REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 346 OF 2004

(From original conviction and sentence in Criminal Case No. 22223 of 2001 of the Principal Magistrate's Court at Makadara: W.A Juma (Mrs)

ANANIA MARIBA RIOBA………………………….…..…APPELLANT

VERSUS

REPUBLIC………………………………………………RESPONDENT

JUDGMENT

The Appellant herein, **ANANIA MARIBA RIOBA**, Criminal Appeal No. 346 of 200, from Criminal Case No. 22223 of 2001, was charged and convicted of **STEALING FROM A DWELLING HOUSE** contrary to Section 279(b) of the Penal Code. The particulars of the charge were that on the night of 1st and 2nd day of November, 2001 at Kayole Estate in Nairobi within Nairobi Province, stole one T.V. Set make Samsung; One Philips lamp; 2 bed sheets, one box containing personal clothings all valued at K.Shss.67,700/- the property of **PAULINE BOKE** from the dwelling house of the said **PAULINE BOKE**.

Being dissatisfied with both the conviction and sentence by the lower court, the appellant has appealed in this court on the following grounds:-

1. The trial magistrate erred in both law and fact in convicting the appellant despite lack of evidence to support the charge.

2. The lower court erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt when this was not the case.

3. The learned Magistrate erred in law and fact and misdirected herself by explaining away any or all evidence favourable to the appellant thereby arriving at a wrong decision.

4. The learned magistrate erred in law and fact in ignoring the cardinal principles in criminal justice by lowering the standard of proof in criminal cases.

5. The learned Magistrate erred in law and fact in shifting the burden of proof to the appellant.

6. The lower court erred in law and fact in convicting the appellant while ignoring contradictory evidence from key witnesses and drawing wrong inferences thereby arriving at a wrong decision.

7. The conviction is against the weight of evidence. The appellant is represented by Chacha

Advocate.

In brief, the prosecution case is that, P.W. 1, the complainant, Pauline Boke was at the material date, staying with her family in a residence where appellant was the caretaker.

On 1/11/01 the appellant went to her house very early in the morning and wanted her to move her belongings so that he locks the door for rent arrears for 2 months. The appellant gave her up to 2.00p.m. to bring the money or have the house locked up. P.W. 1 left and did not return till 7p.m. by which time her house was already locked. Her sister and children were already at a neighbour's place and that is where they spent the night.

The next morning the house was found open and her property mentioned in the particulars of the charge sheet was found missing. In P.W. 1's view, the responsibility lay with the appellant who had locked the house and also because there was no breakage on the house. P.W. 1 testified that they have a day watchman but the security at night was the duty of the caretaker – appellant.

On cross-examination, P.W. 1 said that she had been in that house for six months, and it was her husband who used to pay the house rent, and that she waited at the husband's office the whole day and came back before he got back to the office. She found him at home. She also said that she had only one key to that house and since the house was locked in her absence the key was locked inside that house. She said it was her husband who had the documents relating to the stolen television, and that they had two T.V. sets. She said that when they shifted from the residence the appellant was aware of it and denied that she was found secretly transporting her property away on a handcart without the caretaker's knowledge after the appellant had refused to accept her husband's post-dated cheque.

P.W. 2, husband to P.W. 1 gave similar evidence to that of P.W. 1, but added that although he knew the rent was in arrears and that P.W. 1 had told him that the house would be locked by 2p.m. if no payment would have been made by then, he did not come back till 7p.m. with a cheque from his cousin for 10,000/- which appellant rejected saying he wanted cash. He told the court that the missing items were valued at 67,000/-. He denied that he and his wife knew that the house was to be locked but decided to sneak in at night unseen just to get some sleep. He denied that he had only one T.V. set and that it was not stolen. He also denied that he merely came out for revenge and that nothing was stolen. He stated that had the police asked for the documents relating to his property, he would have produced them.

P.W. 3, Erick Odongo, testified that he was the caretaker of one Masiaga's house on 1/11/01, and on that date the agent of the house called him to go and lock the house of one tenant.

He used to operate a barber shop in that plot. He took a padlock and went to the house where he found a girl and children. He told her to leave the house and the girl locked it with the inside lock then he bolted and locked it with a padlock and took the key to the house of the appellant. He learned the next day that the house he had locked had been broken into and stolen from. He recorded his statement. He had known the appellant for five years and they had never disagreed.

On cross-examination, P.W. 3 told the court that he locked the house at 10.00a.m. and that he told the girl to first lock the house using their key before he put the padlock. He said the appellant was an agent who merely used to receive the house rent. He said even if the rent was paid the door could still have remained closed.

P.W. 4 – Paul Chacha Kisero – told the court that the family of P.W. 1 spent the night of 1/11/01 in his house. He said that the girl claimed that the house had been locked on them, and the next day the family of P.W. 1 learnt that the house had been broken into and stolen from. He knew appellant as caretaker of that place and he had never disagreed with the appellant. He knew nothing about the theft apart from the fact that the family of P.W. 1 spent the night at his house on 1/11/01.

