REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL 446 OF 1999

(From Original Conviction and Sentence in Criminal Case No.2081 of 1999 of the Chief Magistrate's Court at Mombasa – L.N. Mbatia – RM)

RASHID SALIM …….....…… APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

J U D G E M E N T

RASHID SALIM the Appellant was charged together with ISMAIL MAULANA with the offence of burglary and stealing. Because of the controversy surrounding the layout of the charge I reproduce it herein as it was laid.

> CHARGE: BURGLARY AND STEALING CONTRARY TO SECTION 304 AND 279 (B) OF THE PENAL CODE.
>
> PARTICULARS: RASHID SALIM 2. ISMAIL MAULANA on diverse dates between 20th and 29th June 1999 at Fort Jesus in Mombasa District within the Cost Province jointly with others not before Court broke and entered the house of FAUZIA SAID with intent to steal from therein and did steal one sofa set, one show case, two carpets, assorted household, one water tank and one electric lamp the property of FAUZIA SAID being of the value of KShs.80,000/-.

Later in this judgement I shall discuss this layout of the charge.

PW.1 Fauzia Saidi said she lived in two houses one of which was in Fort Jesus area a one bed roomed house and a sitting room. She had not been to it for one month when on 25-6-99 she got information that it had been broken into. She went there and found the door broken and many things missing from the house. She had not gone into the house between 29th June and 2nd October. She reported to the Mbaraki Police Station. From information have kept them. The police took the sofa set. Appellant led them to where show case Ex.2 was, and that was also recovered. Later curtains and lamp were recovered from the house of one Shabdini. PW.2 spoke of seeing things brought to his place in his absence on 3-7-99 including a show case and that later accused 2 brought part of the show case plus some timber. They wanted to sell the show case to her. The previous day the Appellant and the second accused had offered to sell some things for them but the sellers had no receipt to give so PW.2 became suspicious. PW.2 Paid KShs.2,000/- to 2nd accused and his friend but in 2 days accused brought police to PW.2's home where a show case was discovered. PW.3 conducted investigations and accused took him to where the show case was kept and took the exhibit to police station. He also arrested Appellant and from his home they

recovered one lamp belonging to complainant and two curtains Ex. 3, 4 and 5. PW.4 said that on 29-6-99 the appellant hired his vehicle to transport some seats. He took the Taxi-driver to Fort Jesus location at a Central storied house. He also took him to his house in Guraya where he collected two more seats and took them to Mwandoni.. He identified the sofa seat appellant hired him to carry on 29-6-99. PW.5 Husein Mohamed confirmed that appellant kept the seat brought by PW.4 at his house for appellant when he gave the reason that his sister had chased him away and PW.6 Abdul Karim Hasseinmohamed appellant's nephew said how on 30-6-99 appellant took 2 sofa sets to the house.

In his defence appellant gave unsworn statement. He denied knowing anything to do with the goods shown and although he knew PW.4,PW.5 and PW.6 he knew nothing about these items. However, these items were identified by PW.1 as hers.

The Learned Magistrate found that from the evidence of PW.1 to PW.6 it was proved that appellant was one of the people who broke into PW.1's house and stole things. He rejected appellant's claim that he had grudges with the police as pure concoction. Under the same considerations he acquitted 2nd accused and convicted the appellant.

In his grounds of appeal which were argued by Mr. Magolo for him, he argued that the sentence was illegal because first it was excessive then secondly that it was based on double charge.

Then he argued grounds 1-4 together saying there was no evidence that the break in was at night, so the charge of burglary was misconceived and because the witnesses impressed the magistrate as un-reliable he should not have accepted their testimony without corroboration. As to possession Mr. Magolo said there was no connecting evidence and that the man who was living in the house was not called upon to give evidence. But Miss Kwena

State Counsel supported the conviction and sentence and relied on the evidence on record.

She said goods were stolen on 29-6-99 but even if the night was not shown in the charge Sheet that omission is curable under S.382 of the Criminal Procedure Code, and that the charge was NOT Duplex.

The most important point here for determination is whether the charge as laid is duplex. Mr. Magolo says that the charge is bad because the evidence called does not show that it was time of day and also that it charged two offences. First the offence charged was indicated as being under S.304 of the Penal Code without indicating if it was under sub section (2) thereof. But in so far as it says Burglary it is implied that the offence meant was indeed burglary. I think Mr. Magolo is right in saying that the charge could not have been burglary but a breaking in and it was what was proved, because the charge in so far as it omitted any reference to time actually charged housebreaking.

Under second schedule of the Criminal Procedure Code the mode of charging burglary with theft together is prescribed. It is anomalous though as it charges burglary and theft in one count. It is a principle of law or of practice that in any charge each offence charged must be grounded in one specific count. It is therefore wrong practice to charge burglary (Housebreaking) together with theft. But S.137 of C.P.C. allows this in case of burglary (housebreaking) S.137 provides–

> "The following provisions shall apply to all charges and information, and not withstanding any rule of law or practice a charge or information, shall, subject to this Code not be open to objection in respect of its form or contents if it is framed in accordance with this code.

S. 137 (a) provides further:-

> "The forms set out in the second schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in any other cases forms to the same effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being carried according to the circumstances of each case."

In view of this I cannot see how a charge drawn in accordance with these requirements can be rejected but it must be firmly understood that a charge is the communication between the accused and the accuser. It has to convey to the accused in simple terms the facts of the complaint. It enables the accused to plead to the accusation and be able to defend himself. What 2nd schedule provides in relation to burglary or housebreaking must be the exception and not the rule. But the court must interpret it strictly, and must ask itself if as it is it obscured the definition of the charged offence or it occasioned injustice to the accused.

