REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO.239 OF 2002

(From Original Conviction and Sentence in Criminal Case No.3946 of 2000 of the Senior Principal Magistrate's Court at Mombasa – J.S. Mushelle, Esq., - SPM)

ABDIKARIM HUSSEIN…….....……..…….APPLICANT

=V E R S U S=

REPUBLIC……..RESPONDENT

JUDGEMENT OF COURT

The appellant herein applied to this court for bail pending appeal which came before me on 2.7.2002. By an agreement between the counsel for the applicant Mr. Warsame and that of the State Counsel, Miss Mwaniki, the application aforementioned was abandoned and with a go-ahead from this court the counsel proceeded to argue the main appeal.

The appellant was charged with the offence of Stealing from a dwelling house contrary to S.279(b) of the Penal Code. He was convicted and sentenced to prison for a period of 18 months with 2 strokes of the cane. He appeals against both conviction and sentence.

At the stage of complying with Section 211 of the Criminal Procedure Code, there were technical revision orders or directions given under this court's powers under S.354, 357 and 358. I have examined the lower court records and note that the directions which were merely procedural, were complied with. Thereafter the court proceeded with the trial ordinarily and regularly found the appellant guilty as charged and sentenced him as aforesaid. It is from the said conviction and sentence that appellant appeals.

Mr. Warsame for the appellant first argued that the charge was incurably defective and that upon this alone the appeal should be allowed. He stated that the ingredients of the charge which must be proved include:

a) That there must be a dwelling house from which the accused steals and that the house must belong to the complainant.

b) That the stolen property must be of a value of more than 100/-.

c) That the accused person must use violence to gain entry into the house from where he finally steals and that such violence or force must be used by the accused before, during or after entry.

He then proceeded to argue that these ingredients were not proved by the prosecution in the evidence before the court. The charge which the appellant faced reads as follows:-

> *"**Abdikarim Hussein:** On the 23 rd day of November , 2000 at about 2.30 p.m. at Kidunguni Village in Likoni Location within Mombasa District of the Coast Province, stole one gold chain, three pieces of gold earings and cash 7000/ -, all valued at Kshs.27,000/ -, the property of Rukia Mohamed, in the dwelling house of the said Rukia Mohamed".*

Mr. Warsame first said that the house did not belong to Rukia Mohamed who was also the complainant. He said the house belonged to complainant's husband and that the charge should have named the complainant's husband. In this court's view, this argument is not material and indeed has no substance. The house belonged to Rukia Mohamed and her husband who happened at the time to be stationed away from the residence, being a police officer. Mr. Warsame further argued that the issue of stealing was not proved in the evidence. He stated that on 23.11.2000, the appellant in company of the complainant's son visited the dwelling house of the complainant. At the material time the complainant's co-wife was present at the sitting room of the complainant, accompanied by complainant's four other children. It is then alleged that the appellant, in the presence of all the above persons, unlawfully entered the bedroom of the complainant and later came out. It was when he had left the house that the complainant according to her evidence realized, that the items mentioned in the charge sheet were missing. She suspected the appellant to have stolen them after being informed that the appellant entered the bedroom as the complainant was cooking in the kitchen. The events that are alleged to have followed were not believable, according to Mr. Warsame. The complainant lives in Police Staff Quarters next to the Police Station. She realized that her gold chain and ear-rings and 7,000/- were missing. She did not report to the police and name the appellant as suspect if indeed the story told that the appellant unlawfully and without permission entered the bedroom, was true. She did not report to the Police until 3 days later on the 26.11.2000. The co-wife and son of complainant who were in the house and who claim to have seen appellant enter the bed-room did not stop him or inform the complainant so while appellant was in the bed-room, to stop him do mischief therein. She had to telephone her husband who came after three days and was the one who reported the alleged theft to the Police. These are the facts Mr. Warsame argued were unlikely. He argued that the complainant's story was unlikely to be true since it stood against logic and that the doubts raised due to its unlikeness should have been treated in favour of the appellant.

I have considered this argument and the answer given in rebuttal by the State Counsel, Miss Mwaniki. It is my view that the evidence of the complainants and the other witnesses who supported her at the lower court, are most unlikely to be true. I agree with the position taken by Mr. Warsame. It is unlikely indeed that appellant would enter the complainant's bed-room in the presence of her son who had brought the appellant to that house, and neither the son, the co-wife nor the other children, fail to inform the complainant who claims to have been in the kitchen at the material time. Indeed according to the evidence of PW.2, Rahma Abdi, the co-wife, the appellant picked the gold chain and ear-rings in her presence from the cupboard which appears to have been not in the bed-room but sitting-room where they all were sitting. She even claimed that when the appellant came out of the bed-room, he was carrying the stolen money in his hand and then pocketed them as she looked on. And yet PW.2 failed to raise an alarm or just inform the complainant. I do hold that this sequence of events is unlikely to be true as it does not make good sense that can be believable. If there indeed was money in the bed-room, and appellant went there and picked it, unlawfully of course, he would unlikely have come out with it in hand. He would thrust same into his pocket and come out innocently. Mr. Warsame argued that the evidence makes up a concocted story, made up by the complainant's husband, to fix the appellant who he did not trust because he had had information that he was having an illicit affair with his wife, the complainant. Whether that is so or not, the facts and evidence before the court fell short of being good and reliable evidence upon which the trial Magistrate's court could have relied on to convict.

The evidence therefore failed to fulfill the required standard of proof in criminal cases. The trial Magistrate should have given the appellant the benefit of doubt. He erred in not doing so.

Mr. Warsame also argued that the Judgment written by the trial Magistrate did not comply with the legal requirements of a judgment as provided under Sections 168 and 169 of the Criminal Procedure

Code. It failed to be based on reasoned grounds, answering specific issues of fact and law rising in the case after analyzing the evidence before the court. I have examined the relevant judgment carefully. It is my opinion that the trial Magistrate has carefully reiterated the prosecution and defence evidence, not probably to the best of his ability, but has rejected the accused's evidence while accepting or believing the prosecution evidence. He then, basing his finding on that conclusion, he has found the accused guilty. As I have just said, he should have done a better job than he did, but to say that there is no judgment or that the judgment there is does not amount to one is equally erroneous.

The up-shot of this canvassing is that this appeal must succeed. The conviction is quashed and the sentence set aside. The appellant shall forthwith be released unless he is being lawfully detained in prison.

Dated and delivered at Mombasa this 18th day of July, 2002.

D. A. ONYANCHA

J U D G E