P.W. 5 is the sister to P.W. 1 who was in her sister's house on 1/11/01 when two boys armed with a padlock came to their house and instructed her to leave the house as they wanted to lock it. They claimed

that they had been sent by the caretaker. P.W. 5 said she took the children and left for a neighbour's house, and left the boys locking the house. P.W. 5 knew the appellant as the caretaker in that place.

On cross-examination, P.W. 5 said that they had two T.V. Sets, and that she was not present when that house was opened.

P.W. 6, P.C. Fred Wahome, of Buruburu Police Station is the one who investigated the case upon instructions from the D.C.I.O. and went to the O.C.P.D. Kayole and re-arrested the appellant who was there. P.W. 1 brought her witnesses and they recorded their statements. P.W. 6 testified that the information he gathered was to the effect that the appellant was the caretaker of the place and the sole holder of the gate keys; that the gate was not broken and the padlock which had locked the complainant's house was not recovered. He said he was aware that the appellant had been arrested and released by the Kayole Officers and it was therefore that P.W. 1 brought the report at Buruburu on 8/11/01 because P.W. 1 said the Kayole Police had not investigated the case to P.W. 1's satisfaction; and that appellant had been in custody from 8/11/01 till 15/11/01..P.W. 6 said he visited P.W. 1's house and saw a black and white T.V. Set. P.W. 6 denied threatening appellant and forcing him to admit liability. He said the D.C.I.O. was one Tum and the complainant's husband is Koech. He denied having been used to harass the appellant.

In his sworn defence appellant said that he is the agent of Mary Muhere Khawambi and receives rent from her tenants on her behalf; and that P.W. 1 was their tenant and owed three months rent and deposit for the house, all totaling 20,000/- @ 5,000/- per month. He said he was not a watchman for the place which has only a day watchman.

Appellant testified that the complainant's house was locked and the key given to the wife of the appellant. He denied that P.W. 2 ever gave him a cheque for 10,000/- and to him, P.W. 1's house was not broken into as the lock was intact and P.W. 1 had the keys to the house. He said the only other time he went back to the house is when he was called that it had been stolen from. He admitted that the main gate is locked after 9.00p.m. and that it is him who opens for the last comers and that on the material night he locked it at 9.30p.m. till morning. He did not see any breakage on that door.

I have carefully perused the evidence on record and re-evaluated the same in light of the grounds of appeal herein. I have great difficulty in finding the evidence upon which the learned trial Magistrate concluded that the prosecution had proved their case against the appellant beyond any shadow of doubt. If anything, the prosecution evidence left huge gaps and the witnesses contradicted each other.

In my view, the prosecution case failed to resolve the key issues of whether the house was opened and if so, how and by whom? If as given in the evidence, P.W. 3 locked the house with the padlock after P.W. 5 had locked the inner lock, logic would follow that for that door to be opened, not broken, the two keys had to be used. Yet there is no evidence from the prosecution witnesses to show how the key with P.W.1 got to the appellant unless P.W.5 was an accomplice, yet she is not charged together with the appellant. Further, it is not clear who actually locked with the padlock. Was it P.W. 3 or the young men whom P.W. 5 said came to the house and ordered her to get out before they locked the house, and whom she left locking the house? P.W. 3's evidence is that he is the one who locked the padlock after P.W. 5 had locked with the inner lock.

At J7 the learned magistrate failed to appreciate the problem raised by the issue of the keys and the locks when she said **'The Lock(s) were merely opened. It is the view of the appellant that the key was with P.W. 1 who must have opened the house herself. The appellant does not want to admit that the key he had was supposed to be used also in order to have that door opened softly as it was".**

From the above it seems clear that the learned magistrate, even if unconsciously, was shifting the burden of proof to the appellant which is not the case in criminal cases. The appellant has no obligation to admit anything or prove anything. It is the prosecution to prove their case against the appellant beyond any reasonable doubt.

Secondly if the key with the appellant had to be used to open the door, didn't the other key with P.W. 1

and or P.W. 5 have to be there too?

P.W. 5 testified that she left the door to the two boys who ordered them (P.W. 5 and the children) out to lock the door. From this and the evidence of P.W. 3, doubts linger as to whether the door was ever locked. Thus for the lower court to hold that appellant confirms that, he found the door open, and there is no other explanation of how or who opened his padlock, is drawing a conclusion without evidence in a criminal case where myriads of doubts remained.

Finally, to conclude that the available circumstantial evidence leads to the inescapable conclusion that it is only the appellant who had the means and opportunity to commit this offence is to jump onto a conclusion without evidence and does not comply with the standard of proof that the appellant must be shown to have committed the offence beyond all reasonable doubt.

There were many doubts and loose ends in the prosecutions case. In Criminal law and cases, the benefit of such doubts must be give to the appellant (accused). Here that did not happen.

For all the above reasons, the appeal succeeds and I quash the conviction and set aside the sentence by the lower court.

DATED and delivered in Nairobi this 18th day of May, 2005.

O.K. MUTUNGI

JUDGE