

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 300 of 2004

FRANCIS MWAI NDWIGA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeal against the conviction and sentence of A. Lorot. Murigi, Resident Magistrate, in the Resident Magistrate's Criminal Case No. 1313 of 2003 at Gichugu)

JUDGMENT

The Appellant was convicted of shop breaking contrary to *Section 306* of the Penal Code. He was also convicted for unlawful assault contrary to *Section 451* of the Penal Code. The Appellant was aggrieved by that conviction and has preferred this appeal. The evidence presented before the lower court by P.W. 3 was that on the 26th October 2003 at 2.00 a.m., he was arriving home from Kerugoya. It was raining heavily. He found a person by the road near the home of his brother. This person had goods in a sack. He also saw a sewing machine and a pump spray. He inquired from this person why he was moving the goods at night. The person responded that the goods had been kept for him by his wife's brother. P.W. 3 left him alone and began to go home. He said "***I took a torch and proceeded to my brother's house***". He explained to his brother that he had met a man carrying a sack near his home. They decided to follow the man. As they went they found the sewing machine and the pump spray. They however did not see that man where these goods were. He further stated that he knew that the man would not be able to get far because the sack was heavy. After one kilometre they saw him. He was surprised to see them and he dropped the sack and began to fight them. They too began to fight him and also called neighbours. P.W.3 left his brother at the scene and went to call his sister in law, the Complainant. He said that she identified the items being carried by the man. The man was taken to the Police Station.

P.W. 4 David Wachira Njeru reiterated the evidence of P.W.3 on how he was called by P.W.3 and how he had been informed that someone had broken into the premises. His evidence was that they both went to the shop where he sells items like flour, sugar and cooking fat. He confirmed that they saw the sewing machine and the pump spray. He noticed that the lock had been broken and the padlock was not there. The shop is normally run by Lucy Kinyua. He confirmed that they trailed the man and found him a kilometre away. He flashed the torch at the man who ran away leaving behind the sack. As this witness ran towards him the man pulled out a knife. P.W. 4 as well as P.W. 3 identified that man as the Appellant who was in the dock. The evidence of P.W.2 the Complainant was that she was called by her husband's brother whom she named as Wachira who told her that her shop, which was facing the road but attached to the house had been broken into. She went to the shop and found that the padlock was not there. She also confirmed that all the items in the shop had been taken. She approximated the value of the goods at Ksh.15,000/=. She confirmed that a sewing machine and a pump spray were found at the gate. The two brothers left to pursue the man and twenty minutes later one of them came back and told her that they had arrested the thief. She went to the scene with her brother and recognized the Appellant as a person known to her. He used to sell cakes to her. The items that were recovered from the thief were produced but it is pertinent to note that the prosecution did not lead evidence for the complainant to identify the items that were exhibited before court as being her property. These were the items that were recovered from the Appellant. The Appellant on being found to have a case to answer stated that on the material date he met Wachira at Kingunye town. He owed him money and when he asked him to pay Wachira referred him to his wife. Later on in the evening he went to a place where he used to sell his cakes and Wachira pulled him down and he became unconscious. His evidence was that it was around 9.30 p.m. when this occurred. He however denied that he had stolen the Complainant's goods, denied being found in her

compound and denied being arrested as narrated by the prosecution witnesses. The prosecution witnesses had given evidence that the Appellant was wearing shorts when he was arrested. In his defence the Appellant stated that he was wearing an underwear, shorts and trousers on top. He further stated that there was a grudge between him and Wachira because of a girl he married. The lower Court in its judgment found that the prosecution had proved its case beyond reasonable doubt in respect of the charge of shop breaking. The Appellant was also convicted on the charge of assault. In respect of the 1st count the Appellant was imprisoned for six years. In respect of the second count the Appellant was imprisoned for one year. The sentences were to run concurrently. The Appellant brought before court the following grounds of appeal.

“1. I pleaded not guilty to the charge.

2. That the learned trial magistrate erred in law and fact by concluding and convicting me in absence of investing officer who could have visited the scene of crime to establish the truth of the alleged breaking.

3. That the trial court erred in law by failing to take into consideration the testimony of P.W.1 who admittedly didn't identify the person he found at the gate late in the night before he went to alert other members of the family.

4. That the trial court erred in law by failing to realize that my assailants allegedly arrested me 2 Kms in their search from the scene of crime a fact that does not connect me with the said offence.

5. That the trial court erred in law by believing the testimonies of the prosecution witnesses who were members of the same family who claimed to have raised the alarm in which neighbours neither any member of the public responded a fact which clearly shows this was an afterthought.

6. That the trial court erred in law by dismissing my defence which was not shaken by the prosecution side.

7. That the sentence meted against me was manifestly harsh and excessive considering the mitigating factors and all other circumstances surrounding this case.

I have considered the evidence adduced by the prosecution as I am required to as the first appellant court. I find that there is no evidence against the Appellant of shop breaking. As stated before the items that the Complainant produced as exhibit before Court, the prosecution failed to lead her to identify the same as being her property. It is clear that the items that were produced as exhibits were probably items that ordinarily would be found in a shop with no unique identification but what the Court finds is that the prosecution did not get the witness to state that the goods were hers. The Court therefore finds that the prosecution did not prove its case beyond reasonable doubt in respect of count one and which also would go towards the alternative count of handling stolen goods. The Appellant's appeal therefore would succeed in respect of his conviction on count one.

In respect of count two of assault causing actual bodily harm contrary to *Section 251* of the Penal Code, the Court finds that the prosecution did prove its case on the required standard. The evidence of P.W. 3 and P.W.4 clearly show that the Appellant attacked P.W.4 with a knife. P.W.1 the doctor gave evidence of his treatment of P.W.4 of an injury that was eight hours old. In the opinion of the doctor the injury was caused by a sharp object. In his opinion the injury was harm. The Court therefore is of the view that the Appellant's appeal on the second count does fail. The prosecution did prove its case beyond a reasonable doubt. Accordingly the conviction and sentence on count one of six years is set aside. The Appellant, however, will serve the sentence on count two, that is one year.

Dated and delivered at Nyeri this 28th day of September 2007.

MARY KASANGO

JUDGE