**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NYERI**

**Criminal Appeal 37 of 2006**

**WILSON KANGERI……………….………APPELLANT**

***VERSUS***

**REPUBLIC ……………………….………RESPONDENT**

***(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at Karatina in Criminal Case No.389 of 2005 by P.C. TOROREY – SRM)***

# J U D G M E N T

The appellant together with one, **Peter Muchiri Muriithi**, were jointly charged with the offence of House Breaking and Stealing contrary to *Section 306 (a)* and *Section 279 (b)* of the Penal Code. There was an alternative charge of handling stolen property against **Peter Muchiri Muriithi** alone. They pleaded not guilty to the charges and were tried. At the conclusion of the trial, they were convicted and sentenced to 3 years imprisonment each in respect of the first count. The leaned magistrate correctly made no findings in respect of the alternative count.

The brief facts of the case are that on the 19th March, 2005 the complainant **Purity Gathoni Karingithi** (PW1) secured her house at about 10.00 a.m. and left the keys in the kitchen which she did not lock. She came back at about 11.30 a.m. only to find the key was not where she had left it. The door to the main house she had locked was open. On entering the main house she discovered her video deck missing together with her mobile phone. She immediately informed her neighbours and went to the police station where she made a report. On the 20/3/05 she learnt from one **Denis Karingithi Kinyua** (PW2) that he had seen the appellant walk from the her gate carrying a paper bag at about 10.00 a.m. She passed over this information to the police. The 1st appellant was then arrested. Later the complainant received a telephone call from Gatundu police station informing her that her items were at the station. She proceeded to the police station and positively identified the video deck and mobile phone. Apparently the said items had been brought to the said police station by one **Mr. Patrick Mbugua** (PW3). He stated that it was the appellant's co-accused aforesaid who had taken the same to him for safe keeping. The appellant's co-accused was eventually arrested and arraigned in court jointly with the appellant.

The appellant in his sworn statement of defence told the court that on the material date he was out working in the shamba with his brother **Ephantus Wachira Wangari** (DW3) from 8.00 a.m. to 1.00 p.m. His said brother in his testimony confirmed the appellant's allegation.

**Mr. Kamwenji**, learned counsel then retained by the appellant submitted that PW2, the alleged eye witness was not a credible witness. He had claimed that he allegedly seen the appellant carrying the green paper bag on 16/3/05 as opposed to 19/3/05 when the offence was committed. He also invited the court to find that as PW2 had admitted to loitering on the streets of Karatina, his evidence should be

treated with abundant caution. He also asked the court to find that Geoffrey who allegedly told PW2 of the house breaking was not called as a witness. On the other hand the prosecution urged the court to find they had proved their case beyond all reasonable doubts. The learned Magistrate after careful consideration of the evidence as a whole came to the conclusion that the prosecution was right in preferring the charge against the appellant and co-accused. Accordingly she convicted them and sentenced them as aforesaid.

It would appear that it was only the appellant who was aggrieved by the conviction and sentence. Hence he preferred the instant appeal. There is no evidence that his co-accused lodged an appeal against the said conviction and sentence.

Through **Messrs M.C. Kamwenji & Co. Advocates**, the appellant faults his conviction broadly on the rounds that the evidence tendered did not support the charge, there was no proper investigation of the case, lack of collaboration, credibility of PW2 as a witness and finally that the evidence tendered was insufficient to find a conviction.

At the hearing of the appeal, **Mr. Kimani** learned counsel retained by the appellant for purposes of this appeal submitted that the appellant was convicted because he was implicated by the co-accused. That though PW2 claimed to have seen the appellant coming from the direction of the complainant's house carrying a polythine bag, there was no evidence as to what was contained in the bag. Counsel further submitted that PW2 had indicated in his testimony that he had seen the appellant on 16th March, 2005 and not on 19th March, 2005. This was a fatal contradiction as on 16th March, 2005, the offence had not yet been committed. Further counsel submitted that PW2 was a 16 years old. The learned Magistrate did not address her mind to the fact that he was a minor whose evidence required corroboration.

As for the state, **Ms Ngalyuka,** learned state counsel submitted that contradictions as to the dates in the evidence of PW2 were not major. PW2 being aged 16 years was not a minor whose evidence required corroboration. Counsel concluded by submitting that the evidence of PW2 coupled with that of PW3 and 4 was sufficient to find a conviction.

