



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 54 OF 2019

(From original conviction and sentence in Butere SRMCCRC

No. 137 of 2017 of 26th October 2018 by Hon. F. Makoyo, Senior Resident Magistrate)

CALEB HAWADI MUYUKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. F. Makoyo, Senior Resident Magistrate, of housebreaking contrary to Section 304(1) of the Penal Code, Cap 63, Laws of Kenya, and stealing contrary section 279(d) of the said Act, and was accordingly sentenced to three (3) years imprisonment therefor. He was also convicted on a second count, of stealing a motor vehicle, contrary to section 278A of the Penal Code, and was sentenced two years imprisonment for that offence. The three sentences were to run concurrently.
2. The particulars of the charge on the first count, of housebreaking and stealing, were that on 6th August 2017 within Ekumira Village, Butere Sub- Location, within Kakamega County, he with others not before the court, he broke and entered the dwelling house of Frederick Dixon Amukowa Anangwe, with intent to steal therein and that he did steal from therein assorted items, being a pistol, rounds of ammunition, gas cylinders, household items, tents and beans, all valued at Kshs. 1, 100, 000.00. The particulars of the second count were that on the same day and within the same village, he, and others not before the court, he stole a motor vehicle registration mark and number KAH 872X, belonging to the same complainant.
3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called eight (8) witnesses.
4. The complainant, Frederick Amukowa Anangwe, testified as PW1. He had employed the appellant as a security guard. He explained that the appellant had called him on 5th August 2017 to ask for permission for another employee to go and vote on 7th August 2017. He granted permission to that other employee, who left the homestead on 6th August 2017. On 7th August the appellant called PW1 for permission to allow his wife visit PW1's home for two days and for a salary advance, which requests he granted. On 8th August 2017, PW1 was called by the other employee, who reported that there was a problem at PW1's homestead. He instructed another person to get into the compound, and he informed him that the dogs had been let loose, security lights were still on, the motor vehicle was missing, a metal steel door had been broken and was ajar, the lock had been broken, among other breakages. A report was made at the Butere Police Station, and it was after that that they had established the extent of the theft committed within the house. He explained that he telephoned the appellant and informed him that he had reported the incident, and warned him that he risked being shot by the police. He abandoned the motor vehicle at a police station, and informed the wife of PW1 of the fact. The gun was also recovered. He stated that the appellant was not found with anything belonging to PW1 when he was arrested.
5. PW2, Mary Amukowa Anangwe, the wife of PW1, confirmed that the appellant was their employee. She stated that PW1 telephoned her to inform her that the appellant was not at their home at Butere, and instructed her to travel to Butere, from Nairobi. She travelled to the Butere home, that same day, 8th August 2017, arriving late morning. She found the vehicle missing, and the garage, kitchen and steel doors were broken. Things were strewn about, with the safes broken. She stated that some items were recovered. She further stated that the appellant sent her a text message to effect that the vehicle was at a petrol station at Kakamega town. She also listed the items that they found missing from the house. She confirmed that the appellant did not have any of the items on him when he was arrested.
6. Claus Wamukoya (PW3), testified that PW1 had instructed him on 8th August 2017 to go to his home, to assist someone who intended to buy Napier grass from PW1's home. When he got there he found the two gates locked, dogs were barking and he did not get the Napier grass customer. When he entered the compound, on instructions of PW1, he found the vehicle missing, and the main door open. James Madegwa Amusula was PW4. He was the other employee of PW1. He had been off duty on 6th August 2018. He stated that while still at his home, a customer called him saying he wanted Napier grass, but had found no one at the home of PW1. He called PW1, who instructed him to

resume duty, which he did on 9th August 2018. He found the door to the house broken, and a gas cylinder missing. He found PW2 had already arrived at the compound. PW5 was the customer who wanted to buy Napier grass. His name was Hannington Makwata. He got to the home of PW1 at 11.30 AM, on 8th August 2018, and found no one there. He telephoned PW3, who informed him that his coworker, who was supposed to be at the compound, had switched off his phone. PW5 then left.

7. Number 53012 Police Constable Jackson Wanyama (PW6) was among the police officers who visited the scene on 8th August 2018. They found the gate closed and the dogs barking. They jumped over the gate, and found the door broken, and everything scattered within the rooms. PW7 was Number 54049 Corporal Barnabas Koech. He was the police officer who arrested the appellant. He stated that he was not found with anything belonging to PW1. Number 76966 Police Constable Benson Hanzano (PW8) was the investigation officer, having taken over from the previous investigating officer. He narrated the steps that were taken in the course of the investigations.

8. The court found that the appellant had a case to answer and put him on his defence. He gave a sworn statement, and did not call witnesses. He denied committing the offence. He said he was within his home area of Saboti Constituency on 8th August 2017, and remained there until he was arrested on 29th August 2017 at Sabatia, within Butere. He said that he met PW1 for the first time in court during the trial.

9. After reviewing the evidence, the trial court convicted appellant of the charges in the two counts, and sentenced him as stated in paragraph 1.

