



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Criminal Appeal 126 of 2005**

**(From Original Conviction and Sentence in Criminal Case No. 10 of 2005 of the Senior Resident Magistrate's Court at Voi E. Mwaita Esq., R.M.)**

**JOSEPH KANYETHE MURURI ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**Coram: Before Hon. Justice L. Njagi**

**Mrs. Mwangi for Republic**

**Appellant in Person**

**Court clerk - Kinyua**

**J U D G M E N T**

The appellant was charged with burglary contrary to section 304(2) and stealing contrary to section 279(b) of the Penal Code, and further with an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code. He pleaded not guilty to all the charges and after hearing was convicted of burglary and stealing. In respect of that conviction, he was sentenced to five years imprisonment for burglary and five years imprisonment for stealing, the two sentences to run consecutively. He has now appealed against that conviction and sentence.

The prosecution evidence in brief was that early on the morning of 4<sup>th</sup> August, 2004, the complainant's wife went to switch on the radio in the sitting room of their house only to find that the radio was not there. She asked the complainant whether he had taken it and he told her that he had not taken it. He then came out and checked and found that both the radio, make Sanyo, and his motorcycle were not there. The door was damaged and it was open. It was then that he went and made a report to the police.

P.W.5, No. 50978 Corporal Ezekiel Ombati, testified that on November 21, 2004 the police got information that there was somebody in whose house were electrical instruments and the residents suspected those instruments to be stolen property. Following some leads, some police officers went to the suspected house in the evening. When the suspect opened the house, P.W.5 recognised him as the appellant in this case and called him by name as he was a person he knew. When the appellant realised

that P.W.5 and the others were police officers, he tried to escape but the officers thwarted the bid to do so. Upon checking the house, the police found many things including some two big radios, sheets, seven sufurias, and two black suit cases all of which were carried to the police station after which the police started looking for the owners. During their investigations, the police found the report made by the complainant about the loss of his radio. He was called to the police station where he was able to identify the radio and the appellant was charged and convicted.

Against this conviction, the appellant raises two main points. The first one is that the complainant and P.W.4 contradicted one another when the complainant testified that the door to his house was broken and P.W.4, No. 50523 Corporal Benjamin Nyamu said that he suspected that the suspect must have used a master key to gain entry into the house. This contradiction is relevant to the conviction on the charge of burglary. The definition of housebreaking is clearly spelt out in section 303(1) of the Penal Code, Cap.63 of the Laws of Kenya. So far as is relevant to this appeal, the relevant words in that subsection are –

**“A person who breaks any part, whether external or internal of a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever any door ... is deemed to break the building.”**

Whether the appellant broke the door, as stated by the complainant P.W.1, or whether he used a master key to gain entry as stated by P.W.4, both physically breaking into the house and gaining entry by use of a key form part and parcel of the definition of breaking a building as enshrined in section 303(1) of the Penal Code. The apparent contradiction in the terminology used by the two witnesses is of no consequence and does not aid the appellant. This ground of appeal against conviction on the charge of burglary must, therefore, fail.

The second point raised by the appellant relates to conviction on the charge of stealing. There is no doubt that the complainant's radio and motorcycle were stolen in night of 3<sup>rd</sup> and 4<sup>th</sup> August, 2004. That theft was reported to the police early on 4<sup>th</sup> August, 2004. Acting on information received, the police went to the house of the appellant at 7 p.m. on November 21, 2004. The police found the accused in the house, and he was alone. Upon seeing the police officers, the appellant tried to escape, but the police thwarted the escape bid. The radio which had been reported by the complainant as having been stolen was found among the electrical instruments in that house. It was then that the accused was taken to the police station and later charged with the offence.

The appellant says that he was not in possession of the radio, and that if he was in possession, his landlord, who was said by P.W.5 to have been present, should have been called to corroborate the evidence of P.W.5. It is instructive and noteworthy that at common law, the evidence of a single witness may be relied on and requires no corroboration except in a few delineated matters, and this is not one of them. The instances in which corroboration is required include evidence in offences against females and the evidence of children. Failure to call the landlord or any other witness to corroborate the evidence of P.W.5 was, therefore, not fatal to the prosecution case as no such corroboration was necessary.

The appellant also argued that when the complainant was called to come and identify his radio at the police station, he identified one out of the many which were at the police station. He submitted that this did not show that he was with the radio or that he was the one who had stolen it. The fact of the matter is that the complainant's radio was stolen. It was traced in a house in which the appellant was. According to P.W.5, the house belonged to the appellant. The appellant has not sought to refute the fact of his ownership of the house. Since the radio was found in the possession of the appellant in his house, it was upon the appellant to offer some explanation as to how he could have been in possession of that radio without having stolen it. Instead of making any such offer, the appellant now takes the court upon a wild goose chase, alleging that he was not in possession of the radio, and that the investigating officer must have told the complainant that it was the appellant who stole the radio. There is no grain of evidence tendered by the appellant to establish such an allegation. Instead, the prosecution offered evidence which the learned trial magistrate believed to be true, and which this court also believes to be true that the radio was found in the possession of the appellant in his house. In the absence of any explanation as to how he came to be in possession of the radio, the accusing finger points at him as the person who stole the radio. It is also significant that when he opened the door and discovered that the persons who had come calling

were police officers, he attempted to escape but the officers restrained him. Why did the appellant want to run away? In my view, this can only point to a guilty conscience. The allegation by the appellant that the police had a grudge against him lacks substance as no evidence was given in an effort to demonstrate any such grudge.

For the above reasons, the appeal against conviction must fail.

After finding the appellant guilty of burglary and stealing, the learned trial magistrate sentenced him to five years imprisonment for each of the offences, the sentences to run consecutively. The appellant submitted that the sentence was excessive and this court agrees with him, but only to the extent of the sentences running consecutively. Taking into account all the circumstances of this case which include the appellant's antecedents, especially his criminal record, and considering the maximum sentence for each of the offences committed, this court agrees with the learned counsel for the Republic that a sentence of five years is not manifestly excessive.

For these reasons, the appeal against conviction is dismissed. The appeal against sentence is allowed only to the extent that the sentences were ordered to run consecutively. While retaining the five year sentences, this court hereby orders that the same will run concurrently.

Dated and delivered at Mombasa this 12<sup>th</sup> day of June, 2006.

L. NJAGI

JUDGE