



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 57 of 2005

JESSE KIMANI NJIRU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case No. 613 of 2004 of the Principal Magistrate's Court Kikuyu - M.W. Murage PM)

JUDGMENT

JESSE KIMANI NJIRU, the appellant, was charged before the subordinate court with a first count offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code. The particulars of the offence were that on 2nd April 2004 at Kikuyu Township in Kiambu District within Central Province, broke and entered a building namely a bar and stole therein 600 packets of cigarettes, 30 CDs, assorted spirits, cash Kshs.8,000/= all valued at Kshs.15000/= the property of MERCY WAIRIMU WAMBUI. He was also charged with a second count of breaking a building and committing a felony contrary to section 306(a) of the Penal Code.

The particulars of the offence were that on 18th April 2004 at Kikuyu township in Kiambu District within Central Province, broke and entered a building namely a boutique **and stole from therein cash** Kshs. 10,000, a Sony VCD player, 10 jeans trousers, two ladies suits, 5 DVD movies and 5 ladies tops all valued at Kshs.33,000/= the property of ERIC NYAMBANE. After a full hearing, he was convicted on both counts. After receiving a Probation Officer's report, the learned magistrate sentenced the appellant to serve 4 years imprisonment on count 1 and 5 years imprisonment on count 2. Being aggrieved by the decision of the trial magistrate, the appellant appealed to this court against both the conviction and sentence. Before his appeal was heard, the appellant was granted on bail pending appeal.

The appellant, in addition to his grounds of appeal, filed written submissions. At the hearing of the appeal, he relied on his written submissions.

Learned State Counsel, Mrs. Kagiri opposed the appeal. Counsel submitted that though there is no direct evidence, the complainant PW1 suspected the appellant as the culprit because the appellant used to work for her in the pub and, after the commission of the offence, the appellant disappeared for two weeks. Counsel contended that the appellant later called PW1 phone and apologized and even refunded the complainant (PW1) Kshs.2500. Counsel contended that the evidence of PW1 was consistent with that of PW2 whose premises were also broken into, two weeks thereafter. Counsel contended that the conduct of the appellant irresistibly connected him to the breaking. Counsel contended that the appellant did not challenge the evidence that he made a proposal to repay the money to PW1. In fact, in his defence, he stated that he had repaid Kshs.5000/.

On the sentence, counsel submitted that the appellant should have been treated as a first offender. The sentences should not have been consecutive. In counsel's view the sentence of 9 years imprisonment was harsh.

I have considered the evidence on record. The appellant was convicted on the evidence of two witnesses PW1 MERCY WAIRIMU WAMBUI and PW2 ERIC NYAMBENE who were the complainants in count 1 and count 2 respectively. This case was a case of circumstantial evidence. The burden of proof is always on the prosecution to prove the case against an accused person beyond reasonable doubt.

IN MUCHENE –vs- REPUBLIC [2002] 1 KLR 367, Chunga CJ, Tunoi & Owuor JJA, held –

“1. It is trite law that where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant but also that there exists no co-existing circumstances which would weaken or destroy such inference.

2. It is settled law that the burden of proving facts which justify the drawing of such inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on prosecution and always remains as such.”

The two witnesses PW1 and PW2 stated in evidence that they suspected the appellant. The appellant was not found with any of the stolen items. Nobody saw him at the vicinity of any of the two premises of the alleged offences on any of the days when the offences were committed. He was merely alleged to have disappeared for some two weeks after the commission of the first offence, and to have promised to repay the money or some of it to PW1 and PW2. In convicting the appellant, the learned trial magistrate stated –

“Although nothing was recovered from the accused, his conduct after the offence was committed, raises a lot of suspicion.”

With due respect to the learned trial magistrate the above was a misdirection. A conviction in a criminal case can only be based on proof by evidence beyond any reasonable doubt. A conviction on mere suspicion on mere suspicion is not sustainable. This position was clearly stated in SAWE –vs- REPUBLIC [2003] KLR 364, where the Court of Appeal held, inter alia –

“7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt”

Having reviewed the evidence on record, I am of the humble view that the conviction was based on suspicion. The evidence on record is evidence of mere suspicion and cannot be a basis for sustaining a conviction in a criminal case. I will therefore have to allow the appeal, quash the conviction and set aside the sentence.

Consequently, I allow the appeal, I quash the convicting and set aside the sentence of the subordinate court. If the appellant, is in custody, he should be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 29th day of October 2007.

George Dulu

Judge

In the presence of –

Appellant in person

Mrs. Kagiri for State - absent

Eric - court clerk