



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**HCCRA NO. 96 OF 2015**

**BRIAN KHALU CHIMWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the a judgment delivered by Hon. F. Makoyo,*

*Resident Magistrateon 1<sup>st</sup> September,2015 in CM's*

*Criminal Case No. 2565 of 2014)*

**JUDGMENT**

1. **BRIAN KHULU CHIMWA** the appellant was charged with the following offences:

**Count 1**

Breaking into a Building and committing a felony contrary to section 306(1) of the Penal Code.

The particulars were that the appellant and others on the 31<sup>st</sup> day of July 2014 at Kakamega township in Kakamega central district within Kakamega county jointly with another already before court broke and entered a building namely a shop of **AazbellYoshah**and committed a felony namely theft and did steal from there in as per attached list valued at Kshs. 86,000/= the property of **YoshahAzbell**.

**Alternative Count**

Handling stolen property contrary to section 322(20) of the Penal Code.

The particulars were that the appellant on the 7<sup>th</sup> day of August, 2014 at Masingoarea in Kakamega central district within Kakamega county jointly with another already before court, otherwise than in the course of stealing dishonestly received or retained goods, as per the attached list knowing or having reason to believe them to be stolen property.

**Count 11**

Grievous Harm contrary to section 234 of the Penal Code

The particulars were that the appellant on the 7<sup>th</sup> day of August,2014 at Kakamega township in Kakamega central district within Kakamega County unlawfully did grievous harm to Police Constable GeofreyWaweru.

2. He pleaded not guilty and the matter proceeded to hearing after which the appellant was found guilty, convicted and sentenced to serve as follows:

Count 1 - Five(5) years' imprisonment.

Count 2 – Ten(10) years' imprisonment

with an order for the sentences to run concurrently.

3. He was aggrieved by the judgment and filed an appeal citing the following grounds.

**i. That the learned trial magistrate erred in law and fact in finding that the prosecution had proved their case against the accused contrary to the evidence on record.**

**ii. That the learned trial magistrate erred in law and fact in failing to find that core ingredients of the offence of breaking into a building and committing a felony was not proved beyond reasonable doubt.**

**iii. That the learned trial magistrate erred in law and fact in failing to find that core ingredients of the offence of grievous harm was not proved beyond reasonable doubt.**

**iv. That the learned trial magistrate erred in law and fact by selectively applying evidence on record to the detriment of the appellant.**

**v. That the learned trial magistrate erred in law and fact in failing to find that the prosecution's evidence as a whole did not disclose a criminal offence committed by the appellant for him to be convicted.**

**vi. That the learned trial magistrate erred sentencing the appellant to ten years, which is excessive in the circumstances.**

4. When the appeal came for hearing the appellant abandoned the appeal against the convictions and asked the court to consider reduction of the sentence only. He proposed a fine instead of the remaining sentence.

5. The state through Mr. Mwaura the prosecuting counsel opposed reduction of the sentence arguing that it was lawful and well deserved.

6. This is a first appeal and this court has a duty to reconsider and re-evaluate the evidence and arrive at its own conclusion. An allowance must be given since the court did not see nor hear the witnesses. This is the principle in

**Okeno V R 1972 EA 32** where the Court of Appeal stated thus:

*“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination(Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA.570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should 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,see Peters vs. Sunday Post [1958] E.A 424.”*

7. A summary of the case before the court will suffice. P.W.2 **William Okumu** worked with Okumu Rollers Security, as a security man. While on night patrol on 31<sup>st</sup> July 2014 he was called by his employee Jared who informed him that thugs had attacked and threatened them with a gun and stolen from P.W.1's shop. He saw the fence having been holed into and a padlock removed. He called the premises owner P.W.1 and informed him. P.W.1 **Yosma Hussein** responded to the call and went to the scene arriving at 1.30 a.m. He found his business place broken into by use of an iron bar. Stolen were the items stated in the charge sheet and valued at Kshs.86, 000.00. A report was made at Kakamega police station the next morning and police visited the scene.

8. The thieves returned at the same place on 7<sup>th</sup> August 2015 at 1.00 a.m. P.W.2 was on patrol when he heard screams. He saw people running towards Masingo, and a report was made to the police. Later information was received in respect of a house at Masingo with an assortment of suspected stolen items. P.W.1 called the police and they went to that house behind Kenya Breweries Ltd. P.W.1 identified a number of items which had been stolen from his shop. The man of the house appeared and was followed by P.W.1 and the police leading to the arrest of the appellant on Mkokoteni pusher the next day. A series of shop items produced as EXB 1-27 were recovered from the house and P.W.1 identified them as his stolen shop goods.

9. P.W.3 **No. 76776 P.C Geoffrey Waweru** and another were on patrol in Kakamega town when they received a report on stolen items at Masingo. They managed to arrest the appellant's co-accused but the appellant had gone into hiding. He was trailed on 8<sup>th</sup> August 2015 by officers Serem and Evita until CplSerem arrested and handcuffed him. Suddenly the appellant bit P.W.3's finger exposing the bones. CplSerem had to shoot in the air to scare him.

