



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Criminal Appeal 571 of 2003**

**PAUL THUMBI NGUYO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, Paul Thumbi Nguyo, was charged with two others (*one of whom was acquitted*) with the offence of **house breaking and stealing contrary to Section 304 (1) and Section 279 (6) of the Penal Code**. The particulars of the offence were that on the 29<sup>th</sup> of June 2003 at Mairo-inya Trading Centre in Nyandarua District, the appellant jointly with others broke into and entered the house of Susan Wambui Ndungu with intent to steal therein and did steal one wall clock make Ajanta Quartz, a serving dish, 23 pieces of table clothes and a pair of shoes, the property of the said Susan Wambui Ndungu valued at Kshs 5,350/=. The appellant pleaded not guilty to the charge and after a full trial he was convicted and sentenced to serve five years imprisonment on each of the limb of the charge. Being aggrieved by his conviction and sentence, the appellant appealed to this court.

In his petition of appeal the appellant raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had relied on circumstantial evidence to convict him whereas the said evidence did not point to him as the only person who could have broken into and stolen the complainant's properties. He was further aggrieved that the trial magistrate had relied on the evidence of PW2, which evidence, according to the appellant was highly questionable and was not credible. He was further aggrieved that the trial magistrate had convicted him whereas the arresting officer had not testified as to the circumstances of his arrest. He also prayed this court to consider the reviewing the sentence which was meted out on him which according to him was harsh and excessive in the circumstances. At the hearing of the appeal, the appellant submitted that the prosecution had adduced false evidence against him. He urged the court to allow his appeal. On his part, Mr Koech Learned Counsel for the State, submitted that the State had adduced overwhelming evidence which proved the charge of house breaking and theft against the appellant. He urged the court to uphold the conviction and the sentence imposed on the appellant. I will consider the arguments made on this appeal after briefly setting out the facts of this case.

On the 29<sup>th</sup> of June 2003, PW1 Susan Wambui Ndungu left her home at Mairo-inya at 7.00 a.m. to attend the local P.C.E.A. church. She attended church upto 5.00 p.m. When she came back to her house she discovered that it had been broken into and several items stolen. Among the items which were stolen were two bowls, 23 table cloths, a wall clock and several spoons. On the following day i.e. the 30<sup>th</sup> of June 2003 she went and reported the matter to Mairo- inya police post. On the 1<sup>st</sup> of July 2003 she was informed by the police that certain items had been recovered. She was asked to go to the police post to identify them. When she went to the police post she was able to identify one serving spoon, one wall clock and 23 table clothes. She testified that she was able to identify the table clothes by the flower patterns that were similar with two pieces of the table cloths that were left behind by the thieves. She told the court that she did not know who had broken into and stolen her properties. She knew the appellant as a neighbour.

PW2 Gilbert Munene, a police officer then based at Ruiru CID Base was at Nyahururu when he was informed that his cousin's hotel at Mairo-inya had been broken into by thieves. He decided to go to Mairo-inya and investigate the matter. Being a Sunday, he first went to the church at Mairo-inya. On the way to the church, he told the court that he saw the appellant carrying a paper bag on top of which was a wall clock. PW2 testified that he saw the appellant walk past the church and go into the nearby bush.

Later when PW2 went to Mairo-inya police post he was informed of the theft of PW1's properties. PW2 knowing that the appellant had earlier been involved in burglaries, informed the police at Mairo-inya to go and search the house of the appellant. They did not find anything in the said house. At that time it appears that the appellant was already arrested by the police and was at the Mairo-inya police post cells. PW2 went to the cells, interrogated the appellant and from the information received was able to arrest the appellant's co-accused in the trial magistrate's court. He was able to recover the serving dish, 23 pieces of table cloth and a wall clock from the appellant's co-accused. PW3 Sgt. Fredrick Peter Igeki investigated the case and after concluding the investigations charged the appellant with the offences which he was convicted. PW3 testified that he knew the appellant because he had arrested him prior thereto for various offences related to theft of property.

