



**Mutonya v Republic (Criminal Appeal 114 of 2021)
[2023] KEHC 17817 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17817 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL 114 OF 2021**

GMA DULU, J

MAY 18, 2023

BETWEEN

SHADRACK MUTUNGA MUTONYA APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Criminal Case No. 197 of 2018 at
Tawa Law Court by Hon. M. K. Mutegi (SRM) on 23rd January, 2020)*

JUDGMENT

1. The appellant was charged in the Magistrate's Court with burglary Contrary to Section 304 (2) and stealing Contrary to Section 279(a) of the [Penal Code](#). The particulars of the offence were that on July 23, 2018 at around 10:00p.m at Ivumbu village within Mbooni West Sub County in Makueni County jointly with others not before court broke and entered the dwelling house of Nahashon Mwangangi with intent to steal therein and did steal therein 2 TV sets (LG flat screen digital, Power King), and LG radio, 3 speakers, 2 TV modulators, 1 flash 8GB, 4 pieces of extension cables, 1 gas cylinder of 13kg, 1 meko gas cooker, key/copy locks, the property of Nahashon N Mwangangi all valued at Kshs 120,000/=
2. In the alternative, he was charged with handling stolen goods contrary to Section 322(1) of the [Penal Code](#), the particulars of which being that on August 12, 2018 at 13:12hours at Mjini area in Machakos town within Machakos County otherwise than in the course of stealing received TV (LG make) flat screen size 32 inches and a speaker knowing or having reason to believe them to be stolen goods.
3. He denied both charges. After a full trial, he was convicted on the main count of burglary and stealing and sentenced to serve five (5) years imprisonment.
4. Aggrieved by the conviction and sentence the appellant has come to this court on appeal, and relied on the following grounds:-



1. The learned Magistrate erred both in law and fact by convicting him without noting that the investigation was very shoddy thus it could not be relied on.
2. The learned trial Magistrate erred both in law and fact for not noting that the prosecution case was not proven beyond reasonable doubt as it was riddled with many contradictions, malice and inconsistencies.
3. The learned trial Magistrate erred both in law and facts by not considering the defence tendered by the appellant and erred in arriving at conclusions without evidence
4. The sentence meted on the appellant is irregular, unlawful and excessive.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
6. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno = Versus = Republic* (1972) EA 32.
7. The appellant was convicted of burglary and stealing, which was the main charge. Nobody saw or witnessed him breaking and stealing. The evidence on record is that PW1 Nahashon Mwangangi the complainant employed the appellant as caretaker of his house and proceeded to Nairobi for his business.
8. On July 23, 2018 PW1 he was called on phone by one of his workers Jackson Mutisya (PW2), who informed him that the appellant had not been seen. PW1 then travelled home only to open the door of the main house to see the items listed in the charge sheet missing and some inside doors broken.
9. PW1 then reported the incident to the police and the appellant was later arrested at Makindu. The appellant thereafter took the police to PW4 Erick Mutua Mutia at Machakos town where a TV set was recovered. The appellant also led the police to PW3 Omar Ali Diyu also at Machakos town where an LG radio woofer was recovered. The two witnesses PW3 and PW4 said in evidence that the subject items were delivered to them by the appellant.
10. The said recovered items were identified by the complainant PW1 as belonging to him, and the appellant did not claim ownership of the same. This was the prosecution evidence.
11. In his sworn defence, the appellant said that he was arrested at Makindu on August 13, 2018 and denied the charges. He contended that it was PW2 who had committed the offence and that PW3 lied in court. He claimed that two other people had been arrested for the offence but had been released, thus the charges against him were trumped up.
12. There is a case based on circumstantial evidence. The legal principle applicable in determining whether to convict are well stated in the case of *Sawe = Versus = Republic* (2003) eKLR. I note from the evidence on record that no stolen item was recovered from the appellant. However, in my view, the circumstantial evidence on record herein point only to the appellant as the thief and to no one else. The first reason is that he was employed by PW1 to take care of his house, and thus he was the only person capable of accessing the house, as PW1 was away in Nairobi. PW2 was an employee of PW1, but was not responsible for caring for the house.
13. Secondly, he disappeared from the work place for no known reason and without informing his employer. Thirdly, some of the items listed in the charge sheet were on evidence of the appellant found



in possession of PW3 and PW4 who clearly stated in evidence that the recovered items were delivered to them by the appellant, within a short period of the alleged break in and theft from the house of PW1.

14. In my view, the prosecution proved beyond any reasonable doubt that the appellant broke the house of the complainant PW1 and stole the items listed in the charge, as he was the only one with such opportunity, based on the evidence on record. I will thus dismiss the appeal on conviction.
15. With regard to sentence, the maximum statutory sentence for burglary under Section 304(2) of the *Penal Code* is ten years imprisonment and for stealing under Section 279(b) is 14 years imprisonment.
16. The appellant was liable to be sentenced on each of the two limbs of the offence but was instead sentenced to only five (5) years imprisonment, after the court considered the period he was in custody during trial of one (1) year and 5 months.
17. In my view, the appellant was lucky to have escaped with such a lenient sentence. I will uphold the sentence.
18. Consequently and for the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court. Right of appeal within 14 days explained.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF MAY, 2023.

GEORGE DULU

JUDGE

In the presence of:-

Appellant

Mr. Sirima for state holding brief for Mr. Kazungu

Mr. Otolo court assistant

