REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 79 OF 2018

BETWEEN

BENARD AUKO OCHIENG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 1163 OF 2016 in the Senior Resident Magistrate's Court at Maseno delivered by Hon. C.N.Oruo (RM) on 24th April, 2018)

JUDGMENT

1. On 24th April, 2018; the Appellant was convicted for the offence of burglary contrary to Section 304 (2) of the Penal Code and was sentenced to serve 5 years imprisonment.

The Appeal

2. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal. In the Petition of Appeal filed on 2nd August, 2018, he raised 7 grounds of Appeal which I have summarized into 2 grounds **THAT:**

1) The learned trial magistrate grossly erred in law and in fact in convicting the Appellant

2) The judgment was against the weight of evidence

Evidence

3. **PW1 COLLINS ODHIAMBO OMER**, the complainant recalled that on 16.10.16 at about 1.50 am, he was sleeping when he heard commotion in his house and he woke up and found the Appellant who was his neighbor in the kitchen with 2 others. He said he screamed and the Appellant and his companions ran away. The witness was stepped down on 29.5.17 and 5.7.17 to avail photographs to support his evidence that his house had been broken into. The evidence on record shows that the witness was neither recalled nor cross-examined. The photographs were also not produced.

4. **PW2 PC OBERT** SIGEI, the investigating officer upon failing to get two witnesses produced a statement by Geoffrey Wasike who stated that he went to complainant's house after an alarm was raised and complainant told him that the Appellant had tried to cut the window grill with a pair of scissors. Sgt Kotut in his statement stated that upon receiving complainant's statement, he visited scene of crime and saw a widow grill that was partially cut.

5. At the close of the prosecution case, Appellant was ruled to have a case to answer and he opted to give no evidence.

6. The learned trial Magistrate considered the evidence and on 24th April, 2018 finding the charge proved, sentenced Appellant to 5 years imprisonment.

Analysis

7. This being a Court of first Appeal, I am guided by the ruling of the Court of Appeal in the case of ***OKENO VS. REPUBLIC (1972) E.A. 32,*** where it held that:-

"It is the duty of a first Appellant Court to consider the evidence, evaluate it itself and draw its own conclusions in deciding

whether the judgment of the trial court should be upheld".

Submissions

Appellant's submissions

8. Mr. Odeny, advocate for the Appellant submitted that the Appellant's right to a fair hearing was breached since he was convicted on the basis of evidence of PW1 and two others witnesses who were not cross-examined. It was further submitted for the Appellant that there was no evidence of entry into complainant's house and that the charge of burglary was therefore not proved. Reliance was placed on **Dennis Leskar Loishiye v Republic [2015] eKLR and Peter Mwirigi Kithia v Republic [2013] eKLR.**

Submissions by the state

9. Mr. Muia learned counsel for the state submitted that the trial was fair and that evidence by complainant that he found the Appellant and two others in his kitchen at night supported the charge of burglary.

10. Article 50 of the Constitution underscores the right to a fair hearing and provides that:

> (2) **Every accused person has the right to a fair trial, which includes the right—**
>
> **(k) to adduce and challenge evidence**

11. The court record reveals that the Appellant was not given an opportunity to cross-examine the complainant and the other two witnesses whose statements the court admitted in evidence. The conduct of the case was a clear contravention of the Appellant's constitutional right to challenge evidence that was tendered against him and the trial is therefore declared a mistrial.

12. The foregoing notwithstanding, I have considered whether the prosecution proved the charge of burglary. Section 304 of the Penal Code Cap 63 Laws of Kenya provides:

> **(1) Any person who—**
>
> **(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or**
>
> **(b) having entered any building, tent or vessel used as a 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.**

13. A charge of burglary is considered proved where the prosecution proves not only breaking but entry into any building, tent or vessel used as a human dwelling at night with intent to commit a felony therein.

14. The evidence on record is to the effect that the Appellant attempted to cut the complainant's window grill. Complainant told court that he found the Appellant and two others in his kitchen but did not clarify how they got in if the window and door were not broken into. Clearly, the charge of burglary was not proved but the prosecution might have been able to prove the offence of attempted burglary contrary to section 304 (2) of the Penal Code had the proceedings been lawful.

15. I have considered whether the court should order a retrial. In the case of **Dennis Leskar Loishiye v Republic (Supra)**, the Court of Appeal cited the case of **Muiruri v R [2000] KLR 552** with approval and observed that:

> **3. Generally whether a retrial should be conducted or not must depend on the circumstances of the case.**
>
> **4. It will only be made where the interest of justice requires it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to quashing of the conviction were entirely the prosecution making or not**

16. That decision was echoed in the case **Benard Lolimo Ekimat v Republic [2005] eKLR** when the Court of Appeal stated as follows:

> **'…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."**

17. Applying these principles to this appeal and considering the nature of the evidence on record, the charge and the possibilities of the availability of the witnesses who did not even testify before the trial court, it is my considered view that a retrial would cause injustice to the Appellant and would amount to enabling the prosecution to fill up gaps in its evidence at the trial.

Decision

18. From the preceding analysis, I find that the conviction and sentence entered against the Appellant was not safe and should not be allowed to stand. I allow the Appeal, quash the conviction and set aside the sentence. I order that the Appellant shall be set be at liberty unless otherwise lawfully held.

DATED AND DELIVERED IN KISUMU THIS 4th DAY OF APRIL 2019

T. W. CHERERE

JUDGE

IN THE PRESENCE OF

Court Assistant: - Felix

Appellant: -

For the Appellant: -

For the state: -