After the close of the prosecution's case, the appellant was put on his defence. In his unsworn evidence he testified that he was at Mairo-inya Trading Centre on the 29<sup>th</sup> of June 2003 where he drunk beer with his friends upto late in the evening. While at the bar drinking beer, the police from Mairo-inya police post came and arrested him at took him to the police post where he was detained. He slept at the police cells. On the following day, he was surprised to be told that he was a suspect in a breaking in and theft case. He testified that PW2 and PW3 were police officers whom he knew and who had a grudge with him. He testified that the charges against him were fabricated.

This being a first appeal this court is mandated to reconsider and re-evaluate the evidence adduced by the witnesses before the trial magistrate so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither nor heard the witnesses as they testified and therefore cannot be expected to make any finding as to the demeanour of witnesses. (*See Njoroge –vs- Republic 1987 KLR 19*). The issue for determination by this court is whether the prosecution proved its case against the appellant to the required standard of proof beyond reasonable doubt. I have considered the submissions made by the appellant and the response made thereto by the State. I have also re-evaluated the evidence adduced before the trial magistrate.

Two pieces of evidence convinced the trial magistrate to convict the appellant. The first piece of evidence was that of PW2 who testified that he had seen the appellant carrying a paper bag in the morning of the 29<sup>th</sup> of June 2003 a top of which was a wall clock. PW2 testified that he saw the appellant pass by the church and enter into a bush while he was carrying the said paper bag. When he was later informed that household items had been stolen from the house of PW1, he recalled the incident earlier in the day. PW2 was known to the appellant. He told the court that he knew the appellant to be a habitual offender especially as he had earlier been arrested having been involved in burglaries. PW2 in company of other police officers searched the house of the appellant but did not find anything that would have incriminated the appellant. The second piece of evidence that connected the appellant to the break in and theft is that of the appellant's co-accused in the trial magistrate's court Teresia Muthoni Mathenge and Maria Wangui Wanjau in their unsworn evidence, implicated the appellant in the theft of PW1's properties.

The issue that this court is to consider is whether this evidence is sufficient to convict the appellant for the offences which he was charged. There was no direct evidence connecting the appellant to the break in and theft from the house of the complainant (PW1). The evidence that the prosecution adduced is that of the recovery of the stolen items from the appellant's co-accused. The two co-accused of the appellant told the court in their unsworn evidence in their defence that the recovered items being one serving dish, 23 pieces of table cloth and a wall clock were sold to them by the appellant. The appellant did not have an opportunity to cross-examine his two co-accused to test the veracity of their evidence.

It is trite law that accomplice evidence is the worst form of evidence in which a trial court can convict an accused person. The credibility of such evidence should always be tested before a court can convict an accused person. In *Matheka –versus- Republic [1983]KLR 351* at page 352, Todd J. held that:

***“Evidence given by a co-accused person against another should only really be considered if it is believed and if it is corroborated in a material particular by independent evidence pointing to the guilt of the accused and if it also implicates the person giving the evidence of the crime .....”***

The evidence of the accomplices was not corroborated. In the circumstances of this case, the two pieces of evidence raises doubt as to whether or not the appellant actually broke into the complainant's house and stole therefrom. Matters were not helped by the fact that PW2 and PW3 appear to have been biased against the appellant from the word go because of his previous reputation as having been involved in burglaries.

I agree with the appellant when he testified in his defence and stated that he was arrested on the day that the complainant stated that her house was broken into and her properties stolen. She did not make the report to the police until the following day. Therefore at the time of the appellant's arrest the crime had not been reported. The police could not have predicted that the appellant had committed a crime and arrested him before even the crime had been reported! The submission by the appellant that the police fabricated this case against him is not therefore far fetched, as it may seem at the first sight. There is doubt raised by the appellant as to the circumstances which he came to be charged with the present offence when in the first place he was arrested for an unrelated and undisclosed offence.

The upshot of the above is that the prosecution failed to prove its case to the required standard of proof beyond reasonable doubt. The doubts raised by the facts of this case will by necessity be resolved in favour of the appellant. I will allow the appeal. His conviction is quashed. The sentence imposed is set aside. He is set at liberty and ordered released from prison unless otherwise lawfully held.

It is so ordered.

**DATED at NAKURU this 3<sup>rd</sup> day of February 2006.**

L. KIMARU

JUDGE