



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO 42, 44 & 45 OF 2019

OLIVER WANJALA.....1ST APPELLANT

KENNEDY WAFULA SIMIYU.....2ND APPELLANT

SAMUEL MUROKOI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being An Appeal From The Judgement (Conviction And Sentence) Of Hon. B.B. LIMO, SRM, Delivered On 9/4/2019 In The Principal Magistrate's Court At Webuye In Criminal Case No. 81 Of 2019, R V. Kennedy Wafula Simiyu, Samuel Murokoi & Oliver Wanjala)

JUDGEMENT

[Pursuant To Section 201 (2) As Read With Section 200(1) (A) CPC]

1. The Appellants Have Appealed Against Their Conviction And Sentence Of Three Years' Imprisonment In Respect Of The Offence Of Breaking Into A Building And Committing A Felony Contrary To Section 8 (2) As Read With Section 306 (A) And Stealing Contrary To Section 279 (B) Of The Penal Code (Cap 63) Laws Of Kenya.

2. Ms Koech, Counsel For The Respondent Has Supported Both The Conviction And Sentence Recorded Against The Three Appellants.

3. The Appeal Against Each Appellant Will Be Considered Separately.

Appeal Of The 1st Appellant- Oliver Wanjala

4. In This Court The 1st Appellant Has Raised Four Grounds In His Petition Of Appeal.

5. In Ground 2 The Appellant Has Stated The Unchallengeable Fact The He Did Not Plead Guilty.

6. In A Coalesced Form The Appellant Has In Grounds 1 And 3 Faulted The Trial Court For Convicting Him For The Offence That Was Not Proved And Upon Evidence That Was Contradictory. In This Regard, The Appellant Has Submitted That There Was No Direct Evidence Against Him. Furthermore, He Also Submitted That There Was A Contradiction As Regards The Date When The Offence Was Committed, With The Complainant Testifying That The Offence Was Committed On 17/2/2019, While Other Witnesses Testified That The Offence Was Committed On 15/2/2019 Or 18/2/2019. In This Regard, The Evidence Of Tom Ngaira (Pw 1), Who Is The Complainant, Is That On 14th February 2019 He Closed His Workshop, According To The Handwritten Original Record Of The Court. The Typed Copy Indicates The Date As Being 17th February 2019, Which Is A Typing Error. He Proceeded Home. In The Morning Of 15th February 2019, Pw 1 Went To The Workshop And Found It Broken. He Reported To The Police At 8.50 Am. He Found His Tools Of Trade Namely 4 G-Claps, 3 Clamps, 2 Chisels, 2 Hammers, 3 Coffee Tables, A Rivet, Queens Of Stool And Other Items Missing. These Tools Were Valued Shs 100,000/=. At 12 00 Noon He Was Called To The Police Station And Was Told Some Items Had Been Recovered. He Identified Those Recovered Items As One Coffee Table (Exhibit 1), 2 Hammers (Exhibit 2) And A Coffee Table (Exhibit 3).

7. In Addition To The Evidence Of PW 1, There Is The Evidence Of No. 83068 PC Julius Kosgey (Pw 2) Of Webuye Police Station. Pw 2 Testified That He Reported On Duty On 15/2/2019 At 8.00 Am. He Found A Complaint Of Burglary And Stealing Had Been Lodged At The Station. During His Investigations, He Established Some Stolen Goods Had Been Taken By The Two Co-Appellants To The House Of The 2nd Appellant, Who Was The 1st Accused In The Lower Court. PW 2 While In The Company Of PC Kipsang And PC Oduor Arrested The

Three Appellants. The 2nd Appellant Stated That He Received The Co-Appellants, As Visitors. Pw 2 And The Other Two Police Officers Proceeded To The House Of The 2nd Appellant, Wherein They Recovered 2 Hammers, One Coffee Table, Stool, A Lap Top And A Mattress. Pw 2 Then Produced The Inventory As Exhibit 4. He Then Produced These Items As Exhibits.

8. The 1st Appellant In His Sworn Evidence Testified That He Was A Mechanic. He Further Testified That On 14/2/2019 He Was In Town, Where He Met Pw 1. Pw 1 Threatened Him With Arrest. He Testified That The Charge Against Him Is A Frame Up.

9. This Is A First Appeal Court. I Have Independently Re-Assessed The Evidence Adduced At Trial. I Find That This Appellant Was Implicated In The Commission Of This Offence By The 2nd Appellant. The Second Appellant Is An Accomplice, Whose Evidence Was Not Subjected To Cross Examination.

10. In Find That The Offence Against The 1st Appellant Was Not Proved Beyond Reasonable Doubt.

11. In The Premises, His Appeal Succeeds With The Result That His Conviction And Sentence Are Hereby Quashed. He Is Therefore Set Free Unless Otherwise Held On Other Lawful Warrants.

Appeal Of 2nd Appellant- Kennedy Wafula Simiyu.

12. The Prosecution Evidence Set Out Above Against The 1st Appellant Applies With Equal Force To This Appellant.

13. In His Sworn Evidence This Appellant Testified That He Is A Casual Labourer. He Further Testified That On 14/2/2019 He Proceeded To Work. Thereafter He Proceeded To Drink Busaa At Malaha, From Where He Was Arrested By Pw 2.

14. This Is A First Appeal Court. I Have Independently Re-Assessed The Evidence Adduced At Trial. I Find That This Appellant Was Found With The Stolen Goods Of The Complainant Within Hours After They Were Stolen. The Goods Were Positively Identified By Pw 1 As His Tools Of Trade. His Explanation That He Received Them From The Co-Appellants And His Total Silence In His Sworn Defence Evidence Clearly Shows That He Is Not A Truthful Witness. I Find That The Trial Court Based Its Decision On The Evidence Adduced Before It. I Find The Submission Of The Appellant That The Offence Was Not Proved As Required By Law Is Without Merit And Is Hereby Dismissed. I Also Find That There Is No Contradiction Between The Evidence Of Pw 1 And Pw 2 As Regards The Date When The Offence Was Committed. In The Circumstances, I Find That The Appellant's Appeal Against Conviction Fails And Hereby Dismissed.

15. As Regards Sentence, I Find That The Appellant Was Sentenced To Three Years' Imprisonment On Each Limb Of This Composite Charge And The Sentence Was Ordered To Run Consecutively. Effectively The Appellant Was Sentenced To Six Years' Imprisonment, Which Makes It Excessive. I Hereby Reduce The Sentence To One Year's Imprisonment On Each Limb Of The Composite Charge, Which Sentence Is To Run Concurrently From The Date Of This Judgement.

Appeal Of 3rd Appellant- Samuel Murokoi.

16. The Prosecution Evidence Set Out Above Against The 1st Appellant Applies With Equal Force To This Appellant.

17. In His Unsworn Evidence This Appellant Testified That He Comes From Webuye Town And That He Is Innocent.

18. I Find That This Appellant Was Implicated In The Commission Of This Offence By The 2nd Appellant. The Second Appellant Is An Accomplice, Whose Evidence Was Not Subjected To Cross Examination.

19. In Find That The Offence Of This Appellant Was Not Proved Beyond Reasonable Doubt.

20. In The Premises, His Appeal Succeeds With The Result That His Conviction And Sentence Are Hereby Quashed. He Is Therefore Set Free Unless Otherwise Held On Other Lawful Warrants.

Judgement Signed And Dated At Narok This 19th Day Of December, 2019.

J. M. Bwonwong'a

Judge

And

Judgement Signed, Dated And Delivered In Open Court At Bungoma This 13th Day Of February, 2020.

S. N. Riechi

Judge

13/2/2020