REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 101 OF 2006

BETWEEN

HARRISON KIARIE WANDERI.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Principal Magistrate Mrs. M.W. Murage dated 13th September, 2004 in Criminal Case No. 1857 of 2003 at the Kikuyu Law Courts)

JUDGEMENT

The appellant was charged with the offence of house-breaking contrary to s.304(1) and stealing contrary to s.279(b) of the Penal Code (Cap.63). He was charged with the alternative count of handling stolen property contrary to s.322(2) of the Penal Code.

The prosecution case was that the complainant, ***Mary Muthoni Njoroge*** (PW1) had left the appellant, a cousin of her husband, in her house with her own children on *23rd December, 2004* at 9.00 a.m. When she returned at 3.00 p.m., her son told her that the appellant had stolen Kshs.10,300/= from the house (which she had left open), as well as a jacket, a pair of trousers and a shirt; and that after taking these items away the appellant had returned to the complainant's home.

The record of evidence reveals an error. The material date is shown on the charge sheet as *23rd December, 2003,* and it is on that date the complainant says her things were stolen. But then the complainant shows an earlier date, *18th December, 2003,* as the date when she effected the arrest of the appellant, in connection with the theft. She says she recovered the clothes, which the appellant was wearing, on *18th December, 2003.*

The confusion of dates is further compounded, when PW2, ***Harrison Kiarie Kamau*** indicates the date of the theft which is the subject of the charge, as *23rd December, 2003;* and he states that the appellant was arrested on *28th December, 2003*. PW3, ***Gladwell W. Wanderi*** too says that the theft the subject of the charge took place on *23rd December, 2003.* PW4, ***John Gakino*** who is a Police officer, says that the said theft took place on *23rd December, 2004*, and that the appellant was taken to the Police Station on 28th December, 2004 with some of the stolen items.

It is clear that there is such a mix-up in the dates relating to the offence, as given in the several testimonies, as to render the trial process an irregular one. Such a mix-up of dates and vital information may be taken as a demonstration that *the trial process was not focussed upon the proof of a specific, named offence committed by the appellant.* Such confusion of information would amount to unsuccessful proof, quite apart from *denying the appellant a chance to mount a proper defence,* in exercise of his constitutional rights to a fair trial (Section 77(2) (b) of the Constitution).

The apparent inconsistency between witness testimony and the particulars in the charge sheet, would also show the *charge sheet* itself to have been *defective,* and yet it was not amended before the conclusion of the case. A trial which proceeds on the basis of such a defective charge sheet is a *nullity,* because it does not provide the right conditions for the fulfilment of the appellant's rights to fair trial (s. 77 of the Constitution). Yet the learned Magistrate sentenced the appellant to *seven years'* imprisonment in respect of the first limb of the main charge; and *another seven years'* imprisonment in respect of the second limb of the main charge – the two sentences to run concurrently.

Learned State Counsel ***Ms. Gateru*** graciously conceded to this appeal. She submitted that the evidence as set out in the proceedings, did not show proof-beyond-reasonable-doubt. There had been no witness to the theft of the complainant's items by the appellant; and the only evidence used to implicate him in theft was that he had been found wearing some of the clothes claimed to have been stolen. The inference of theft, in the prevailing circumstances, was by no means compelling, as the appellant had been left in the house of a relative (PW1) and with the relative's children, in a house the door to which was left unlocked. It was also not possible in these circumstances to see how the appellant could have committed house-breaking.

So on the merits of testimony, there was no proof-beyond-reasonable-doubt, and I am in agreement with learned State Counsel. But more critical is the fact that the proceedings show the course of trial to have been i*rregular,* and in negation of the appellant's *constitutional rights to fair trial.*

On these considerations, I hereby allow the appeal, and quash and set aside the trial Court's judgement, with its conviction and sentence. The appellant shall forthwith be set at liberty, unless he is otherwise lawfully held.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 16th day of July, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Ndung'u

For the Respondent: Ms. Gateru

Appellant in person