This is a first appeal and that being so, the appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have this court's own decision on the evidence. **See Okeno V Republic (1972) EA.32 and Mwangi V Republic (2004) 2 KLR 28.**

During the trial of the appellant in the subordinate court, the prosecution called a total of five witnesses. However of critical importance to this appeal is the evidence of PW2, PW4 and PW5. PW1 secured her house on 19th March, 2005 at about 10.00 a.m. as she went to collect milk. When she came back an hour later, she found the door to her house open and on entering found a video deck and her mobile phone missing. According to PW2, he had seen the appellant coming from the direction of the complainant's house around about the time, the complainant claimed to have left her house having secured it. He had a green paper bag with some item(s) inside. Later in the day he met one Godfrey who sells in a butchery who told him that the complaint's house had been broken into. He then informed one, **Wachira,** the son of the complainant that he had seen the appellant carrying a paper bag from the house of the complainant. **Wachira** gave the information to his mother, the complainant who later passed it to the police and the appellant was accordingly arrested. It would appear from the foregoing that the appellant was arrested on mere suspicion. As it has been constantly held, a suspicion alone cannot lead to a conviction. It remains just that, suspicion. PW2 did see what ever was contained in the paper bag that the appellant had in possession. It may have contained the video deck. It is equally possible that it may have contained something else. Much as PW2 tried to create the impression that the paper bag contained something in a shape of a box, no evidence was led as to the shape of the video deck. In any event there are several other items with a similar shape. Yes the appellant may have been seen emerging from the direction of the complaint's house. However, I do not think that much should be read into that aspect of the matter. After all he was an employee of the complainant according to the testimony of PW2. On the material day he was picking tea leaves on the complainant's farm. Accordingly there was nothing wrong or suspicious for him to be seen emerging from the direction of the complainant's home. Further according to the evidence of PW2, after he encountered the appellant, the appellant went over to talk to another person by

the name **Karingithi.** That **Karingithi** asked the appellant whether he had found the woman, presumably the complainant at home. The response that the appellant gave was to the effect that he had found her but she had not seen him. If this be the case then, it is not possible to say categorically that the appellant stole the video deck as well as the complainant's mobile phone. According to the complainant, the items were stolen from her house when she briefly left the same. However, according to PW2, it would appear that at the time he encountered the appellant, the complainant was still in her homestead. It is possible therefore that whoever broke into the complainant's house could have been somebody else and not necessarily the appellant. Counsel for the appellant submitted that since PW2 was aged 16 years old, he was a minor whose evidence required corroboration. Nothing can be further from the truth. It is only the evidence of a child of tender years that requires such corroboration. At the age of 16 years PW2 was not a child of tender years as we understand it in law.

How about the evidence of PW4? He was a police officer at the time, attached to Giakaibei police patrol base. He is the one who received a note from Gatundu police station notifying him that the complainant's stolen items aforesaid had been recovered and he was requested to arrest, **Peter Muchiri**, the appellant's co-accused who had taken the said items to PW3. The co-accused was arrested and upon interrogation volunteered information that he got the items from the appellant. This evidence to my mind was inadmissible as it was in the nature of a confession. The confession could not have been taken by the said witness. The law is clear as to who should receive a confession from a suspect. PW4 is certainly not among those authorized under the law to receive a confession. Further the learned Magistrate should have been slow and cautious in acting on this evidence. After all it was evidence from an accomplice. Evidence of an accomplice implicating another accomplice is of the weakest kind and unless there is other cogent corroborative evidence, the court should be extremely cautious when dealing with such evidence. In the circumstances of this case there was no other strong evidence implicating the appellant in the crime.

From the evidence, it is apparent that when the co-accused implicated the appellant in the crime, PW4 went to the appellant's home and informed him that the co-accused had implicated him in the crime. The appellant told the police officer that he would present himself to the police station and PW4 left. Sure enough, the appellant later presented himself to the police station. Is this the conduct of a person who has committed a crime? I have my own doubts. One would imagine that if indeed the appellant had been involved in the crime, and had been fingered, he will take the earliest opportunity to disappear from the neighbourhood. He could not wait to be arrested and or voluntarily present himself to the police station. I think the appellant's conduct is consistent with his innocence.

Finally, I will tackle the evidence of PW5. He is a sergeant in the police force. On 20th march, 2005 at about 6.45 p.m. he was at Karatina police station when the complainant made a report regarding the theft. The complainant gave out the names of the suspects and this witness was able to arrest them. The appellant was among them. His house was searched but nothing was recovered. Two days later he released the suspects on police bond. He continued with the investigations. In the course of the investigations information filtered through from Gatundu police station with regard to the recovery of the complainant's stolen items. The appellant's co-accused was implicated. He was re-arrested and in the course of interrogation implicated the appellant. Whatever I have said with regard to confessions in connection with the evidence of PW4 applies with equal force to the evidence of PW5. The appellant having been arrested and released on a police bond on suspicion of having participated in a criminal offence, I doubt that he would not have engaged in a disappearing act as soon as he regained his freedom. The conduct of the appellant once again is consistent with his innocence.

For all the foregoing reasons, I am of the firm opinion that this appeal has merit. Accordingly, it is allowed, the conviction is quashed and the sentence imposed set aside. The appellant shall be set at liberty forthwith unless held for some other lawful cause.

***Dated and delivered at Nyeri this 29th day of September, 2008.***

**M.S.A MAKHANDIA**

**JUDGE**