River. She stated that on 7/09/2005, at about 3.00 p.m, when she returned from fetching water, she saw the appellant emerging from PW1's house. That the appellant was in the company of another man. PW2 stated that on asking the appellant to lock PW1's house, he (appellant) took a padlock from his pocket and locked the house. She also stated that though the appellant attempted to run away, PW2 persuaded him to wait for PW1.

That later when PW1 came home, both PW1 and PW2 took the appellant into PW1's house and gave him drinking water. That on being questioned by PW1, the appellant told the two that he had been brought to PW1's house by PW1's cousin, but that appellant could not give the name of PW1's alleged cousin. PW2 said that together with PW1 they escorted the appellant to Athi-River Police Station where he was arrested and subsequently charged.

6. During cross-examination, PW2 stated that though she did not see the appellant breaking into PW1's house, she found him inside PW1's house and that he later locked PW1's house with a padlock that he brought out of his own pocket; a padlock PW2 described as PW1's padlock.

7. PW3 was Number 54797, Police Sergeant JOHNSTONE MAKOA. He stated that on 7/09/2005, while he was on duty at the crime office at Athi-River Police Station, at around 6.00 p.m, the appellant was escorted to the station by members of the public on allegations of house breaking. PW3 stated that after recording statements from witnesses, he charged the appellant with the offence of house breaking.

8. The appellant gave an unsworn testimony in which he stated that he lived in an estate neighbouring that of PW1 at Athi-River. That after he had left his house he met his friend Kioko and together they went and drank four bottles of beer before going back to his house at Slaughter Estate. He also said that at the request of Kioko, allegedly a cousin to PW1, they went to PW1's house which house Kioko opened before the two of them entered inside. That Kioko then left him inside PW1's house as he allegedly went to buy some cigarettes but that Kioko never returned until the time when PW2 and PW1 found him. The appellant said that both PW1 and PW2 refused to accept his explanation of how he had come to be found in PW1's house and he was then escorted to Athi-River Police Station where he was charged.

9. In his judgment, the learned trial magistrate found that the appellant had admitted being found in PW1's house as testified to by both PW1 and PW2. He thus found the appellant guilty as charged, convicted him and sentenced him to three (3) years' imprisonment.

10. The appellant appealed against both conviction and sentence vide the Petition of Appeal filed in court on 29/11/2005. The six (6) grounds of appeal are that:-

i. **THAT** the Learned Magistrate erred in Law and in fact by convicting and sentencing the appellant for the offence of house breaking contrary to section 304 (1) of the Penal Court when there was no evidence that the complainant's house had been broken into.

ii. **THAT** the learned magistrate erred in Law and in fact by convicting and sentencing appellant which was against the weight of the evidence adduced in court.

iii. **THAT** the Learned Magistrate erred in Law and in fact by finding that the prosecution established its case against the appellant beyond any reasonable doubt as required in law which was against the weight of the evidence on record.

iv. **THAT** the Learned Magistrate erred in Law and in fact by holding/finding that the appellant admitted in his defence that he broke into the complainant's house by way of opening the padlock.

v. **THAT** the Learned Magistrate erred in Law and in fact by holding that the appellant wanted to commit the felony in the complainant's house but was caught unawares by PW2. (sic)

vi. **THAT** the Learned Magistrate erred in Law and in fact by excessively sentencing the appellant considering that he was a first offender and by failing to give the appellant the option of payment of fine.

11. At the hearing of the appeal, Mr Wang'ondu, learned state counsel conceded the appeal on the ground that there was no evidence by the prosecution that the appellant broke into PW1's house as envisaged under section 304 (1) of the Penal Code and that instead, the appellant ought to have been

charged with entering a dwelling house with intention to steal as provided under section 305 (1) of the Penal Code. Mr Wang'ondu submitted that the evidence that was on record showed that PW2 saw the appellant coming from inside PW1's house and going to the toilet. Mr Wang'ondu submitted further that since the appellant was unknown to PW1, then he (appellant) had ulterior motives for entering PW1's house which PW1 had left securely locked when she went to work at 7.00 a.m.

12. While conceding the appeal, Mr Wang'ondu asked for a retrial for the reasons that (a) there was ample evidence as demonstrated by both PW1 and PW2; (b) the charge against the appellant is a serious one and particularly prevalent in the Athi-river area; (c) no prejudice would be suffered by the appellant if an order for retrial were made.

13. As expected, Miss F. Katunga who appeared for the appellant vehemently opposed the prosecution's plea for a retrial on the ground that since the appellant had almost completed his sentence, it would be prejudicial to send him back to the lower court for retrial.

14. It is my duty as the appellate court of first instance to reconsider and evaluate the whole evidence on record with a view to reaching my own conclusions in the matter. (See OKENO versus REPUBLIC (1972) EA 32. Unfortunately, none of the counsels provided the court with any authorities on the issues raised by them during their submissions.

15. I have reconsidered the whole of the evidence and evaluated it afresh and have established the following facts: (a) that PW1 left her house securely locked when she went to work at about 7.00 a.m; (b) that between 2.00 p.m and 3.00 p.m, the appellant, a total stranger to both PW1 and PW2 was seen emerging from PW1's house and (c) that the appellant had in his pocket the padlock to PW1's house which on request by PW2, the appellant locked PW1's house with. The only issue I have to decide now is whether I should allow the appeal, dismiss it or order for a retrial.

16. Upon reaching the entire record, I am persuaded that the prosecution proved the offence of entering a dwelling house with intent to commit a felony therefrom. It is clear that the appellant was not known to either PW1 or PW2 and if it is true that Kioko, his friend is the one who took him to PW1's house, why did he not call Kioko as his witness? I am satisfied that the appellant's evidence did not displace the prosecution's case against him.

17. Accordingly, and pursuant to the provisions of section 179 (2) of the Criminal Procedure Code, I do quash the conviction on the charge of house breaking and substitute therewith a conviction of the offence of entering a dwelling house contrary to section 305 (1) of the Penal code. Regarding sentence, of three (3) years' imprisonment, I see no reason to interfere with the same.

18. In the result, and except as to the offence, the whole of the appeal fails and the same is dismissed.

19. Orders accordingly.

Dated and delivered at Machakos this 8th day of February, 2008.

R.N. SITATI

JUDGE