In the case of **SAINA V. R. [1974]E.A. 83** where accused was charged with the offence of house-breaking, theft, and handling of stolen property in one count. The Magistrate presumably relying under this found the charge alright and convicted the accused on appeal. The High Court on appeal Sir James Wicks C.J. and Justice Trevelyan rejected the charge saying each offence must be laid in one count.

This case is distinguishable though because there the Magistrate did not actually follow the schedule. He accepted 3 offences and not 2. I think this made the charge un-wieldy and out of focus charging housebreaking under S.306, theft under S.275(2)and handling under S.322 It was too loaded.

Mr. Magolo argued this point but omitted to state his view on whether where duplicity is allowed by Statute it can still vitiate the charge.

On Mr. Magolo's submission about the charge reading burglary and not housebreaking vitiating the whole trial is not to be a good reason. I think reading the charge against S.137 and S.382 of the Procedure Code, I am not of the view that the insertion of burglary occasioned injustice.

Mr. Magolo seemed to be saying further that the charge is duplex because the evidence is at variance with it, but I do not think duplicity in a charge can be determined on the basis that the evidence adduced for the proof of that charge is at variance with it because duplicity in a count is a matter of form, such that a charge which was not bad *ab initio* when the trial started cannot be bad later because the evidence shows theft at day time and not at night.

Mr. Magolo also said that the Learned Magistrate erred in law in accepting evidence of witnesses she had deprecated, but I do not think what Mr. Magolo says is true in fact. The magistrate did not find evidence of the witnesses incredible except what PW.2 Suleiman Mohamed said and in relation to the charge against the second accused whom she acquitted, there was no reliance on evidence of discredited witnesses. Even had there existed inconsistency, proof of inconsistency in evidence does not require rejection of the evidence but a court would use all the evidence in a case and not selectively but the entire evidence to reach a verdict.

I do not support the grounds set out by the appellant.

At this stage this being first appeal this court is entitled to evaluate the evidence and come to its own conclusion.

It is true the house of PW.1 was broken into. No one saw the intruders, but appellant was implicated. Some of the stolen property were recovered from him or were in his possession. Under the pretex that his sister had expelled him from his normal residence he kept the stolen sofa set with PW.5 and 6. He himself hired the vehicle of PW.4 Flemy Bembe to ferry the coach from a house in Fort Jesus and sofa set. The same seats he kept at the house of PW.5 Hussein Mohamed. He also kept the seats with PW.6 Abdulhusein. The sofa set and the show case were identified by PW.1 as hers. Theft was between 20/29-6-99. So if on 29-6-99 appellant had them then in his possession he should be regarded to be the thief by virtue of being in possession. The rule was stated in **R. v. Seymoor 38 Cr. App.** About recent possession burglary that when it is proved that premises have been broken into and property in it stolen therefrom and soon after the entry accused is found in possession of the stolen goods court can convict him of (burglary) housebreaking. This is driven from the well known principle of law stated also by our courts in so many cases that –

> "When one is found in possession of goods soon after they have been stolen and he fails to give a reasonable explanation as to how he came by it (then an inference can be drawn that he is either the thief or a guilty receiver (i.e. handler with knowledge that the goods are stole)."

Here the evidence showed directly that the appellant was the thief or a handler.

For these reasons I think the Resident Magistrate had adequate evidence to convict the accused of house breaking and I dismiss his appeal as to conviction except I would change the conviction to be under S.304 (1) and (2) as house breaking. This substitution the trial court possessed jurisdiction to do under Section 187 of the Criminal Procedure Code which says:-

> S.187:- When a person is charged with a criminal offence mentioned under chapter XXIX of the Penal Code and the court is of the opinion that he is not guilty of that offence but that he is guilty of another offence mentioned in that chapter, he may be convicted of that offence although he was not charged with it."

The learned magistrate was wrong in the evidence to convict him as charged but the proper conviction ought to be housebreaking contrary to S.304(2) and I do convict him of it.

As for sentence, under that charge the maximum sentence is ten years imprisonment while under burglary under S.304(2) the maximum sentence is 10 years together with corporal punishment.

The Magistrate awarded 5 years with 2 strokes on each limb to run concurrently meaning 5 years with two strokes but. Under 279(b) the maximum sentence is 14 years.

On appeal the appellate court does not readily interfere with the discretion exercised by the trial in court in sentencing unless that court acted on wrong principle or took extraneous matters into consideration or omitted to take into consideration relevant matters or over relevant matters. Normally where the trial court has imposed excessive sentence or too inadequate sentence which shows that a wrong principle was applied the Court can interfere.

Here the approach by the learned magistrate was clearly erroneous having based the sentence on wrong section of the offence.

Mr. Magolo says that there ought NOT to be two sentences for house breaking and for theft. But as I have said earlier on in this judgement, if as I believe the charge is sanctioned by Statute it is in order.

In my decision notwithstanding what I have expressed above, the consistency is therefore that if the felony committed by the house breaker is theft and it is so charged, and a conviction arises from it then a sentence for that felony also is proper.

I would sentence the appellant to 3 years for house breaking and 4 years for theft therein both sentences to run concurrently. Appeal against sentence therefore is allowed as varied, and as against conviction appeal is dismissed..

Delivered this 20th Day of December, 2000.

A.I. HAYANGA

JUDGE

Read by Commissioner of Assize Khaminwa in the presence of appellant and Mr. Magolo. No Appearance for State.

J. KHAMINWA

COMMISSIONER OF ASSIZE