REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 57 OF 2003

DAVID NYAGA GITONGA……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From original conviction and sentence in criminal case No.575 of 2002 by S.N. MBUNGI, R.M. EMBU)

JUDGMENT

David Nyagah Gitonga (hereinafter referred to as the Appellant) was tried and convicted by the Resident Magistrate Embu with the offence of Buglary and stealing from a dwelling house contrary to section 304(2) and 279(b) of the Penal Code respectively.

Four witnesses testified before the trial court in proof of the prosecution case. Their evidence was briefly as follows:

On 2nd March 2002 at about 11.00 p.m. the complainant Samson Ogolla (PW1) and his wife Mercy Muthoni Samson (PW2) were going to their house to sleep. Before reaching their house they met the Appellant carrying some things. On reaching their house they found it broken into. The complainant then decided to pursue the Appellant. When he reached near the Appellant, the Appellant dropped what he was carrying and ran away.

The complainant immediately identified his slasher as one of the items which the Appellant was carrying. By this time PW2 who had also ran back, arrived. PW1 asked her to call one of their neighbours Njue Kariuki (PW3). He came, saw the items, and also went to the house of the complainant and confirmed that it was broken into. On checking the items which the Appellant had dropped down when being pursued the complainant identified 13 compacts which bore his name. He also identified a slasher, sufuria, a stove, hurricane lamp, a pair of black shoes, wallet and his ID/ card as items recovered. The matter was reported to PC Erick Karia (PW4). PW4 arrested the Accused and caused him to be charged.

In his sworn defence the Appellant claimed he was arrested from his house. The police officers searched his house but did not recover anything. The Appellant claimed that the items alleged to have been recovered from him were actually planted on him by PW3 who had vowed to finish him because he had snatched his wife. He claimed that the complainant also had a grudge against him because he demanded money from him after making a sideboard for him.

In his judgment the trial magistrate believed the complainant and PW2. He found that the Appellant was seen carrying items which were identified by complainant as having been stolen

from complainant's house which had just been broken into. He rejected the defence, convicted the Appellant, and, sentenced him to serve a term of 3 years imprisonment.

The Appellant is aggrieved by his conviction and has raised several grounds of appeal, the gist of which is that the complainant and PW2 were not able to properly identify the person they allegedly met carrying their items and that the trial magistrate was wrong in rejecting the defence of the Appellant.

Learned State Counsel Mr. Omwenga has conceded the appeal contending that the circumstances were not favourable for a positive identification and that only PW2 purported to identify the Appellant. He also faulted the trial magistrate for applying the doctrine of recent possession when the items were not recovered from the Appellant's possession. I have carefully reconsidered and evaluated the evidence as I am obliged to do in this first appeal.

It is evident that the complainant's house was broken into and various items were stolen therefrom. This was testified to by PW1 and 2 and also corroborated by PW3 who went to the house that night and confirmed that the house was broken into.

The main issue is whether the Appellant was positively identified as the person who had broken into the complainant's house. Contrary to the submissions made by the State Counsel both complainant and PW2 testified that they recognized the person they met carrying the items as the Appellant. Both claimed to have known the Appellant before and were therefore able to recognise him. Both claimed to have seen the Appellant well with the assistance of moonlight. I find that this was not the case of a single identifying witness but it was the case of visual recognition by two witnesses. These witnesses reported to the police the very next day and identified the Appellant to PW4 as the culprit. It is Apparent from the court record that PW4 claimed to have received the report on 30th March 2002, but this clearly appears to be a recording error since the Appellant was first arraigned before the court on 4th March 2002 and must therefore have been arrested on 3rd March as testified to by PW3.

In his judgment the trial Magistrate rejected the defence of the Appellant. Although he did not assign any specific reasons I am satisfied that the trial magistrate had the advantage of assessing the demeanour of the witnesses and was in better position to determine who was speaking the truth. Secondly the Appellant's allegation that PW2 and PW3 had a grudge against him were not substantiated.

Although the goods were not recovered from the possession of the Appellant, the goods were recovered in circumstances that left no doubt that the Appellant had just broken into the house of the complainant and stolen the items.

I am satisfied that there was sufficient evidence to prove that the Appellant had committed the offence charged. His conviction was therefore sound.

As regards the sentence of 3 years imprisonment the same was not manifestly excessive as to justify the inter-vention of this court. I would only correct one anomaly in that the trial magistrate did not specify that the sentence was in respect of which limb of the charge. To this extent I would rectify the anomaly by ordering that the appellant's appeal against conviction and sentence is hereby dismissed.

The conviction is confirmed and sentence of 3 years imprisonment in respect of each limb of the charge.

The sentence shall run concurrently. Orders accordingly.

HANNAH OKWENGU

JUDGE

4/6/04