REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE

CRIMINAL APPEAL NO. 413 OF 2002

(From Original Conviction and Sentence in Criminal Case No. 57 of 2002 of the Chief Magistrate's Court at Mombasa – A. NGUGI – RM).

IDD MOHAMED…….APPELLANT

-VERSUS

REPUBLIC……RESPONDENT

J U D G M E N T

The Appellant Idd Mohammed was convicted of the offence of house breaking and stealing contrary to Section 304(1) and Section 279(b) of the Penal Code. The particulars of the charge were that on the 25th day of July 2002 at Saghasa village in Taita Taveta District of the Coast Province, jointly with others not before court broke and entered the dwelling house of Samuel Njumwa with intent to steal therein and did steal one Television set make Great Wall, one Radio Cassette make Yashika, one amplifier, one pressure lamp, one box speaker, two handbags, two pumps and assorted clothes and utensils all valued at KSh.30,000/= the property of the said Samuel Njumwa.

The Appellant was sentenced to 2 years imprisonment on count 1 and 3 years imprisonment with 2 strokes of the cane on count 2. The sentences were to be served concurrently.

The prosecution case before the trial court was that the complainant Samuel Njumwa left his house for his farm in Kisheni on 25.7.2002. When he came back at 6.00 p.m. in the evening he found his house was broken into and several items specified in the charge sheet were missing.

He inquired from one Agnes Bosil P.W.2 his neighbour and he was informed that Appellant had been seen in company of 3 other people carrying items in a sack which items she did not know. Agnes further described the appellant as a known criminal. She however did not see the appellant breaking into the complainant's house. The same story was repeated by P.W.3 and P.W.4.

The appellant's side of the story was that, he was at his place of work which closes business at 11.30 p.m. at night and that he was surprised when a team of policemen came and arrested him and locked him up for 11 days before taking him to court.

The appellant has filed five grounds of appeal which appear to be repetitive on the issue whether there were too, sufficient evidence capable of sustaining a conviction. The Learned State Counsel does not support the conviction. The learned State Counsel submitted wrongly relied in convicting the appellant on his past record. She also conceded that the case before the trial court was not proved to the standard of beyond reasonable doubt.

Form the submission of both the appellant and the State Counsel two issues emerge for decision.

The first is whether the trial Resident Magistrate properly directed himself in taking into consideration the past or previous character of the appellant. This issue was clearly dealt at length in the case of **Wandera Reuben Kubainisi =vs= R [1965] E.A. 572**. In this instant case the appellant did not put his character in issue yet the magistrate after hearing evidence and taking an unsworn statement from the appellant proceeded to adjourn the case to inquire into the previous convictions of the appellant. It turned out that

the appellant had five previous convictions. On appeal, it was held inter alia that since the accused had not put his character in issue the magistrate should not have inquired into or allowed any evidence to be given as to the appellant's previous convictions before judgment. This infringed the principle that justice must be seen to be done. The cause adopted by the trial magistrate in this appeal therefore vitiates the conviction.

The second issue is whether the evidence presented before the trial court directly and or circumstantially proved the charge beyond reasonable doubt. From the evidence on record, it is apparent that there was no credible evidence proving the charge facing the appellant. There was no evidence connecting the appellant to the house breaking nor the theft of the items specified in the charge. There were recoveries of the stolen items. In the case of Mohamed S/o Issa =vs= R [1962] E.A. 392. The appellant was convicted on two counts firstly, of breaking and entering a dwelling with intent to commit a felony therein and, secondly, of committing theft therein. The appellant was staying in the house of the complainant with the consent of the later, and the house breaking of which he was convicted was breaking, not into the complainant's house from outside, but into a room in the house which the complainant had locked and in which he had left the goods which were stolen. The appellant was found in possession of the stolen goods, but there was no evidence as to how the appellant effected an entrance from the rest of the house into the locked room, and in particular there was no evidence that the appellant did so by unlocking or opening in another way the door into the room, or by moving anything in order to gain entrance. On appeal it was held inter alia . That there was no direct evidence on how the appellant entered the room, nor circumstantial evidence to prove, and certainly not beyond reasonable doubt, that the appellant must have moved anything in order to do so. This also applies in the instant case. It is even more difficult in the case of the appellant because the items allegedly stolen were not found in the possession of the appellant neither were they recovered.

From the foregoing therefore the appeal is allowed. The conviction is quashed and the sentence is set aside and the appellant set free unless otherwise lawfully held.

Dated and Delivered at Mombasa this 28th day of February, 2003.

The Judgement is read in the presence of appellant and State Counsel.

J.K. SERGON

J U D G E