REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

Misc Civ Appli 651 of 2004

ABRAHAM MENGICH KIPKOECH……………………………...…APPELLANT

VERSUS

REPUBLIC…………………………………………………….…RESPONDENT

JUDGMENT

The Appellant Abraham Mengich Kipkoech, was charged with the offence of entering a dwelling house with intent to commit a felony contrary to **Section 305 (1) of the Penal Code.** The particulars of the offence were that on 20th January 2004 at Milimani Estate Nakuru, jointly with others not before court the Appellant entered the dwelling house of Isaac Kipkoech Chesire with the intent to commit a felony, namely stealing. The Appellant was also charged with the offence of personating a public officer contrary to **Section 105(b) of the Penal Code.** The particulars of the offence were that on the same day and at the same place, the Appellant falsely presented himself to be a person in the public service, namely a Police Officer and assumed the role of a Police Officer and did a search at the dwelling house of the said Isaac Kipkoech Chesire. The Appellant pleaded not guilty to both counts. After a full trial the Appellant was convicted as charged. He was sentenced to serve one year imprisonment in respect of the first count and two years imprisonment in respect of the second count. The said sentences were ordered to run concurrently. The Appellant was aggrieved by the said conviction and sentences imposed and has appealed to this court.

In his Petition of Appeal, the Appellant has faulted the decision of the trial magistrate in convicting and sentencing him on grounds which may be summarised as follows:- That the trial magistrate convicted him in the absence of sufficient evidence to sustain a conviction for the offences charged; that the trial magistrate erred in convicting him on uncorroborated evidence; that the trial magistrate did not consider the evidence which was adduced in the defence of the Appellant; that the trial magistrate did not evaluate the evidence properly and thus did not give any reason for her decision; that the trial magistrate erred in sentencing the Appellant to a custodial sentence. At the hearing of the Appeal, Mr Ogolla Learned Counsel for the Appellant urged the Court to allow the Appeal while Mr Gumo, the Assistant Deputy Public Prosecutor submitted that the Appeal ought to be dismissed and the conviction and the sentences imposed by the trial magistrate be confirmed. I will address the arguments made by Counsel after briefly setting out the facts of this case.

On 20th of January 2004 at about 10.00 a.m. PW 1 Rose Amulaku Jackson and PW 4 Kiprop were working at the residence of PW 2 Isaac Kipkoech Chesire. PW 1 was working at a househelp whilst PW 4 was working as a gardener. PW 1 and PW 4 testified that at the particular time, the Appellant in the company of another came to the house of PW 2 (the complainant) and claimed that they were Police Officers from Nairobi. They demanded to search the house of the complainant with a view of looking for some documents. PW 1 and PW 4 told the Appellant with his colleague to wait for the Complainant before undertaking the search. The Appellant became harsh to both PW 1 and PW 4. The Appellant with his colleague then searched the house of the complainant. They searched the sitting room. They also searched the bedrooms. They went through five bags which the Complainant had kept in his bedroom. They opened his briefcase and searched therein. They opened the wardrobes and searched through the Complainant’s clothes. After searching the entire house, the Appellant and his colleague went away. About two hours, the Complainant came home and was informed what had transpired. He retraced the route that the Appellant had followed. The Appellant was identified to him by PW 3 Ronald Munyi Chenga who ran a kiosk business in the Milimani area of Nakuru Municipality. The Complainant reported

the incident to the Police. PW 5 Police Constable Joseph Kilundi accompanied the complainant and had the Appellant arrested. The Appellant was later arraigned in court and charged with the offences which he was convicted. The complainant testified that he did not know the Appellant neither had he dealt with him.

When the Appellant was put on his defence he testified that on the material day he had gone to the house of the complainant after he had received information that his laptop which had earlier been stolen from his house on the 19th of September 2002 was being kept in the house of the Complainant. The Appellant testified that although he went to the house of the complainant, he did not search the house neither did he claim that he was a Police Officer. It was his testimony that after asking for the complainant while seated in the sitting room he left the house. The Appellant testified that when he entered the house of the complainant he entered the said house via the kitchen door. The Appellant claimed that his intention in going to the house of the complainant was to ask the complainant if the houseboy had sold him a laptop.

This is a first Appeal. This Court has a duty to remember that the parties to this Appeal are entitled, as well on the questions of facts as on questions of law, to demand a decision of the court and the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions. The court should however bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect (See **Njoroge –versus- Republic [1987] K.L.R. 19)**. In this Appeal, the issues for determination is whether on the evidence adduced by the prosecution the two charges facing the Appellant were proved. The Appellant has submitted, through Counsel, that he was allowed to enter the house of the complainant. He further submitted that he did not claim to be a Police Officer, neither did he conduct a search in the house of the complainant. It was his submission that the person who searched the house of the complainant was a relative of the complainant who had accompanied him. The Appellant further submitted that the prosecution did not prove that he had entered the said house with a view of stealing therefrom. It was his submission that if he wanted to steal from the house of the complainant, nothing would have prevented him from stealing from the said house.

