



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 8 OF 2019

JACOB OMONDI JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the Judgment and decision of the Principal Magistrate's Court at Maseno (Hon. C. N. Oruo SRM) dated the 13th February 2019 in Maseno CMCCR No. 52 of 2016/

JUDGMENT

The Appellant, **JACOB OMONDI JUMA**, was convicted for 2 offences, namely;

i. Count 1 – *Burglary Contrary to Section 304 (2) of the Penal Code and Stealing Contrary to Section 279 (b) of the Penal Code; and*

ii. Count 2 – *Malicious Damage to Property Contrary to Section 339 (1) of the Penal Code.*

1. In respect to Count 1, the Appellant was sentenced to 2 Years imprisonment. Whilst in respect to Count 2, he was sentenced to 1 Year imprisonment.
2. During the hearing of the appeal, the learned state Counsel, Ms Odumba conceded that the conviction on Count 1 was not safe.
3. As the Respondent pointed out, **Section 304 (2)** of the **Penal Code** prescribes the sentence for the offence of burglary.
4. When an accused person faces a charge of burglary, the charge should be founded upon **Section 304 (1)** of the **Penal Code**.
5. Therefore, the Respondent was right to have conceded the appeal in relation to Count 1.
6. I therefore allow the appeal in relation to Count 1, and quash the conviction in that respect. I also set aside the sentence.
7. Meanwhile, in relation to the conviction on Count 2, the Complainant testified as **PW1**.
8. He was the owner of the iron-sheet house, which he had built on his father's parcel of land.
9. He testified that on the material day, he got to the scene and he found that the house had already been demolished.
10. He explained that when he got to the scene, the Appellant was with the co-accused, as they were removing the iron sheets and timber that had been destroyed.
11. During cross-examination, **PW1** clearly stated that he never saw those who destroyed the house.
12. Another notable feature of the evidence of **PW1** was that in his Statement, the 2 accused persons were neither named nor identified.
13. Considering that **PW1** said that the 2 accused persons lived within the same village as he, it would have been expected that if he had

identified them committing the offence, he would have said so in his Statement which he recorded at the police station.

14. **PW2** was the care-taker employed by the Complainant, to guard the structure which **PW1** built on the father's land.

15. It is **PW2** who reported to **PW1** about the destruction of his house.

16. **PW2** testified that he did not know the accused persons.

17. **PW3** testified that he had identified the Appellant's co-accused, as the house was being destroyed.

18. Secondly, he said that on the next morning, he saw the Appellant and the co-accused removing the iron sheets which had been destroyed on the night before.

19. Curiously, during cross-examination, **PW3** said that in the Statement which he recorded, he never mentioned the Appellant's co-accused.

20. **PW3** also said that he did not see the 2 accused persons taking anything from the scene.

21. **PW4** was the Investigating Officer. He testified that it was **PW2** who told the police that he had witnessed the accused persons destroying the house.

22. When it is borne in mind that **PW2** testified that he did not know any of the 2 accused persons, I find that if the investigator relied on information from **PW2**, in order to arrest the accused persons, the case put forward by the prosecution is not sustainable.

23. Therefore, there is merit in the appeal in relation to Count 2.

24. Accordingly, I do hereby quash the conviction on Count 2, and set aside the sentence in relation thereto.

25. In the result, the appeal is successful. I order that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED and DELIVERED at KISUMU This 3rd day of December 2020

FRED A. OCHIENG

JUDGE