



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO.E008 OF 2020

(CONSOLIDATED WITH HCCRA NO. E009/2020, E010/2020, E028/2020)

DENIS ELWAK OTITI.....1ST APPELLANT

ALLAN ONYANGO WAGAH.....2ND APPELLANT

IAN OMONDI OUMA.....3RD APPELLANT

ROLLIENS OCHIENG OMOLLO.....4TH APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being appeals from the original conviction and sentence of Hon. J.M (C.M.C)

in Makueni Chief Magistrate's Court CMCR Case No. 385 of 2019

pronounced on 24th September, 2020).

JUDGMENT

1. The four (4) appellants herein were charged with three (3) others, in the magistrates' court, with several counts. Ultimately, the other three (3) accused persons were acquitted, two (2) at case to answer stage, and one (1) at judgment stage, and the four (4) appellants herein convicted on counts (i) (ii) (iii) and (iv).

2. The charges under which the four (4) appellants herein were convicted were **(i)** house breaking contrary to section 304(1) and stealing contrary to section 268 as read with section 275 of the Penal Code. The particulars of count (i) being that on 18th July 2019 at unknown time at Westlands estate – Wote town in Makueni Sub-county broke and entered the dwelling house of Mbula Mutula with intent to steal and did steal from therein one 24 inch Samsung television, a laptop make H.P, wrist watches, one duvet, one masai shuka, two pillows, and one Versace spray, and cash Kshs.20,000/=, all valued at Kshs.325,000/= the property of the said Mbula Mutula.

3. Count **(ii)** was for house breaking contrary to section 304(1) and stealing contrary to section 268 as read with section 275 of the Penal Code. The particulars of offence were that on 15th October 2019 at unknown time at Shimo estate in Wote town in Makueni Sub-county within Makueni County, broke and entered the dwelling house of Telesia Mumbua Matilu with intent to steal and did steal therein one Bruhm television set 32 inch and its remote control, one blanket and two bags all valued at Kshs.32,000/= the property of Telesia Mumbua Matilu.

4. Count **(iii)** was also for house breaking contrary to section 304 (1) and stealing contrary to section 268 as read with section 275 of the Penal Code. The particulars of offence were that on 15th October 2019 at around 1130hours at Baraka house Kileleshwa estate – Wote town in Makueni Sub-county within Makueni County broke and entered dwelling house No. 1F of Mr. Duke Muchiri with intent to steal, and did steal from therein one Samsung television 49 inch, one microwave make LG, one laptop make E-machine, one laptop make Sony, bedsheets and one hard disc and 300GB flash disc all valued at Kshs.170,000/= the property of Mr. Duke Muchiri.

5. Count **(iv)** was also for house breaking contrary to section 304(i) and stealing contrary to section 268 as read with section 275 of the Penal Code. The particulars of offence were that on 15th October 2019 at around 1130 hours at Baraka house in Kileleshwa estate of Wote town in Makueni sub-county within Makueni County broke and entered a dwelling house No. 1B of Mr. Justus Kitetu with intent to steal and did

steal from therein one 24 inch Samsung television, a fan heater make Ramco and mobile charger all valued at Kshs.29,000/= the property of Mr. Justus Kitetu.

6. On conviction each of the appellants was sentenced to concurrent seven years imprisonment for each of the first limb of the offence, and three years' imprisonment for each of the second limb of the four counts, thus a total of seven years imprisonment for each of the appellants.

7. Dissatisfied with the conviction and sentence of the trial court, the four (4) appellants have come to this court on appeal, on grounds of appeal, which can be summarized as follows –

1) That the learned trial magistrate erred both in law and facts and misdirected himself by holding that the case for the Prosecution was prove to the required standards whereas on the basis of the record the burden of proof was not discharged and indeed left reasonable doubts that ought to be resolved in the appellants favour.

2) That the trial magistrate erred in law and fact by wholly relying on prosecution witnesses testimony yet in the circumstances of the case ought to have been backed by evidence linking them to the offence of house breaking and stealing.

3) That the learned magistrate misdirected himself after failing to cautiously explore statements of the Prosecution witnesses who could not prove the house breaking and stealing.

4) That the parade was conducted contrary to parade rules.

5) That the magistrate handed down a harsh and excessive sentence.

8. The four appeals proceeded by way of filing written submissions. I have perused and considered the submissions of each of the appellants and the submissions filed by the Director of Public Prosecutions.

9. This being a first appellate court, I have to start by reminding myself that I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences, but bearing in mind that I did not have the opportunity to see witnesses testify to determine their demeanor – see **Okeno –vs- Republic (1972) E.A 32**.

10. I have re-evaluated the evidence on record and I have also considered the defences of the appellants as well as the judgment of the trial court, in addition to considering the submissions.

11. Three of the appellants were identified in a parade conducted by Pw6 Sup. Harold Jimmy Kimaru whose conduct in my view was in accordance to the law and procedure. Ian Omondi was identified by Duncan Njoroge Kamau, Rollien Ochieng was also identified by this witness. Felix Munyao also identified him. Allan Onyango was identified by Duncan Njoroge, and Felix Munyao. Duncan Njoroge was Pw1 and Felix Munyao was Pw9. Pw9 also saw Ian Omondi Ouma and Dennis Otiti in the vehicle at Wote town. They were identified by people who saw them at the relevant scenes by witnesses who were not involved in arresting them. There was also CCTV footage produced by Pw13 that captured some of them. This footage was played in the trial court.

12. Rolliens Ochieng and Allan Onyango Wagah two of the appellants were also identified by Dw5 Francis Muthamia as the persons who sold some of the recovered stolen items to a shop dealer in Kasarani, to persons who were initially charged in court but later acquitted. The descriptions given in court about these two appellants leave no doubt that they were described in detail and their identity is not in doubt.

13. The four appellants were also arrested by police from Kola Police Station together in the vehicle that was used in ferrying items, which vehicle had been hired from a witness who described how that vehicle was hired and not returned in time as had been promised by the hirer. There is evidence that the said vehicle was reflecting disguised plate numbers by changing the appearance of the numbers on the plate by using black plastic cello-tape.

14. I am aware that in all criminal cases, the Prosecution bears the burden to prove the accused person guilty beyond any reasonable doubt – see **Woolmington –vs-DPP (1935) AC (an English case)**.

15. In my view, with the Prosecution evidence on record, the Prosecution proved the guilt of each of the appellants beyond reasonable doubt. The defences of the appellants were not believable and the trial court was thus correct in disbelieving the defences. I hold that the prosecution proved its case against each of the four (4) appellants on the charges on which they were convicted and I will uphold the conviction.

16. On sentence, I find no fault on the part of the trial court. The concurrent sentences of 7 years for the limb of housebreaking and three years for the limb of stealing is not excessive in this matter where, the offences were committed were committed in a series. I will thus uphold the concurrent sentences, even though the appellants are said to be relatively young persons. They deserve a deterrent sentence.

17. Consequently, I find no merits in the appeals. I dismiss the appeal of each of the four (4) appellants and uphold both the conviction and sentence.

Delivered, signed & dated this 7th day of October, 2021, in open court at Makueni.

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George Dulu

Judge