The Appellant further submitted that he went to the said house after he had received information that the complainant could be aware of the whereabouts of his missing laptop. He submitted that he wanted to ask the complainant if he had seen the laptop. The Appellant further submitted that he did not try to hide his identity. It was his further submission that the prosecution had not established that he had gone to the house of the complainant with the intention to commit a felony. The burden of proving that the Appellant had the intention to commit a felony was not discharged by the Prosecution, the Appellant submitted. In response, Mr Gumo, the Assistant Deputy Public Prosecutor submitted that the Prosecution had proved its case as against the Appellant beyond any reasonable doubt. He submitted that from the very beginning the Appellant and his colleague had masqueraded as a Police Officer to gain access to the house of the complainant wherein they conducted a search and ransacked the bedroom of the complainant. The Learned Assistant Deputy Public Prosecutor submitted that the conduct of the Appellant was clearly manifested and was obviously consistent with his actions. It was his submission that the two counts were overwhelmingly proved and the evidence adduced by the witnesses sufficiently corroborated.

I have re-evaluated the evidence adduced by the Prosecution and the defence offered by the Appellant. I have also carefully analysed the submissions made by the Counsel for the Appellant and by the State. It is not in dispute that the Appellant went to the house of the Complainant on the material day. The Appellant claims that he went to the house of the complainant to ask him if he had seen his laptop which had been stolen. This evidence is however contradicted by the evidence of PW 1, the househelp and PW 4, the gardener who testified that the Appellant went to the complainant’s house claiming that he was a Police Officer who had instructions to conduct a search of the complainant’s house. PW 1 and PW 4 requested the Appellant to await the arrival of the complainant who was not at home, but the Appellant refused to accede to their entreaty. According to the evidence of PW 1 and PW 4 the Appellant with his colleague entered the house inspite of the fact that they had been told that the owner of the house, the complainant, was absent. The evidence by PW 1and PW 4 that the Appellant claimed to be a Police Officer to gain entry into the house of the complainant is thus credible. PW 1 testified that when the Appellant entered the house, he started to conduct a search of the entire house including the

complainant’s bedroom. The complainant testified that when he went to his bedroom he found his belonging scattered all over the room.

It is the finding of this court that the charge against the Appellant that he had entered the house of the complainant with the intention of committing a felony was proved. The Appellant claims that he went to the house of the complainant to ask him if he had seen his laptop which was missing. The evidence adduced however showed that the Appellant took the law into his own hands and decided to undertake a search in a house of a citizen without a search warrant issued by the court. The intention of the Appellant to commit a felony was clearly manifested by the fact that he claimed to be a Police Officer and further insisted on conducting a search of the house of the complainant even after he had been informed that the complainant was away. I further hold that the prosecution established beyond reasonable doubt that the Appellant, impersonated a public officer, namely, a Police Officer inorder to gain entry into the house of the complainant. PW 1’s evidence was cogent, consistent and was corroborated by the evidence of PW 3 and PW 4. PW 1 testified that she let the Appellant search the house after he had informed her that he was a Police Officer.

The defence offered by the Appellant was rightfully dismissed by the trial magistrate as being of no evidential value to the case. The story that the Appellant wanted the court to believe that he went to the house of the complainant to ask the complainant if he had seen his lost laptop is not supported by any evidence. The Appellant admits that he went to the house of the complainant. He however claims that the house of the complainant was searched by a relative of the complainant and not himself. I hold that the said relative of the complainant, if indeed he searched the house of the complainant as claimed by the Appellant, did so under the direction and supervision of the Appellant. PW 3 the kiosk owner testified that the Appellant had not told him that his laptop had been stolen. It is further my finding that the issue of the stolen laptop was raised by the Appellant as a red herring to divert the court from considering the real intention of the Appellant going to the house of the complainant, which was to commit a felony. I find no merit in the Appeal against conviction filed by the Appellant. The Appeal against conviction is dismissed.

On sentence, I have considered that the Appellant is a first offender. The sentences imposed by the trial magistrate in this case were however harsh considering the circumstances of this case. I will therefore set aside the sentences imposed by the trial magistrate and substitute them with sentences of this court as follows:- The Appellant shall pay a fine of Kshs 20,000/- on each of the offence convicted or in default he shall serve six months imprisonment on each of the count that he has been convicted. If the said fine is not paid, the said sentences shall run concurrently and shall take effect from the 5th of November 2004. It is so ordered.

DATED at NAKURU this 21st day of January 2005.

L. KIMARU

JUDGE