



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 139 OF 2017**

**BETWEEN**

**MORGAN NAUNA.....APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

***(Being an appeal from original conviction and sentence dated 15/11/2017***

***by Hon. E. K. Malesi, Senior Resident Magistrate in Kakamega***

***CMC.Cr. Case No. 2123 of 2016)***

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. The appellant herein, Morgan Nauna was charged with **office breaking contrary to section 304 (1) (b) and stealing contrary to section 279 (b) of the Penal Code**, the particulars being that on the night of 29<sup>th</sup> and 30<sup>th</sup> May, 2016 at Electronic Information Service Provider, 1<sup>st</sup> floor Kakamega Township, Kakamega Central District, within Kakamega County, jointly with another not before court broke and entered the office of JOAB MWAMTO AMUKHALE with the intent to steal therein and did steal from therein an assortment of properties, among them cameras of various description all valued at Kshs 406,000/= the property of JOAB MWAMTO AMUKHALE. The detailed list of the stolen items is too long to be typed onto the charge sheet was attached to the charge sheet.
2. The appellant faced the alternative charge of handling suspected stolen property contrary to **Section 322 (1) of the Penal Code**, whose particulars are that on the night of 29<sup>th</sup> and 30<sup>th</sup> May, 2016 at Electronic Information Service Provider 1<sup>st</sup> floor in Kakamega Township, Kakamega Central District, within Kakamega County, otherwise than in the course of stealing dishonestly retained various items as attached to charge sheet, knowing or having reason to believe them too be stolen property.
3. The appellant pleaded not guilty to the charges. The prosecution called 4 witnesses in support of its case against the appellant. These were Joab Mwamto Amukhale, the complainant who was PW1 (Mwamto), Lydia Nyongesa, Mwamto's employee who was PW2 (Lydia), number 108184 Police Constable Busuru Samson (PC Samson) testified as PW3. Number 69947 Cpl David Sugut who was the investigating officer in this case testified as PW4 (Cpl Sugut).
4. At the close of the prosecution case the appellant was found to have a case to answer and placed on his defence. He gave sworn evidence, but did not call any witnesses.

**Judgment of the Trial Court**

5. After a careful analysis of all the evidence on record, the Learned Trial Magistrate was satisfied that the prosecution had proved the charge of house-breaking and stealing against the appellant beyond reasonable doubt and accordingly convicted the appellant of both offenses and sentenced him to four years imprisonment for house breaking and seven years for stealing. Both sentences were to run

concurrently.

### **The Appeal**

6. Being aggrieved by the whole of the Trial Court's Judgment the appellant filed the Petition of Appeal dated 29/11/2017, on the same date. The Petition of Appeal raises eight grounds of appeal in which the appellant alleges that his trial was unfair (though this ground of appeal was not pursued at the hearing of the appeal); that the conviction was against the weight of the evidence; that the prosecution's case was not proved to the required standard; that the Learned Trial Court erred in law and fact by failing to note that the evidence of both PW3 and PW4 was malicious. The appellant further contends that the sentence was harsh in the circumstances and finally that the Learned Trial Magistrate rejected the appellant's defence without assigning any good reason for the same.

7. It is the appellant's prayer that his appeal be allowed, conviction quashed and sentences set aside.

### **First Appeal**

8. This is a first appeal and in this regard, this court is under a duty to reconsider and evaluate the evidence afresh before reaching its own conclusions in the matter. The court has however to remember that it has no opportunity of seeing and hearing the witnesses who gave evidence during the trial and to make an allowance for the same. Generally see *Okeno -vs-Republic [1972] EA 32*.

### **The Prosecution Case**

9. Mwamto, a resident of Kakamega town testified that on 30/3/2016, he was informed by his employee Lydia that his business premises situated at Coast Bus building within Kakamega town had been broken into. He immediately rushed to the premises and confirmed that many items from his shop were missing, the most conspicuous of which was a CPU. He then prepared an inventory of all the missing items which he valued at Kshs 406,000/=, before going to report the matter to the police. With the help of the police, he watched a CCTV footage, but he was not able to recognize the thief.

10. On the following day one Wycliffe Adagala, a friend of Mwamto arrived at Mwamto's shop with a Sony HD black camera seeking to have some work from therein processed for him. On checking the camera, Mwamto realized that the camera was one of the items which had been stolen from his shop. Mwamto beseeched Adagala to help him trace the person who had sold the camera to him.

