REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Criminal Appeal 987 of 2006

HILLARY KIBIEGO MWOROR :::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC ::: RESPONDENT

J U D G M E N T

HILLARY KIBIEGO MWOROR is the appellant herein. His said appeal arises from his conviction for the charges of housebreaking and stealing contrary to sections 304 (1) and 279 (b) of the Penal Code. The appeal is also against the sentences meted out against the appellant.

The grounds of appeal were set out by the appellant in the following words;

"***1. That; I did not plead guilty on trial to he alleged offence.***

2. That, I did not commit the alleged offence.

3. That; I am an orphan, my parents passed away long time ago, thus am under my grandfather whom I depend on and is often sick.

4. That; the court did not look into the fact that there were some contradicting statements between PW1, PWIV and PWV about the amount in question that is alleged I stole. The complainant claims that the amount was Ksh. 43,000/=; PWIV the arresting officer claims that the amount he arrested me with was Ksh. 10,000/=. PWV, the investigating officer claims a different figure from the above mentioned amount.

5. That; I am a student schooling at Talau Secondary School, and hoping for a better future after my studies.

6. ***That; I appeal to your honourable court to consider my appeal and set me at liberty."***

During the hearing of the appeal, the appellant basically restated the grounds of appeal as set out above.

In answer to the appeal, the learned state counsel, Mr. Makura, asked the court to dismiss it, as the evidence adduced by the prosecution was overwhelming. He also put into perspective the various sums cited by the appellant, and explained why, in his view, there were no inconsistencies. And, as regards the sentences, the learned state counsel submitted that the same were indeed lenient. The court was thus asked to dismiss the appeal.

In determining the appeal, I will re-evaluate all the evidence on record and draw therefrom my own conclusions. By so doing, I will be discharging my obligation as a first appellate court. However, I do also acknowledge the fact that this court did not have the advantage of seeing or hearing the witnesses as they testified. Therefore, in instances wherein the learned trial magistrate may have made observations on the conduct of any witness, I would have no factual basis for faulting such an observation.

PW1, MARGARET CHELANGAT MAINA, was the complainant. On 16/8/2004 she left her home, at Kaibos, at about 7.00 a.m. Inside a locked drawer, the complainant had a sum of Ksh. 64,000/=. The said locked drawer was inside PW1's house, which she locked.

When PW1 returned home at about 7.00 p.m., she found her house open. Inside the house she found clothes and bedding scattered all over the floor. PW1 also found the cupboard broken into, and the Ksh. 64,000/= stolen. She therefore reported the incident to the police, whom she told that the appellant was a suspect.

PW1 explained that she was suspecting the appellant because on previous occasions, the appellant had stolen other goods, such as tractor parts, one sack of beans and Ksh. 50,000/= cash.

Following the complainant's report, the police arrested the appellant.

PW1 also said that when she interrogated the appellant, he admitted having taken the money, amounting to Ksh. 64,000/=.

Out of the said sum, PW1 said that Ksh. 10,000/= was recovered from the appellant, whilst a further sum of Ksh. 33,000/= was recovered from PW2, who was said to be a girlfriend to the appellant.

PW2, EMILY CHEBET ANDIEMA, said that she had been arrested on 17/8/2004, in relation to some allegations over a mobile phone. According to PW2, she was at the Administration Police camp, where the appellant was placed in the same cell as the witness.

It is in those circumstances that the appellant gave to PW2, the sum of Ksh. 50,000/= to keep for him. Later, when PW2 was released, she went away with the said sum of Ksh. 50,000/=.

Once PW2 had regained her freedom, she gave to Maureen Ksh. 5,000/=. PW2 also testified that she gave to PW3, (Philip Powen), Ksh. 6,000/=. Thereafter, PW2 consumed some money by drinking some beers together with her friend Maureen.

Later, PW2 surrendered Ksh. 33,000/= to the police.

During cross-examination, PW2 said to the appellant that he had given to her the sum of Ksh. 50,000/= which the appellant removed from his socks.

PW3, PHILIP POWEN, was a student at Tilak Primary School. Although he was almost 18 years old, PW3 was in class 8 as he was a mature entrant into school.

On 17/8/2004, PW3 saw PW2 and her other friends drinking a lot of beer. PW3 also said that PW2 gave him a total of Ksh. 6,000/=. Out of that sum, he was to buy beer for PW2 and her friends, using Ksh. 3,000/=. However, he was free to keep the remaining Ksh. 3,000/=.

PW4, EVANS MATHENGE WAMBUGU, was an Administration Police officer. He testified that on 16/8/2004, PW1 lodged a report, that the appellant had stolen Ksh. 64,000/= from her. PW4 booked the complainant's report in the O.B.

Later, PW4 recovered Ksh. 10,064/= from the appellant. The said recovery was also recorded in the O.B.

