REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO
Criminal Appeal 115 of 2003

(From Original Conviction and Sentence in Criminal Case No. 1102 of 2002 of the Principal Magistrate's Court at Bomet – G.M.A. ONG'ONDO - R.M)

ERICK KIBE CHERUIYOT …………...………. APPELLANT

VERSUS

REPUBLIC …………………...…………………RESPONDENT

JUDGMENT

The appellant, Erick Kibet Cheruiyot was charged before the Resident Magistrate, Bomet with the offence of **house breaking contrary to Section 304(1)** and **stealing contrary to Section 279(b) of the Penal Code.**

The particulars of the charge are that;

On the 16th day of December 2002 at Kamureito village in Bomet District of the Rift Valley Province, broke and entered into a dwelling house of Geoffrey Koskei with intent to steal therein and did steal from therein one radio valued at Kshs.1,000/-, the property of Geoffrey Koskei. The appellant pleaded not guilty and after a full trial, the appellant was convicted of the offence and sentenced to serve two (2) years imprisonment.

The appellant being dissatisfied with the above conviction and sentence has appealed to this court and raised the following grounds of appeal: -

1. That the learned trial Magistrate erred in both fact and law in relying on the prosecution's circumstantial evidence that was insufficient in both quality and quantity to warrant the conviction and sentence of the appellant.

2. That the learned trial Magistrate erred in both fact and in law when convicting the appellant for two (2) counts when the charge sheet before the court disclosed one count.

3. That the learned trial Magistrate erred in that he failed to take into account the fact that the appellant was a first offence and the facts given by the appellant in mitigation when sentencing the appellant.

4. That the learned trial Magistrate erred in both fact and in law in not finding that the charge sheet was fatally defective.

The evidence that led to the conviction and sentence of the appellant may be summarized briefly as

follows: -

Geoffrey Kibiegon Koskei (PW 1) went to his house at Chebole on 16th December 2002 at about 2.00 p.m. He received a report that the appellant had gone to his house looking for him. He found the radio missing and reported the incidence at the A.P camp at Kamureito. A search for the appellant was started he being a suspected. He was found and led PW 1 with the arresting officer, Jackson Okoth, PW 2 and Richard Kiplangat Koske, PW 3 to his house where the complainant's radio was recovered under the bed. The appellant was then taken to Bomet police station and was charged with the offence stated above.

PW 2 gave evidence of how he received a report from PW 1 and accompanied PW 1 to Kamureito market where he arrested the appellant who led them to his house where they recovered the radio.

PW 3 said that he saw the appellant on 16th December 2002 at about 2.00 p.m. going into the house of PW 1. After about 30 minutes, PW 1 came and told this witness that his house had been broken into and his radio was missing. They arrested the appellant at Kamureito market and he led this witness and others to his house where they recovered the radio under the appellant's bed.

Upon consideration of the above evidence the appellant was put on his defence. He gave a sworn statement of defence and said that the charges were tramped up charges as he and the complainant had differences over the running of a hotel. He denied having stolen the radio or the radio having been found in his possession.

The court being the first appellate court is obliged to review the evidence in order to determine whether the confession recorded upon that evidence should stand. In doing so caution should be exercised because unlike the trial court, the appellant court did not have to benefit of seeing and hearing the witness testify (*see* the case of **Kimeu Vs Republic [2002] I KLR**).

I have carefully reviewed the evidence as well as the judgment of the trial court. It is clear from the records that there was no evidence adduced before the court to support the first limb of the charge that is housing breaking contrary to **Section 304 (1).**

Although none of the witnesses gave direct evidence on this limb, there was overwhelming evidence by the three prosecution witnesses that the appellant was found in possession of the complainant's radio. This is the radio that had been stolen from the complainant's house on the same day and the court relied on the doctrine of recent possession to arrive at the conclusion that the appellant must have stolen the radio.

Although the appellant was not charged with the alternative charge of being in possession of stolen property, the fact that the stolen radio was found in his house where he led the witness and the recovery of the radio was made on the same day the complainant's house was broken into, there is no prejudice carried to the appellant who had the opportunity to cross-examine the witnesses and even offered a sworn statement of defence.

Another issue to consider which is incidentally to the above is whether the joiner of the two charges of house breaking and stealing was proper.

The charge of housebreaking and stealing was properly joined as they related or followed and formed part of the same transaction. (*See* the case of **Dusara Vs Republic [1981] KLR 141**).

I have considered the defence raised by the appellant, I am in agreement with the trial court that the same did not shake the prosecutions' case and the trial court was right in dismissing the same.

As stated above, I see no prejudice that was suffered by the appellant regarding the sentencing because the sentence of two years for each limb of the offence cases to run concurrently.

For the above reasons the appeal herein fails, the conviction and sentence is hereby confirmed.

It is so ordered.

Judgment read and signed on 12th May 2006 at Kericho.

MARTHA KOOME

JUDGE