11. With the help of the police, a trap was laid for the appellant. When the appellant arrived at Mwamto's shop, Mwamto gave him some other items to go and sell to Adagala who was stationed at Malava. Mwamto, together with the police went to Malava in search of Adagala. Both the appellant and Adagala were arrested and taken to Kakamega police station. The videos and cameras were recovered from the appellant who was arrested and charged with the present case.

12. Lydia testified that when she reported for work at around 8.00 a.m. on 30/5/2016 on the first floor of Coast Bus building, she found a new and unlocked padlock on the door. Not being sure who had changed the padlock, Lydia telephoned Mwamto and informed him about it. When she opened the door and entered the office she discovered many items were missing. When Mwamto arrived at the office, he took the matter over and made a report to the police. Lydia also confirmed that some of the stolen items were found with the appellant during arrest.

13. PC Busuru testified that on 7/6/2016 while he was at Kabras police station a person by the name Adagala went to the station and reported that a young man from Kakamega had tried to sell a camera to him which he suspected to be stolen. That Adagala also informed PC Busuru that the young man still had certain items for which he was looking for buyers. PC Busuru went to the scene and found the appellant who was riding a Honda motor bike. PC Busuru immediately arrested the appellant and later handed him over to the police from Kakamega police station. PC Busuru stated that at time of arrest the appellant had three cameras stuffed in a bag. The items were handed over to the officer from Kakamega police station. The appellant was not found with a computer.

14. Cpl Sugut, the investigating officer testified that on 8/6/2016, he received a telephone call from Kabras police station informing Kakamega Central police station about a suspect who was being held at the Kabras police station. That the suspect had been found in possession of suspected stolen goods. Cpl Sugut also testified that Mwamto had made a report to Kakamega police station that his shop had been broken into on the night of 29/30/05/2016 and many electronic items stolen therefrom. The items alleged to have been stolen were contained in an inventory a copy of which had been provided to the appellant.

15. Cpl Sugut further testified that on 7/6/2016, Mwamto was informed by one of his friends by the name Adagala that the appellant herein had tried to sell some of the stolen items to him (Adagala). Thereafter the appellant was lured to avail more items for 'sale' to Adagala. On the 8/6/2016, the appellant did so and it was on that day that the appellant was arrested. The police recovered from the appellant a digital camera which was among the items that had been stolen from Mwamto's shop. Photographs of the same were produced in court.

16. Upon arrest and after interrogation the appellant volunteered to show the police where the rest of the stolen items had been hidden. He took the police to Amalemba estate from where other electronics were recovered. More recoveries were made on 9/6/2016. On that day the appellant was arrested and together with the appellant, Cpl Sugut made an inventory of the recovered items. The inventory, a copy of which the appellant had produced as Pexhibit 2. Photographs of the three recovered cameras were produced as Pexhibit 1 (a) (b) and (c). Photographs of all the recovered items were produced as Pexhibit 3 (a) (b) (c) (d) and (e).

17. During cross examination, Cpl Sugut told the court that Mwamto's shop had been fitted with a CCTV camera. He also testified that the inventory for the recovered items was prepared together with the appellant and that the appellant signed the same. Cpl Sugut also confirmed to the court that Adagala had not been availed as a witness. The evidence of Cpl Sugut marked the close of the prosecution case.

## The Appellant's Case

18. At the close of the prosecution case, the appellant was put on his defence. He gave sworn evidence and testified that on 20/4/2016 he was collected by Wycliffe Adagala on the understanding that he (Adagala) had a job for him to do in Malava. The job involved installing a flash light in a photo studio. After he had done the quotation of the required items, Adagala sent him to Kakamega town to make the purchases. After making the purchases, he went back to Malava where Adagala was. The work was worth Kshs 6,000/= which amount Adagala promised to pay via Mpesa. He did not receive the payment as promised and at the end of May, 2016 he decided to go to Malava to demand payment, but Adagala was not present. The two agreed that he (appellant) would return to Malava on 8/6/2016. He did so on 8/6/2016, using a motorbike. On arrival at Adagala's place he found the latter in the company of two people. After hearing Adagala talk on phone, two people went to where the appellant was and identified themselves to him as police officers. The two policemen arrested him. Adagala then appeared with three cameras and told the police that it was the appellant who had sold the cameras to him (Adagala). It was at that moment that the appellant was informed he had broken into an office and stolen some items from there. The appellant further stated that though the witnesses told the court that the appellant had been seen on CCTV footage, no such evidence was produced in court. The appellant also challenged the allegation that he was seen carrying three digital cameras in a back pack, saying that it was not possible to do so.