10. The appellant being dissatisfied with the conviction and sentence appealed to this court and raised several grounds of appeal, being that the trial court convicted yet no documentary exhibits had been produced, relied on malicious and fabricated evidence, and his defence was not properly evaluated.

11. Being a first appeal, I have re-evaluated all the evidence on record and drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of **Okeno vs. Republic (1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

12. Directions were given on 21st May 2020 for disposal of by way of written submissions. The directions were complied with by both sides, for they have filed their respective written submissions.

13. In his written submissions, the appellant urged several matters. He submits that the documentary exhibits were not produced. Secondly, he submits that the evidence tendered was fabricated and amounted to mere allegations. He submits that PW5 was the only independent witness, all the rest were linked to PW1 one way or the other. He further submitted that even though it was alleged that the vehicle was found abandoned at a petrol station, no one from the alleged station was called as a witness. . Finally, he argues that his sworn statement was not given any consideration by the trial court.

14. On its part, the respondent submitted that section 62 of the Evidence Act, Cap 80, Laws of Kenya, provided that all facts, except the contents of documents, could be proved by oral evidence, to argue that documentary evidence was not necessary to prove the offence of housebreaking and stealing. It was submitted that the state had provided physical evidence, of the broken door and the instrument used to effect the break in. On the evidence being fabricated and malicious, it was submitted that the appellant was not found in possession of any of the stolen items, however, the circumstantial evidence pointed to the fact that it was him who had committed the offence. *Kipkering arap Koske vs. Republic* [1949] 16 EACA 135, was cited, to state the principles governing circumstantial evidence. It was further submitted that although the appellant denied knowing the complainant, PW1, there was ample evidence that he was PW1's employee. It was submitted that the circumstances pointed to his guilt. He was the only one left at the home to take care of it, he held keys to the gate and not the house and the gate was found intact but the door to the house broken, he had access to the vehicle as he was also its driver. He never informed PW1 that he would be leaving to go to vote, he switched off his telephone and stooped communicating with PW1 and his coworkers and that he did not report the incident to the police. Thirdly, it is submitted that there were no inconsistencies in the evidence, and even if there were any they were minor and of little effect, going by the position taken by the court in *Philip Nzaka Watu vs. Republic* [2016] eKLR. Finally, it is submitted that the trial court did evaluate the appellant's defence before dismissing it.

15. On the first issue, as to documentary evidence, I agree with the respondent, that documentary evidence was not necessary to establish commission of the offences charged, specifically that of housebreaking to establish commission of the offences charged, specifically that of housebreaking and stealing. The evidence required to be presented is of the break in and theft. The respondent presented a good number of witnesses who testified as to broken doors, one of which was produced in court, and of items missing from the house, after the break in. Photographic evidence of the damage to prove the break in would have been useful, but the oral testimonies of the witnesses presented sufficed.

16. On the evidence being fabricated and malicious, I would start by saying that the appellant has not sought to demonstrate the malice behind the evidence. His testimony was that he did not know PW1, and that he saw him for the first time in court. That begs the question, why would a total stranger have malice against him, as to have him framed up. Secondly, from the testimonies of the prosecution witnesses, the appellant was placed squarely on the scene. He was the one left in charge of the compound, it behooved him to account for any mishap. He did not. If the house was broken into during his stewardship, then it was expected that he would report to PW1 or the police, or both. He did neither. Instead, he switched off his phone, and made himself unreachable by his employer, and his coworkers. The trial court properly convicted him based on the circumstantial evidence that placed him on the scene, and his conduct around the material time.

17. On inconsistencies in the evidence, I have carefully gone through the record, and I found the prosecution's case to be generally flowing. The appellant did not point out any inconsistencies or flaws in it, nor how any such flaws, if at all, impacted on the prosecution's case. Going by the authority in *Philip Nzaka Watu vs. Republic* (supra), if there were any, then they must have been minor, and the mere presence of inconsistencies, does not impact on the state's case, unless the same are of such significance as to render the evidence unreliable.

18. Finally, on his sworn evidence not being properly evaluated, I would start by agreeing with the appellant that sworn evidence is taken more serious than unsworn statements. Indeed, the courts have repeatedly stated that unsworn testimonies are worthless. However, that said does not mean that the court should treat every sworn statement as gospel truth. It has to be evaluated against the rest of the other testimonies. I agree that the trial court, in the judgement, did not commit much time to analyzing the defence statement, but it is clear from the judgment that the trial court did consider elements of it. Looking at the defence as against the other evidence, I am not persuaded that the trial court fell into any error. The evidence on record is clear that the appellant was an employee of PW1, he was the one left in charge of the home at the material time of the incident, he was bound to account for any such incidents, he did not, and instead he ran away and switched off his phone. The circumstances heavily outweigh the defence that he offered.

19. Overall, I am not persuaded that there is any merit in the appeal. I am of the considered view that the conviction of the appellant, in Butere SRMCCRC No. 351 of 2017, was safe. I shall accordingly confirm the said convictions and uphold the sentences imposed. The appeal herein is hereby dismissed. The appellant has a right to challenge this judgement at the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 1st DAY OF October, 2020

W MUSYOKA

JUDGE