REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 8 OF 2019

ALEX KIRIMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment and sentence in the Senior Resident Magistrate's

Court at Wajir in Criminal Case No. 499 of 2018 delivered on 8th February 2019 by Hon. A. K. Makoross (SRM))

JUDGEMENT

1. The appellant was charged with two counts:

Count I: Burglary contrary to section 304(1) (b) and stealing contrary to section 279(b) of the Penal Code.

2. The particulars being that on the 2nd day of December 2018 at Township Location in Wajir East Sub-County within Wajir County broke and entered the building used as a dwelling house by one ALI ABDI SALAT and stole a mobile phone make SAMSUNG GALAXY NOTE 3 valued at Kshs.43,000/= (forty three thousands) the property of the said ALI ABDI SALAT.

3. In the alternative to Count I the appellant was charged with handling stolen goods contrary to section 322(1) (2) of the Penal Code.

4. Particulars being that on the 3rd day of December 2018 at Township Location in Wajir East Sub-County within Wajir County otherwise than in the course of stealing dishonestly retained a mobile phone make SAMSUNG GALAXY NOTE 3, knowing and having reason to believe them to be stolen goods.

5. **Count II**: Giving false information to a person employed in the public service contrary to section 129(a) of the Penal Code.

6. Particulars being that on the 3rd day of December 2018 at Wajir Police Station in Wajir East Sub-County within Wajir County, having been arrested for the offence of burglary and stealing and was required to give his full names, he informed No. 89253 PC PHILEMON REKO a person employed in the National Police Service that his names were DENNIS MUGAMBI MOSES the information that he knew or believed to be false intending to hide his identity knowing that he had previously been charge and convicted vide CR No. 310/2017.

7. He pleaded not guilty and after full trial, he was convicted and sentenced to serve seven (7) years on Count I and one (1) year on Count II. Sentence to run concurrently.

8. Being aggrieved by the above decision he lodged instant appeal and set 6 grounds which can be comprised as (1) whether the prosecution proved its case to the required standards; and (2) whether sentence was excessive.

9. The parties were directed to canvass appeal via submissions but only appellant filed the same.

10. I have perused through the proceedings and submissions on record and do find the issues are; whether prosecution case was proved as required by law and whether the sentence awarded to the appellant was excessive.

ANALYSIS AND DETERMINATION

11. Section 304 of the Penal Code Cap 63 under which the appellant is charged on the first count provides:

"304(1) Any person who –

(b) Having entered any building, tent or vessel used as human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years."

12. It was thus the prosecutions duty to demonstrate beyond reasonable doubt that the appellant entered into a building used as a dwelling house and that he committed a felony therein.

13. The building in issue is the complainant's house and it is not in contest that the same was used as a dwelling house. The complainant gave evidence that he was living in the said house and had only left temporarily to go to the shop at the material time. As stated, his evidence was not challenged and I therefore find and hold that it has been proved to the required standards that the house material to this case was a dwelling house.

14. That a felony was committed therein is also not in issue. All the prosecution witnesses testified that at the material time a Samsung Note 3 Galaxy phone had been stolen and this is admitted to by the appellant who says that even prior to his arrest he had been informed that a phone had been stolen from the said house. The only contest therefore is whether the same was stolen by the appellant herein.

15. I have considered all the evidence on record and I find that the evidence against the appellant is overwhelming. This is almost a classic case of being found with the smoking gun.

16. To begin with, it is clear from the evidence of all the prosecution witnesses that when they discovered the loss of the phone, they had also discovered some alien shoe prints in the plot where the complainant resided.

17. PW1 (the complainant) and his two neighbours (PW2 and PW3) followed those tracks and it led to the house of (PW4). They knocked at PW4's house but when they searched the said house they did not find anything.

18. However, as they conducted the said search two people ran from the adjacent house and they immediately took them to be the suspects they were pursuing. Accordingly, they tasked the ladies who were in that house with producing the suspects.

19. As the summary of evidence shows, the results were prompt. The ladies working with PW4 and their landlord (PW6) arrested the appellant and locked him up and when the complainant and the police turned up the next morning, it was unanimously confirmed that the appellant's shoe tracks marched those of the thief they had been tracking.

20. They took the appellant to the police station and, as shown by the evidence, whilst there, he volunteered to produce the phone. He then led the police to the room where he had been locked up and of his volition removed the phone from under the sleeping mat.

21. His retrieval of the said phone was witnessed by the police offices, including PW7 as well as by the landlord (PW6) and the owner of the house where he had been locked up (PW4).

22. It is important to appreciate the diversity of people who testified during trial in the case. PW1, PW2 and PW3 were all neighbours in a different quarter of town and before the theft of PW1's phone he did not know either the appellant or the other prosecution witnesses in this case.

23. The police officer was also a stranger to the parties and these facts are clearly admitted by the appellant who says he did not know any of the witnesses who testified in court before.

24. That being so, it would be wondrous indeed if the complainant lied that he had lost his phone, then enlisted the help of his two neighbours in perpetuating the lie and further enlisted the help of four strangers (PW4, PW5, PW6 and PW7) only to fix the appellant who was also not known to him at the material time.

25. It would indeed be beyond wonder, if, as the appellant suggests, the complainant was to pay the witnesses to testify against him.

26. I have analyzed the appellant's defence vis-a-vis the prosecution's testimony and find the defence to be devoid of substance and accordingly reject it.

27. The time of the offence has been shown to be 11pm at night or thereabouts and this is not contested meaning that the prosecution had proved its case as against the appellant on the first charge to the required standards.

28. The second count facing the appellant is one of giving false information to a person employed in the public service and it is contended on the charge sheet that at the initial stage the appellant had deliberately given his name to a police officer falsely as DENNIS MUGAMBI MOSES so as to avoid recognition as a previous offender.

29. I have perused the records in this matter and I note that when the appellant took plea before the trial court on 4th December 2018, the charge sheet showed his names as DENNIS MUGAMBI MOSES. As is customary, the name on the charge sheet was called out in open court and the appellant responded to it and pleaded under those names without raising any objection that he names used were not his.

30. In his defence however he properly introduced himself as Alex Kirimi thus proving the lie of his earlier claim to the name DENNIS MUGAMBI MOSES.

31. The founding lie was told to a police officer in the course of his duty and I therefore find that the prosecution also proved the charge of giving false information to a person employed in the public service contrary to section 129(a) of the Penal Code.

32. Thus the court finds no merit in appeal and makes the following orders;

i) Appeal is dismissed, conviction is upheld and sentence confirmed.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 19TH DAY OF FEBRUARY, 2020.

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C. KARIUKI

JUDGE