10. P.W.3 went to the then Kakamega general hospital for treatment. Later his hand developed problems due to bacteria infection. It was operated on twice and he remained in hospital for 2 ½ months. During the 2<sup>nd</sup> operation skin grafting of the hand was done. He was to undergo a 3<sup>rd</sup> operation for another grafting.

P.W.4 **No. 72874 Corporal David Serem** gave similar evidence to that of P.W.3 as far as the arrest of the appellant was concerned.

11. P.W.5 **Duncan Murunga**, a clinical officer at Kakamega county general hospital produced the P3 form (EXB 28) in respect to P.W.3 on behalf of Dr. Opondo. He also produced the discharge summary for P.W.3 (EXB 29) and the 3 Xrayfilms( EXB 30 a – c). He confirmed that P.W.3 developed a severe medical condition from bacteria in his finger. The condition is known as post mazyitis. P.W.6 **No. 83213 PC AbdidekSharrif** was the investigating officer and he confirmed the reports received and the investigations conducted.

12. The appellant gave an unsworn statement of defence without calling any witness. He stated that on 31<sup>st</sup> July 2015 he left his wife home in Masingo. On his return in the evening he found his wife having been picked by the police. He was brought to court by the police and P.W.1. Some of his items in the house were taken. He did not however identify which ones. He also stated that proper identification had not been done by P.W.1. He denied assaulting P.W.3 and said no photos were taken, to confirm that.

13. In his written submissions which he later abandoned the appellant submitted that the evidence adduced was fabricated and that he had been tried without witness statements having been supplied. He also argued that ownership of the recovered items had not been established. Following the appellant's abandonment of the appeal against conviction Mr. Mwaura learned counsel for the State did not submit on the evidence adduced.

14. I have considered the evidence adduced, grounds of appeal and submissions, by both parties. The prosecution witnesses indeed confirmed that there had been a break in at P.W.1's shop twice i.e. on 31<sup>st</sup> July 2014 and on 7<sup>th</sup> August 2014 at 1.00 a.m. It's during the first break in that shop goods were stolen. These shop goods were found in the appellant's house where his wife who was charged together with him was found. She told the police it was the appellant who had brought the items to their house. These items were produced as EXB 1 – 27, and they were all shop goods.

15. The appellant and his wife Janet Maxiam(co-accused) never laid any claim to these items and they never explained how they had come into possession of them. I am therefore satisfied that the learned trial magistrate properly convicted the appellant and his two co-accused on the 1<sup>st</sup> count of house breaking and stealing.

16. P.W.3 and P.W.4 are two out of the three officers who went out to arrest the appellant. They testified to the offence of grievous harm contrary to section 234 of the penal Code. Their evidence on the sequence of events is very consistent. It is the appellant who bit P.W.3's left finger. He had absolutely no reason for doing so. P.W.6 **No. 83213 PC Abdidek Sharrif** received the report about the assault of P.W.3 by the appellant. He received the appellant and his co-accused in his office and he charged them.

17. The appellant's defence was a mere denial. The evidence of P.W.3 and P.W.4 on what happened during the arrest was not challenged at all. The appellant had no reason for biting P.W.3 when the officers were simply executing their lawful mandate.

To crown it all, during the appeal the appellant abandoned his appeal against the conviction. In other words he accepted the trial magistrate's findings. I therefore find no merit in his appeal against conviction on both counts.

18. Coming to sentence section 234 of the Penal Code provides:

**“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”**

After conviction the appellant was given a chance to mitigate. This is what he told the court at page 33 of the proceedings:-

**“ I ask for a sentence my family can afford”**

19. The learned trial magistrate stated that after considering the seriousness of the injury caused and the fact that the appellant showed no iota of remorse he passed the sentence he did. It is after testing the prison life that the appellant is now pleading for this court to reduce the sentence.

20. I do note that the injury the complainant who is a police officer and who was just carrying out his lawful duty suffered is a permanent injury.

21. The appellant has been in prison for four(4) years. I am sure he has been picking up his lessons every day. I have considered all this and I make the following orders”

(i) Appeal on conviction is disallowed. The conviction on each of the two counts is upheld.

(ii) Appeal on sentence on the 1<sup>st</sup> count is disallowed. The sentence of five(5) years imprisonment is upheld.

(iii) Appeal on sentence on the 2<sup>nd</sup> count of Grievous harm is allowed. The sentence of ten(10) years imprisonment is set aside and substituted with a sentence of seven(7) years imprisonment from 1<sup>st</sup> September 2015. The sentences to run concurrently.

Orders accordingly.

**Delivered, signed and dated this 12<sup>th</sup> day of September 2019 in open court at Kakamega.**

**H.I. ONG'UDI**

**JUDGE**