



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 134 of 2007

HAFIDH MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Hafidh Mohammed, was convicted by the Mombasa Resident Magistrate – B. Mararo of the offence of Burglary contrary to Section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code and sentenced to 3 years imprisonment on the first limb and 2 years imprisonment on the second limb and both sentences were to run concurrently. He has now appealed to this court against the conviction and the sentences.

The complainant Shamsa Bukani (PW1) left her house in Kisauni at 10.00 a.m. on 24th December 2006 to attend a wedding. She returned the next day in the morning to find a lock cut and a window broken and the following items missing from her house: Samsonite travelling bag, a diamond watch, Gold plated Seiko 5, Gold chain, gold rings, building plans, bracelets and Kshs. 20,000.00. Her mother (PW 2) told her that she saw the appellant taking her box and she observed footmarks on the wall. She said she knew the appellant's foot prints. On receiving the report she reported to Nyali Police Station where she was given 3 police officers who accompanied her to her house. The appellant was subsequently arrested by a vigilante group. In her testimony she said that her house had no roof and the appellant had entered it at 4.00 a.m.

The complainant's mother, Zuhura Moth, (PW2) testified that on 25th December 2006 at 4.00 a.m., when she was asleep with her grandchildren, the appellant opened the door. She then heard someone in the house and went to the toilet. She then saw the appellant take a suit case from the complainant's house. She did not talk to the appellant who passed through the roof.

PW3, PC Johnson Wekesa of Nyali Police Station testified that on 25th December 2006, at 11.00 a.m. the complainant reported at the station that whilst she was away at a wedding, her house was broken into and the following items stolen from therein: jewellery, cash 20,000.00, a watch and a traveling bag all valued at Kshs. 150,000.00. He then together with PC Musyoka, accompanied the complainant to the latter's house where she pointed out how access to the house had been obtained and how the complainant's mother had seen the appellant.

The appellant gave sworn evidence at the trial. He denied committing the offence and set up an alibi. He testified that on 24th December 2006 he went to the public beach until 10.00 p.m. and later at 11.00 p.m. in the company of his wife (DW2) went to Lotus where they stayed until 3.00 a.m. when they went home. Three days later he was arrested and taken to Nyali Police Station.

The appellant's wife Uthum Abdulkarim testified that on 24th December 2006, the appellant went for lunch and they went out at 11.00 p.m. They then went to Lotus until 4.00 a.m. The appellant also called one Robin Mayata Mawasi (DW3) who was on duty at Lotus Hotel. He testified that he received the appellant and his wife as his customer at midnight. The couple had meals and as it was Christmas Eve they left at 5.00 a.m. for their residence.

The Learned Resident Magistrate convicted the appellant on the basis that PW2, the complainant's mother knew him and positively identified him. He therefore dismissed the alibi set up by the appellant. The appellant has challenged the conviction and sentence on 5 grounds as follows:-

- 1) That the Learned Magistrate erred in Law in convicting the appellant on the basis of shaky evidence.
- 2) That the Learned Magistrate erred in Law in attempting to shift the burden of proof on the appellant.
- 3) That the Learned Magistrate erred in Law in his evaluation of the evidence and coming to a wrong conclusion.
- 4) That the Learned Magistrate erred in Law in dismissing the evidence of the appellant and his witnesses.
- 5) That the sentences of three years and two years for the two limbs of the charge were manifestly excessive.

Counsel for the appellant argued the grounds of appeal together. His main target of attack against the Learned Magistrate's judgment was his treatment of the entire evidence and the apparent contradiction in the conclusions made by the Learned Magistrate.

Learned State Counsel did not support the conviction on the grounds that the Learned Magistrate appeared to shift the burden of proof on to the appellant and appeared to believe and at the same time disbelieve the defence put up by the appellant. Learned State Counsel further submitted that the charge was duplex and therefore defective. He also submitted that there were discrepancies in the prosecution case which should have created doubt in the mind of the Learned Resident Magistrate.

This is a first appeal and this court is mandated to re evaluate the evidence adduced before the trial court as if it were the court of first instance and reach its own conclusion as to whether the appellant was properly convicted.

The evidence of PW2 upon which the Resident Magistrate relied in convicting the appellant cannot be said to be water-light regarding identification. She testified that while she was asleep on 25/12/2006 at 4.00 a.m. the appellant came and opened the door. She added that she heard someone in the house. She then went to the toilet and saw the appellant take a suit case from the complainant's house. She did not talk to him and the appellant passed through the roof. Although the appellant did not cross examine her, her testimony even without the cross examination was not safe to found a conviction. She did not say how she was able to identify the appellant at that late hour. The evidence is further not clear whether the appellant opened the door to her house or that of the complainant and further why the appellant who had gained entry through the door exited through the roof which (roof) according to the testimony of the complainant did not exist. The Learned Resident Magistrate does not seem to have addressed those discrepancies in the evidence of PW 2 contending rather casually that the appellant was positively identified by PW2 who had stated that the appellant had made it a habit of breaking into the

complainant's house.

Equally significant is the Learned Magistrate's finding that the prosecution had not challenged the evidence of the appellant and surprisingly finding at the same time that the appellant had not provided evidence to verify his allegations. Those findings are unfortunate because they show that the Learned Resident Magistrate did not have the right rule in mind with respect to the Burden of Proof. They are also clear testimony that the Learned Resident Magistrate did not evaluate the evidence before him. I say so because the appellant called his wife (DW2) and an employee from Lotus Hotel (DW3) who corroborated the defence of alibi set up by the appellant. He himself found that the appellant's said witnesses gave evidence that the appellant was at Lotus Hotel at the time of the alleged break in.

It is settled that an accused who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden (See **Kiarie – v – Republic [1984] KLR 739**). The Learned Magistrate in the case below in finding that the appellant did not provide any evidence to verify his allegations was demanding more from the appellant than the law allows.

Having evaluated the evidence adduced before the Learned Resident Magistrate and further having analysed his judgment, I find and hold that the Resident Magistrate's finding on identification was not free from error. I also find and hold that his finding on the alibi put forward by the appellant was erroneous in law. Without those findings the Learned Resident Magistrate would not have convicted the appellant.

For the reasons given above, I allow the appeal, quash the conviction and set aside the sentences. The appellant shall be released forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF MAY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Ondari for the Respondent and the Appellant.

F. AZANGALALA

JUDGE

19TH MAY 2008