REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.37 OF 2019

(An Appeal arising out of the conviction and sentence of Hon .H. M. Nyaga (CM) delivered on 25th February 2019 in Makadara Criminal Case No.2622 of 2011)

AMOS MUOKA MULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Amos Muoka Muli was charged with the offence of **breaking into a building and committing a felony contrary to Section 306(a)** of the **Penal Code.** The particulars of the offence were that on 13th April 2011 at Industrial Training Directorate in Industrial Area within Nairobi County, the Appellant, jointly with others not before court, with intent to steal, broke and entered a building namely Directorate of Industrial Training office and stole 4 HP computers, 2 Dell computers and six TFT monitors all valued at Ksh.408,000/-, the property of the said Directorate of Industrial Training. In the alternative charge, the Appellant was charged with the offence of **neglect to prevent a felony contrary to Section 392** of the **Penal Code**. The particulars of the offence were that on 13th April 2011 at Industrial Training Directorate in Industrial Area within Nairobi County, the Appellant, being a watchman guarding the Directorate of Industrial Training Office failed to use all reasonable means to prevent the commission of a felony namely breaking and stealing.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged on the main charge and sentenced to serve two (2) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was of the view that the evidence on record was not sufficient to sustain a conviction. He faulted the trial court for finding that the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court failed to properly evaluate his defence in arriving at its determination. He took issue with the fact that the trial court failed to consider his mitigation before passing the sentence against him. He was further aggrieved that the trial court convicted the Appellant based on the wrong provisions of the law hence causing a miscarriage of justice against the Appellant. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant filed written submission in support of his appeal. In addition, this court heard oral submissions from Mr. Omiti for the Appellant and Mr. Momanyi for the State. Mr. Omiti submitted that the circumstantial evidence against the Appellant was not sufficient to sustain a conviction. There was no direct evidence connecting the Appellant to the theft. He asserted that there were other people who could have stolen the said items. He stated that there was a training that was held at the conference room where the computers were stolen on that material day. He added that six people, including the Appellant, had keys used to access the front entrance of the building. There was therefore opportunity for other people to commit the offence.

Counsel for the Appellant further submitted that the evidence by the prosecution witnesses was inconsistent. He asserted that the motor vehicle suspected to have transported the stolen items was driven by an employee. The person who took the computers identified themselves to the Appellant as a staff member. He added that none of the daytime guards were called as witnesses to establish whether the motor vehicle was searched. He stated that it was not ruled out whether the occupants of the said vehicle stole the computers. He was of the view that the police conducted shoddy investigations and that the Appellant was a scapegoat. He maintained that the Appellant was convicted based on mere suspicion. He submitted that the sentence meted to the Appellant was harsh and excessive in the circumstances. In the premises therefore, he urged this court to allow the Appellant's appeal. Mr. Momanyi for the State conceded to the appeal. He averred that the prosecution failed to establish its case against the Appellant to the required standard of proof beyond any reasonable doubt. He therefore urged the court to allow the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Justus Milimu was the Deputy Director at the Directorate of Industrial Training. He stated that the Appellant was a security officer at the institution. He testified that when he arrived to work on 13th April 2011, he was informed that six computers as well as other computer accessories had been stolen from the offices. The security supervisor Mr. Sikweya, informed him that the Appellant was on duty the previous night. The keys to the main entrance were usually given to the security officer on duty. The Appellant told him that he opened the main entrance to someone who identified himself as a staff member. He could however not identify him. On cross-examination, PW1 stated that about five employees were in possession of the keys to the main entrance. He said that the thieves had forced their way into the offices. The offices had been broken into. He testified that there was a meeting at the board room the previous evening which was cut short due to a blackout. It was his testimony that there were no records of any vehicle entering or leaving the premises on the material night and the following morning.

PW2, Jackson Mungalla was a security guard at the institution. He was on duty on the material night of 11th April 2011. He stated that there were three guards on duty *i.e.* himself, Kakai and Etyang. PW2 was manning the parking lot and hostels, Kakai was manning the main gate while Etyang was guarding the buildings. He told the court that there was a black out that night from 8.00 p.m. to 11.00 p.m. At about 5.00 a.m., he saw a car at the parking area. Two men alighted from the said vehicle and spoke to the Appellant. They told him that they attended a meeting that was held the previous day and that they had forgotten their laptops. The Appellant opened the main entrance of the building and let the said men in. When the daytime guards arrived, PW2 informed them about the vehicle and told them to ensure that they inspected it before it left the premises. He then went home. He did not witness the theft. On cross-examination, PW2 stated that he did not enter the building with the Appellant and the two men. He stated that he did not witness the men taking the computers; neither did he witness the Appellant opening the office door for them.

PW3, CPL Edward Kamau, investigated this case. He was based at Industrial Area Police Station. On 13th April 2017, PW1 came to the police station and reported a break-in that occurred at the Industrial Training Directorate. He visited the scene of crime accompanied by PC Origa. They interviewed the witnesses and recorded their statements. The guards informed him that the Appellant let in strangers to the offices where the computers were stolen. The door locks had been interfered with. PW3 recovered a register from the main gate which established that the vehicle that was suspected to have carried the stolen items was registration number KBK 808H. The driver of the said vehicle was unknown. After his investigation, he decided to charge the Appellant with the present offences. On cross-examination, PW3 stated that three guards and the Appellant were manning the premises on the material night. He testified that two guards recorded statements with the police. However, the guard who was manning the main gate disappeared and was therefore not available to adduce evidence. He admitted that he did not conduct a search to establish the registered owner of the motor vehicle in question. He stated that the main door was accessed using keys but the office doors were broken into.

