REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 252 OF 2003

PETER MBURU NGUGI.....APPELLANT

VERSUS

REPUBLIC…….....……..…RESPONDENT

(Being an appeal from the judgment of J.N. Nyaga, Senior Resident Magistrate, dated 17th July 2003, in the Senior Resident Magistrate's Court at Karatina, criminal case No. 322 of 2003.)

JUDGMENT

The Appellant was charged with stealing from the person contrary to section 279 (a) of the Penal Code, particulars alleging that on the 1st day of May 2003 at Karatina Township in Nyeri District, Central province, the Appellant jointly with another person not before court stole Ksh. 600/= the property of Catherine Wangechi Nyokabi.

The Appellant was convicted and was sentenced to serve one year imprisonment. He appealed stating that the trial Magistrate failed to enter a proper plea of guilty adding that the Magistrate, misdirected himself, relied on inconsistent evidence which was not also corroborated and that the magistrate failed to see that the prosecution has not proved its case against the Appellant beyond reasonable doubt and further that the Magistrate failed to properly consider the Appellant defence which included an alibi which had not been disproved by the prosecution.

On the 1st December 2005 when I heard this appeal, the Appellant must have finished serving the sentence of one year imprisonment imposed upon him but it was apparent from the record that he did not care about the existence of this appeal which he could have prosecuted even after being released from jail for the purpose of cleaning his name if indeed he had not committed the alleged offence. The appeal case file shows that after on 24th October 2005, this appeal was fixed for hearing on 1st December 2005, the Appellant, on 9th November 2005 collected a copy of proceedings which could have enabled him prepare for the hearing on 1st December 2005. As such he could have been aware of the hearing date. But he never appeared on the hearing date. I therefore heard the appeal in his absence, the learned Provincial State Counsel, Mr. Orinda submitting, during the hearing, that he supported the conviction of the Appellant because Appellant arrested on the spot. He added that the sentence was not harsh.

I have considered what the learned state counsel said in the light of the Appellant's grounds of appeal with reference to the evidence on record. I will be brief.

First, the complainant Catherine Wangechi (pw1) who alleged stealing did not clarify when and how she discovered the alleged theft. Otherwise what she stated if true, would tend to reveal robbery rather than stealing. The money appears to have been taken from her while she was seeing it taken. I use the word "appear" because of lack of clarity and that was a decease which was left untreated throughout the prosecution's evidence.

Secondly, therefore, how far was John Muthee (pw2) when the alleged theft was taking place on pw1 ? No effort was made to clarify that. But pw1 talks as if pw2 was not seeing what was happening and only came to know about it after the thieves had run away and pw1 was seeking assistance calling upon Gichimu to help. But pw2 in his evidence talks as if he was seeing everything around pw1 at the minute of the alleged theft and goes on to claim he is the one who called Gichimu.

Thirdly, the said Gichimu did not give evidence yet was said to have been a person who worked where the incident took the place. No other person was called as a civilian witness apart from pw1 and pw2 who appear to have been wife and husband, pw1 saying the Appellant was found and arrested outside Karibu Bar while pw2 says the Appellant was arrested while inside that bar.

Fourthly, it is apparent the evidence of pw2 included what he merely heard from pw1 but pw2 presented that part of the evidence in court as if he himself saw it so that real corroboration of the evidence of pw1, with regard to what she alleged the Appellant did to her, was lacking. That situation is made worse when it is realised that in his evidence pw2 told the court he was testifying in respect of stealing which took place on 11th May 2003 at 11.30 am and the prosecution did nothing to reconcile that part of the evidence with the charge and the evidence of pw1 which alleged that the stealing complained of took place on 1st day of may 2003.

Fifthly, there are a good number of inconsistencies in the prosecution evidence.

Sixthly, although the Appellant was arrested within a short period from the time of the alleged offence, the money shs 600/= claimed stolen was not recovered from him and it is surprising that pw1 and pw2 who were assisted by other people to arrest the Appellant never bothered to immediately search him to recover the money before taking the Appellant to Karatina police station and this conduct on the part of pw1 and pw2 would tend to support the Appellant defence that this case arose out of a grudge emanating from a previous dispute between pw1 and the Appellant over a watch. Pw1 and probably pw2 therefore knew the Appellant before the alleged stealing of 1st May 2003 yet pw1 and pw2 went on telling the court they had not known the Appellant before that day. That is a sign of untruthfulness on the part of pw1 and pw2 which makes their total evidence suspect with regard to truthfulness. Otherwise what evidence of identification was there from pw1 and pw2 concerning the Appellant which made it so easy for pw2 to pick out the Appellant from the multitude of people in Karatina Town that day for pw1 to arrive a few minutes later at Karibu (Karibuni) bar to confirm pw2 had apprehended the right person.

In those circumstances, I must agree with the Appellant that the prosecution did not succeed in proving this case against the Appellant beyond reasonable doubt and the Appellant ought not to have been convicted. Accordingly, I do hereby allow the Appellant appeal. Quash his conviction and set aside the sentence although already served.

Dated this 23rd day of February 2006.

J. M. KHAMONI

JUDGE