

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 135 of 2007

LAWRENCE MURUGU..... APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(Being an appeal from the conviction and sentence of

S.N. Mbungi Senior Resident Magistrate in Senior Resident Magistrate's

Criminal Case No. 44B of 2007 at Kangema)

JUDGMENT

The appellant was charged with house breaking on count one contrary to section 304 (1) of the penal code. In the second limb of that count he was charged with stealing contrary to section 279(b) of the penal code. The particulars of those offences are that, "*Lawrence Murugu Mbutia on the 11th day of March 2007 at Kagumwini village in Murang'a district within central province broke and entered the dwelling of Philip Mbutia Murugu with intent to steal therein and did steal cash Kshs.2000 the property of the said Philip Mbutia Murugu.*" In the second count he was charged with house breaking contrary to section 304(1) and stealing contrary to section 279(b) of the penal code. In respect of those counts the particulars were that he broke into the house of Philip Mbutia Murugu within intent to steal and did steal a Nokia phone 3310 the property of Esther Nyakeru Mbutia. The alternative charge was handling stolen goods contrary to section 322(2) of the penal code. That charge related to the Nokia phone. The lower court convicted the appellant on count one and two. He was sentenced to four years imprisonment on each limb of the two counts. That sentence was to run concurrently. The appellant has preferred this appeal against that conviction and sentence. This is the first appeal. In deciding this appeal we are guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

*"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see *Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570*)."*

PW 1 the father of the appellant stated that on 11th march 2007 he had gone to church. When he returned home at 7p.m. his wife inquired whether he had taken Kshs.2000 which he had given to her. He responded that he had not taken the money. His daughter Esther Nyakeru also said that her mobile phone was missing. They suspected the appellant. On the following he was informed that the phone had been seen with the appellant. His daughter PW 2 had seen the phone at the place where they charged telephone. On Thursday of that week that is on 15th March 2007 he saw the appellant touting. He reported to the police post who in turn arrested the appellant. They recovered from the appellant Kshs.300/- in notes of one hundred shillings. The police also recovered the mobile phone from the

appellant. On 11th march 2007 when they had gone to church they had left the appellant in his house which he described as being a bit far from their house. On being cross examined he denied that his daughter had sold the phone to the appellant. PW 2 Esther Nyakeru said that on 11th march 2007 she and her parents had gone to church. They had not left anyone in the house. The house was locked. On their return they found her Nokia mobile phone missing. She had earlier on left it on the table. Her father PW 1 also had lost Kshs.2000/-. Later she was informed that the appellant had taken the mobile phone to shop where they normally charge mobile phones. On the appellant being arrested he was found in possession of a mobile phone which bore her initials. On being cross examined this witness said that, “*I do not know how the accused gained access to the house.*” Further she denied having sold the mobile phone to the appellant. She confirmed in cross examination and in re-examination that the appellant had differences with their father PW 1. PW 3 was a police officer to whom the report was made of the house breaking in. This witness stated, “*Entry must have been gained by use of a duplicate key.*” He confirmed that the complainants reported the theft of mobile phone and Kshs.2000/-. He was the officer who arrested the appellant and recovered Kshs.300 in denomination of one note of 200 and one note of 100. In re-examination this witness stated, “*The padlock locking the door of the house was opened using a duplicate key.*” The appellant was put to his defence at the end of the prosecution’s case. He stated in his defence that on the material date PW 2 called him and told him that he was selling her mobile phone. She informed him that she intended to return to her place of residence. On checking the phone he gave an offer to her which she accepted of Kshs.2000/-. The following day he went to Kiriaini market to look for casual jobs. It was at that point he was arrested. He said that it did seem that it was the plan of his sister to sell to him the mobile phone so that he could be jailed. He gave the reason for that suspicion that it was because he had refused to divorce his wife. I have chosen to consider all the grounds of appeal together. In respect of count one as the particulars show the money stolen from the house of PW 1 was said to belong to PW 1. In evidence PW 1 stated that he had given the money to his wife. I am in agreement with the submissions of the appellant’s counsel that the offence of theft in regard to that count was not proved in view of the fact that the money was not in PW 1’s possession or control. It was in possession and control of his wife. His wife was not called as a witness in this case. The lower court in convicting the appellant on count 1 relied on hearsay evidence. In PW 1’s he stated that it was his wife who told him that her money was missing. The prosecution was under obligation to call the wife even if her evidence would have been adverse to the prosecution’s case. A case in point is *Bukenya & others vs Uganda [1972] E.A 549*, it was held inter alia:-

“(ii) *The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.*

(iii) *The court has a right, and duty to call witnesses whose evidence appears essential to the just decision of the case.*

(iv) *Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.....”*

The money recovered from the appellant bears no relevance to the alleged theft since it could not categorically be proved to be part of the money that was stolen. The appellant in submissions was of the view that he should have been charged under section 305 of the penal code which relates to entering into a dwelling house rather than being charged as he was in count I and II under section 304 of the penal code relating to house breaking. The prosecution’s evidence was not clear on how the appellant was supposed to have gained access to a closed house. Prosecution’s evidence was that the appellant could have had a duplicate key since the door was locked. PW 1 and 2 did not however say that the appellant had a duplicate key. Indeed PW 2 said that she was unaware how the appellant gained access to the house. It was the arresting officer who stated that the appellant gained access by means of a duplicate key. That not having been corroborated by PW 1 and 2 is of no probative value to the prosecution’s case. The prosecution failed to adduce evidence on whether there existed a duplicate key. Going back to the submissions by the appellant I am of the view that the appellant was correctly charged under section 304 of the penal code because breaking in envisaged under that section does not necessarily require that a door be broken. It suffices if entry is gained through a duplicate key. The evidence of PW 2 need to be received in my view in the background that there was some bad blood in the family between PW 1 and

the appellant. PW confirmed that their relationship was strained. The question that comes to mind is whether it was because of that bad blood that the wife of PW 1 was not called. Is it possible that she could have exposed the differences between the two as the basis of the charges the appellant faced? The theft the subject of the charges hereof were said to have occurred on 11th march 2007. Both complainants did not report the thefts to the police until 15th march 2007. The question again is why the complainants waited for four days to report to the police that they had suffered theft in their home. The appellant attributed this case to his refusal to divorce his wife. Although he did not elaborate there is the possibility that since there was that strained relationship that PW 1 in collusion with PW 2 could have arranged for the arrest of the appellant on trumped up charges with a view to punishing him because of that relationship. On the whole having considered the lower court's case I find that I entertain doubt in respect of the charges the appellant faced. Although the learned state counsel in submission stated that PW 1 was not cross examined in respect of that relationship with appellant considering the evidence as a whole I find that the doubt that I entertain ought to be considered in favour of the appellant. Accordingly the appellant's appeal does succeed and the lower court's conviction is hereby quashed and its sentence is hereby set aside. I do order that the appellant be released unless otherwise lawfully held.

Dated and delivered at Nyeri this 28th day of October 2008.

MARY KASANGO

JUDGE