When the Appellant was put to his defence, he testified that he was employed as a Board Master for the hostels at the Directorate of Industrial Training. On the material night, there were three guards on duty; Kakai who was stationed at the main gate, and PW2 and Etyang who were on patrol. At about 5.20 a.m., he received a call from Kakai informing him that there was a staff member who had arrived at the main gate. The said staff introduced himself as Kelvin. He opened the main entrance of the building and let the said Kelvin in. He afterwards went to the dining hall area. He was later informed that the offices had been burglarized. The Appellant told the court that he was not employed as a guard or a security supervisor as alleged. He was not in charge of security. He averred that the guards were in charge of inspecting vehicles allowed into the premises. He maintained that he was a scapegoat, and was not in any way involved in the theft of the computers. He stated that he did not know all the staff members.

This being a first appeal, this Court is mandated to re-evaluate the evidence presented before the trial court afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic [1987] eKLR** stated this on the duty of the first Appellate court:

> ***"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."***

In the present appeal, the issue for determination is whether the prosecution established the charge of **breaking into a building and committing a felony contrary to Section 306(a)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. **Section 306(a)** of the **Penal Code** provides thus:

> ***"Any person who;***
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> > ***(a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or***
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> > ***(b) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years."***

It was evident from the facts of the case that there was no direct evidence connecting the Appellant to the break in. The trial court in convicting the Appellant relied on circumstantial evidence. The Appellant was convicted as a principal offender by virtue of **Section 20** of the **Penal Code** for aiding and abetting the persons who were suspected to have stolen the computers from the offices. The case by the prosecution was that the Appellant was on duty on the material night of the break in. He was the only person who had the keys to the main entrance of the building. The Appellant was alleged to have opened the main entrance to the persons suspected to have broken into the offices and stolen the computers. None of the prosecution witnesses witnessed the break in.

PW2 stated that at about 5.00 a.m., he saw a vehicle at the parking lot. Two men alighted from the said vehicle. They informed the Appellant that they had attended a meeting at the premises the previous day, and that they needed to pick their laptops. The Appellant opened the main entrance to the building and let them in. PW2 informed the day guards to ensure that they inspected the said vehicle before it left the premises. He was later informed that the offices had been burglarized. The Appellant in his defence did not deny being on duty that material night. He however stated that he was not in charge of security. There were three guards on duty that night. He stated at about 5.20 a.m. he received a call from the guard stationed at the main gate (Kakai) who informed him that there was a staff member who had arrived. The said employee introduced himself as Kelvin. The Appellant opened the main door and let the said Kelvin in. He was later informed that the offices had been burglarized.

After re-evaluating the evidence on record, this court is of the view that the circumstantial evidence adduced by the prosecution was not sufficient to sustain a conviction against the Appellant. The Appellant admitted that he indeed opened the main door to someone known as Kelvin who stated that he was a staff member. The Appellant testified that he did not know all the employees. He also stated that it was not unusual for employees to come in early to the premises. The Appellant asserted that it was not his duty to vet people or inspect vehicles that were let in the premises. That was the duty of the guard stationed at the main gate. The prosecution failed to adduce any evidence to displace this assertion by the Appellant. In fact, PW2 testified that he did inform the day guards to inspect the said vehicle before it was allowed to leave the premises. His testimony therefore corroborated the Appellant's evidence that he was not in charge of inspecting vehicles allowed into the premises.

Further, the investigating officer (PW3) did obtain the register at the main gate of the vehicles that were let in the premises on that material day. He established that the vehicle that was in the premises that morning was registration number KBK 808H. PW3 however failed to conduct a search to ascertain the registered owner of the said motor vehicle, and establish whether the said registered owner had any connection to the Appellant. As it is, the prosecution failed to adduce any evidence connecting the suspected assailants to the Appellant. The Appellant only had keys to the main entrance of the building. He did not have the keys to the offices that were burglarized. The said offices were broken into. PW2 stated that when the Appellant opened the main entrance for the said staff member, he went back to the main gate. No evidence was led to prove that the Appellant was aware of the theft. This court was not informed when the vehicle left the premises. It was also not established whether the said staff member who was let into the building by the Appellant was the one who actually stole the computers. The Appellant cannot be said to have aided and abetted the theft when no evidence was adduced showing any connection of the Appellants to the suspected thieves.

There was absolutely no evidence that the Appellant participated in the burglary. The prosecution failed to prove to the required standard of proof beyond any reasonable doubt that the Appellant was aware that the theft was happening and that he was in some way connected to the persons who stole the said computers. None of the stolen items were recovered in the Appellant's possession. His conviction was based on mere suspicion. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt (See **Sawe vs Republic [2003] eKLR)**. The trial court ought to have given the Appellant the benefit of doubt and acquitted him of the present charges.

In the premises therefore, this court finds merit in the appeal lodged by the Appellant. The Appeal is hereby allowed. The conviction is quashed. The Appellant is acquitted. The Appellant is set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF DECEMBER 2019

L. KIMARU

JUDGE