PW5, PC DANIEL LIMO, testified that on 18/7/2004 he was on duty at Makutano Police Post. He

recalled that whilst he was there, the appellant and another suspect were taken to the police post by two Administration police officers. PW5 also said that the suspects were handed over to him, together with Ksh. 10,064/=.

Later that evening, PW5 escorted the appellant and the other suspect to the Kapenguria Police station.

When PW5 carried out investigations, the appellant admitted having given some money to PW2. In the light of that information, PW5 went to Mawingo Road where the police arrested PW2 and recovered Ksh. 33,000/= from her.

During cross-examination, PW5 said that the appellant had admitted to the police that the money recovered from PW2 was not the appellant's.

After the prosecution closed its case and the appellant was put on his defence, he told the learned trial magistrate that the sum of Ksh. 43,000/= which was recovered from him was his school fees. The said money had allegedly been withdrawn by the appellant's grandfather.

Then, in his closing submissions the appellant said that because PW2 had told the court that she had received money from him, that implied that the said money belonged to the appellant. The appellant insisted that the money which had been recovered should not be released to the complainant because it was his own money.

In my considered opinion, there is a definite admission by the appellant that he had Ksh. 43,000/=. That therefore is the starting point, in the determination of this appeal.

The next, and only, issue for determination is whether the said sum belonged to the appellant or if it was part of the money which had been stolen from PW1. I say that that is the only issue for determination because even though the appellant was convicted on two charges, there was no doubt at all that the complainant's house was broken into, and so also the cupboard from which the money was stolen.

If I should find that the money did not belong to the appellant, I would be entitled to invoke the doctrine of recent possession to conclude that the appellant was the person who had broken into PW1's house, and stolen the money therefrom. That doctrine would be invoked not only in relation to the sum of Ksh. 10,064/= which was recovered from the appellant personally, but also in relation to the sum of Ksh. 33,000/= which the appellant concedes having given to PW2.

Indeed, the doctrine could also legitimately be extended to the entire sum of Ksh. 50,000/= which PW2 received from the appellant, on the day after the money was stolen from PW1.

But first, the question that must be tackled is whether the money belonged to PW1 or to the appellant.

In deciding this question I do caution myself that I should not be influenced at all, by the complainant's assertions about the appellant's previous alleged acts of pilfering. I also remind myself that the appellant was not under any obligation to prove his defence. Therefore, his failure to provide a letter or a proforma to prove the amount of fees that was payable, or the school to which it was to be paid, should not be the basis for dismissing the appellant's defence.

At all times, it remained the obligation of the prosecution to prove beyond any reasonable doubt that the appellant was guilty as charged.

The facts presented to the court were that PW1 had locked up Ksh. 64,000/= inside a drawer, in a cupboard. PW1 then locked the house, before staying out for the rest of the day.

When she returned home, PW1 found the house open. She also found clothes and bedding strewn all over the floor. Clearly therefore, the house had been broken into. However, the question is; who is it that broke into the house; was it the appellant?

In his defence, the appellant laid claim to Ksh. 43,000/=, as being his fees. However, it is also in evidence that that is not the only amount which the appellant had. I say so because, whereas he had Ksh. 10,064/= on him, the appellant had also given a further sum of Ksh. 50,000/= to PW2. Those two sums already add up to over Ksh. 60,000/=.

As the sums add up to almost the said sum which had just been stolen from the complainant, I hold and do find that the money so recovered was part of the money stolen from PW1.

Once the money was recovered from the appellant and PW2 (who had received Ksh. 50,000/= from the appellant), that circumstantial evidence was sufficient to link the appellant to the breaking into and the theft of money from the complainant’s house.

In that context, the explanation offered by the appellant, in an endeavour to justify his claim of ownership to the money, is woefully inadequate. I therefore share the view expressed by the learned trial magistrate, to the effect that the appellant’s defence was not true.

Incidentally, the appellant had testified that when he was searched the police recovered Ksh. 43,000/=. That was not possible as only Ksh. 10,064/= was recovered from the appellant, whilst Ksh. 33,000/= was recovered from PW2.

As regards the alleged discrepancies over the amounts of money in issue, I found none. I say so because the total sum stolen from PW1 was Ksh. 64,000/=. Out of that sum PW2 was given Ksh. 50,000/=. However, by the time the police caught up with her, PW2 only had a balance of Ksh. 33,000/=.

Meanwhile, out of the sum which the appellant had retained, amounting to Ksh. 14,000/=, he had utilized about Ksh. 4,000/=, leaving a balance of Ksh. 10,064/=.

In the result, I find that the evidence adduced by the prosecution was overwhelming. I also find that the sentences meted out against the appellant were neither harsh nor excessive. Accordingly, I sustain both conviction and sentences. The appeal is therefore dismissed.

Dated and Delivered at Kitale, this 24th day of October, 2007.

FRED A. OCHIENG.

JUDGE.