REPUBLIC OF KENYA

IN THE HIGH.COURT OF KENYA

AT KERICHO
CRIMINAL APPEAL NO.3 OF 1999

(From Original Conviction and Sentence in Criminal Case No.346 of 1997 of the Resident Magistrate at SOTIK)

CHARLES KIMUTAI KORIR……..……..1ST APPELLANT

NELSON KIMUTAI ROTICH……...…… 2ND APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

RULING

Appeals Nos.3/99 and 4/99 where consolidated for hearing.

The two appellants were convicted of Burglary contrary to Section 304(2) of the Penal Code and Stealing contrary to Section 279(b) of the Penal Code. Each was sentenced to serve 5 years imprisonment on each Limb and to receive 2 strokes of the cane on each limb.

Each of the appellants appeals against both conviction and sentence but the first appellant Charles Kimutai Korir, told this court on appeal that he was only interested in the sentence being reduced.

The facts of the case are simple and can be briefly stated.

On 28th March, 1997 the complainant locked his house and left for a disco. When he came back to the house at around 1.30 a.m. he found that his house had been broken into. On entering he found that his things in the house had been disturbed. He found 3 skirts, 3 shorts, 1 sweater, 1 blanket, 1 bedsheet, 1 small radio, 3 sufurias, and slipers missing. The matter was reported to Sotik Police Station.

Later the first appellant was spotted wearing a shirt which the complainant identified as his. The first appellant said that he had bought it from the second appellant. The second appellant was found wearing a sweater which was also identified as that of the complainant.

In his defence the first appellant said that he had said that he had bought the shirt.

The second appellant insisted that the sweater was his.

The witnesses did not agree on whether the first appellant said that he had bought the shirt from the second appellant or whether the first appellant said that the two had stolen together. But what matters most in the case is whether the shirt and the sweater were positively identified.

The complainant said that the shirt had one button missing. He did not make a further effort to show that the shirt was his. As to the sweater the complainant only said that he believed the sweater to be his as he had bought it at shs.500/-.

The second appellant insisted that it was his. The prosecution had a duty to prove its case beyond reasonable doubt. Although the learned trial magistrate believed the prosecution witnesses and disbelieved the defence case, this was not enough in a criminal case. An effort should have been made to show that surely the shirt and the sweater belonged to the complainant. Chances are that they belonged to him but better evidence and not casual evidence was needed. The witnesses contradicted themselves as to what the first appellant said about the shirt. Did he say that he stole it together with the second appellant or that he bought it from the second appellant. His evidence was that of an accomplice. It should have been handled with caution. It also required corroboration. The learned magistrate did not consider this aspect of the case.

While there was strong suspicion against the two appellants there was no tangible evidence to prove the case beyond reasonable doubt. Suspicion alone is not enough no matter how strong it is.

I find that the case against the two appellants was not proved on the required standard. The appeals are allowed. The convictions of the appellant are quashed and the sentence set aside.

They are ordered set free forthwith unless they are lawfully withheld.

Dated and delivered at Kericho this 26th day of February, 2001.

D. M. RIMITA

JUDGE

26.2.2001