REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 234 OF 2002

KAPERU MUCHIRI……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

The appellant has appealed against the original conviction and sentence in Criminal Case No. 716 of 2001 of the Senior Resident Magistrate, Narok. In that case, the appellant had been charged for two counts of house-breaking and stealing, contrary to 279 (b) of the Penal Code. He also faced two alternative charges of handling stolen goods contrary to Section 322 (2) of the Penal Code. After a full trial, the appellant was found "not guilty" for both Count I and II. However, he was found "guilty" and convicted for both alternative Counts. Subsequently, the appellant was sentenced to 4 years imprisonment for each of them. The sentence was to run concurrently.

During the hearing of the appeal, the appellant conceded that on 20th October, 2001 while he was drinking traditional liquor at Miti Ni Dawa Bar, the PW1 and his friends who were dancing knocked their table and hence the alcohol that they were drinking poured down. After some exchange of bitter words, the PW1 hit him and later a fight ensued. Consequently, members of the public intervened and hence the appellant decided to go and rest at home. Subsequently, the appellant narrated how he was arrested at Park View Bar by police officers after being identified by the PW1.

According to the appellant, the police officers explained to him clearly that they had arrested him due to the fight. As far as the appellant was concerned, he was only framed for the offence of house-breaking and stealing. The appellant lamented that though he had requested for the O.B. to be produced, the same was not availed to him. The appellant also complained that the sentence was excessive. On the other hand, the state through Mr. Koech, State Counsel has supported both the conviction and sentence. According to Mr. Koech, the witnesses recovered a jacket and they followed the footmarks upto the house of the accused. Thereafter, the police were alerted and they arrested the appellant. Apart from the above, Mr.Koech submitted that when the appellant was cross examining the PW1 he never raised the issue of any grudge.

In addition to the above, he submitted that even the stolen items of the PW2 was recovered from the house of the appellant. He concluded by submitting that the trial Magistrate had rightly convicted the appellant on the alternative charge. This Court has carefully perused the above together with the record of appeal that contains the judgment of the learned Magistrate. Being the first Appellate Court, I am aware of my duty to examine and evaluate the evidence afresh so that I reach my own independent conclusion. This Court is alive to the fact that it never had the advantage nor opportunity to see the manner and demeanour of the witnesses. Besides the above, this Court has the obligation to consider the grounds of appeal of the appellant – See Okeno Vs Republic [1972] E.A. Page 32.

From the evidence on record, the PW1 – Felix Muthama Masiva confirmed that on 27th December, 2001, his house was broken into and the following items were stolen: - 2 bed-sheets, 9 long trousers, - a radio and a shirt. Following investigations, the PW1 and police officers recovered 2 bed- sheets from the house of the appellant. The PW1 conceded that the two bed- sheets had no identification marks nor did he have any receipt. In his evidence, the PW2 Michael Mutie deposed that on the material day his house was broken into and the following items stolen: - a radio, 1 bed sheet, a blanket, 2 long trousers, 3 sheets, 2 water-proof cement and a towel.

Both the above witnesses had stated that on the following day one jacket – bearing the mark of St. Mary and a wallet had been recovered. When they followed the footmarks, the same led them to the house of the appellant. Subsequently, when the house of the appellant was searched, the PW2 managed to recover the following items: - 2 water-proof cement, a towel and bed-sheet. The PW3 – Bernard Mutua Mpusia who is the landlord of the above two witnesses confirmed and corroborated their stories in details.

From the evidence on record, it is apparent that both the PW1 and PW2 never had any genuine marks to enable them to identify the recovered properties. Secondly, the items that were allegedly stolen are common and can be found and bought by anybody. Besides the above, the PW1 and PW2 were not able to produce any receipt to prove that they had bought the items. The above doubts should have been resolved in favour of the appellant. The Court hereby finds that the learned Magistrate erred in law and fact by convicting the appellant. I hereby find that the conviction is not safe and hence I hereby “quash” the same. On the other hand, I hereby set aside the sentence of 4 years imprisonment on each of the alternative charge.

The appellant should be released forthwith unless held lawfully. Those are the orders of this Court.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of

MUGA APONDI

JUDGE

6TH APRIL, 2005