19. During cross examination, the appellant conceded that he went and met Adagala at Malava after Adagala had spoken to him. He however denied that the reason for going to Malava was to sell stolen items to Adagala. The appellant closed his case without calling any witnesses.

## Issues for Determination and Analysis

20. The issues for determination revolve around the provisions of *section 304 (1) (b) and 279 (b) of the Penal Code* under which the appellant was charged. *Section 304 (1) (b)* reads as follows:-

*“304 (1) Any person who;-*

*a. ....*

*b. Having entered any building, tent or vessel used as human dwelling with intent to commit felony therein or having committed a felony in any such building, tent or vessel breaks out thereof, is guilty of the felony termed house-breaking and is liable to imprisonment for seven years.”*

*“279. If the theft is committed under any of the circumstances following, that is to say;-*

*a. ....*

*b. If the thing is stolen in a dwelling house, and its value exceeds one hundred shillings or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling house.*

*c. ....*

*d. ....*

*e. ....*

*f. ....*

*g. ....*

*the offender is liable to imprisonment for fourteen years.”*

21. The above provisions require the prosecution to prove that there was an entry into any building with intent to commit a felony in any such building and also that something was stolen from such a building. The appellant on his part filed submissions in which he alleged that the case against him is a fabrication and that the evidence on which his conviction was based was flimsy. The appellant questioned the evidence of recovery arguing that it is not clear how those items were recovered. The appellant cited the case of *Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic – Nyeri Court of Appeal Criminal Appeal No. 272 of 2005*, in support of his submissions regarding exhibits.

22. The appellant also submitted that the Learned Trial Magistrate did not properly evaluate his defence which he said was plausible.

23. Mr. P. O. Juma, Learned Prosecution Counsel opposed the appeal and submitted that the evidence on record clearly pointed a finger at the appellant as the culprit in this case.

24. I have myself carefully reconsidered and evaluated the evidence afresh. I have also carefully read the judgment of the Learned Trial Court, the grounds of appeal and the relevant law and I am satisfied that the findings made by the Learned Trial Court on the guilt of the appellant were well grounded. Though there is no direct evidence connecting the appellant with the break-in, it is not in doubt that there was

a break-in into Mwamto's office on the night of 29<sup>th</sup> and 30<sup>th</sup> May, 2016. Lydia testified to this fact.

25. There is also the evidence of PC Busuru who recounted how he received a report from Adagala that someone was trying to sell some digital cameras to the said Adagala which cameras Adagala suspected to be stolen goods. Mwamto also testified that Adagala went to see him at the business and showed him a camera with work he wanted processed though the memory card was missing. Once Mwamto recognized his camera which Adagala had, a trap was laid for the appellant who was later arrested in the act as he tried to sell more of the stolen gadgets to Adagala. The appellant's contention that his case against him is fabricated or that the evidence is flimsy is certainly not correct. The evidence against the appellant was cogent. There was no suggestion during cross examination of Mwamto by the appellant that Mwamto had fabricated the case against him. The appellant did not also make such a suggestion when he cross-examined PC Busuru.

### **Conclusion**

26. I am therefore satisfied that the conviction of the appellant was safe and the sentence imposed was lawful. The appellant did not explain how he came to be in possession of Mwamto's stolen items. The evidence given by the appellant in his defence did not in any way dislodge the cogent prosecution evidence against him. Having fail to properly say how he came into possession of the stolen items, the provisions of **Section 119 of the Evidence Act** come into play.

27. In light of all the above, I find that the appellant's appeal on both conviction and sentence lacks merit. The same be and is hereby dismissed in its entirety.

28. Orders accordingly.

Judgment written and signed at Kapenguria

**RUTH N. SITATI**

**JUDGE**

**Judgment delivered, dated and countersigned in open court at Kakamega on this 9<sup>th</sup> day of October, 2019.**

**WILLIAM M. MUSYOKA**

**JUDGE**