REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 347 of 2004

NJOMO NJOGU MUSAU……...…….……..APPELLANT

Versus

REPUBLIC……..RESPONDENT

(Being appeal against the conviction and sentence by A. Lorot, Resident Magistrate, in the Resident Magistrate's Criminal Case No. 1455 of 2004 at Gichugu)

JUDGMENT

The Appellant Njomo Njogu Musau was charged with breaking into a boutique contrary to *Section 306(a)* of the Penal Code. He was convicted and sentenced to six years imprisonment. He has appealed against conviction and sentence. P.W.1 stated in evidence that on 15th July 2004 on reaching her boutique she found that it had been broken into and several items stolen and the only thing that was left at the boutique were some pillows. She reported the matter to the police. As a result of a lead given to the police, P.W.1 in the company of police officers went to the Appellant's homestead. There she saw clothes that were hanging on the line which she identified as clothes that were in her boutique. She also saw the wife of the Appellant wearing a lesso which also was from the boutique. The witness described other items of clothing that she was able to identify as items from her boutique. A box was also retrieved and she was able to identify and proceeded to open the padlock with a key she had. Later a tailor approached her carrying some nylon paper and he gave her items of clothing that had been given to him by the Appellant's wife to adjust the size which item she was also able to identify as belonging to her. She was also able to go with the officers to the Appellant's girl friend's home where they were able to recover other items of property. P.W.2 is an assistant chief who confirmed that he received a tip about people selling boutique clothes and he confirmed that he gave that information to the Police. P.W.3 is a Police Officer and he confirmed that P.W.1 reported the breaking in of her shop and he confirmed that he received information of where the items of clothing were from the Assistant Chief. Thereafter he corroborated the evidence of P.W.1 in respect of the recovery of items of property.

The Appellant on being found with a case to answer gave an unsworn statement. He said that on 28th August 2004 he was working as a casual labourer in Embu. He had intention to visit his family and as he entered a caffe he was arrested.

The evidence against the Appellant as can be seen from the narration herein above shows that prosecution relied on circumstantial evidence. This is because the items of property stolen from the boutique were not found in possession of the Appellant. The wife of the Appellant informed P.W.1 and 2 that it was the Appellant who brought the goods to the home in the company of another person. The other goods were found at the premises of the Appellant's girl friend. Does that circumstantial evidence show that the Appellant committed the offence? It is more than coincidental that the stolen items were found in his house and his girl friend's house. The test to be applied on circumstantial evidence was stated in the case of **R -V- TAYLOR WEAVER AND DONOVAN [1928] 21 Cr. App. R. 20.** That case stated as follows:

"***Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics."***

Circumstantial evidence must be tested carefully as stated in **TEPER -V- R (1952) AC 489.** That case found as follows:

"***Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another…….. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

I have examined the prosecution's evidence and I make a finding that the prosecution did prove a case on the charge of breaking into the boutique beyond a reasonable doubt. I have tested the evidence and the clear inference is one of guilt of that charge. There are no circumstances that weaken that inference. The sentence of the Appellant is found to be in accordance with the provisions of the law. There is therefore no reason to upset that sentence. The Appellant's appeal is therefore dismissed.

Dated and delivered at Nyeri this 1st day of October 2007.

MARY KASANGO

JUDGE