



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. 10 OF 2016**

**JOHN GICHOVI NYAGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from original conviction and sentence in Criminal Case No.1698 of 2014 of the Chief Magistrate's Court at Embu)*

**JUDGEMENT**

The appellant was charged with the offence of burglary contrary to section 304(2) and stealing contrary to section 279(b) of the penal code. The particulars of the offence are that the appellant, on the night of 18<sup>th</sup> and 19<sup>th</sup> day of July, 2014 at Kathangari Sub-location, within Embu County jointly with another already before court broke and entered the dwelling house of LUCY MUTHONI with intent to steal therein and they did steal from therein drilling machine, extension cable, assorted utensils, assorted clothes, one DVD haitech, Ig video player, 6 kg gas cylinder, two radios, diamond disk, two bags, a suitcase, kerosene lamb, one battery lamp, a jiko, one charcoal iron, a water heater, three mattresses, two nail hammers, four liters of paint, secondary textbook, barbed wire, gumboots, shoes, two umbrellas and a stove all valued at Ksh 70,000/= the property of LUCY NANCY MUTHONI.

The trial court convicted the appellant and sentenced him to six (6) years imprisonment for the offence of burglary and eight(8) years for the offence of stealing. The grounds of appeal are THAT:-

- 1. The appellant pleaded not guilty to the charge before trial magistrate.***
- 2. The trial magistrate erred in both points of law and facts when he failed to consider that no eye witness witnessed the appellant in the process of committing the alleged offence at the scene of crime.***
- 3. The learned trial magistrate still erred in both matters of law and facts when he failed to consider that no exhibit was recovered from the appellant during the arrest.***
- 4. The learned trial magistrate still erred in both matters of law and fact when he failed to consider that the alleged recovery made in appellants' house was made in absence of the appellant and no independent witness witnessed the alleged recovery being made by the police together with the assistant chief.***
- 5. The learned trial magistrate still erred in both matters of law and fact when he failed to consider that vital witnesses were not summoned to give evidence in regard to the matter in question and thus infringed sec 145 and 150 of the C.P.C and the charge sheet was defective contrary to section 214(1) of the C.P.C.***
- 6. The trial magistrate erred in both law and facts when he rejected the appellant's defense on weak reasons and thus infringed Section 169(1) of C.P.C.***
- 7. The learned trial Magistrate erred in both matters of laws and facts when he failed to consider that there was no evidence to prove that the appellant had gone to have lunch as the appellant was arrested within his home area and the confession of the co-accused person wasn't sworn and repeated as stipulated in section 25 A of the EVIDENCE ACT.***
- 8. The case was not proved beyond reasonable doubt as stipulated by the law under Section 11 of the Evidence Act and the sentence imposed by the trial magistrate was not under the offence alleged to be committed.***

The appellant submit that the prosecution did not prove its case beyond reasonable doubt as required by the law. The evidence indicates that

one Joseph Nthiga confessed and is the one who was found with the stolen items. None of the witnesses saw the appellant committing the offence. It is submitted that a confession of a co-accused person cannot form the basis of a case against a co-accused. PW2, PW3 and PW4 visited Joseph Nthiga's house when the alledged recovery was made. The appellant was not present. Two maroon bed sheets and one curtain are alledged to have been recovered. These items are not in the charge sheet. PW5, the landlady was present when the recovery was made but the appellant was not present.

The appellant further contends that the witnesses gave contradictory evidence on what was recovered. PW4 stated that they found window curtains and bedsheets, PW3 stated that they recovered a sack, bedsheets and container. The charge sheet differs from the recovered items. No inventory was made so as to differentiate what was found in the appellant's premises and what was recovered in the premises of his co-accused. The appellant was arrested on 16/10/2014 as per the charge sheet and the recovery was made on 19/7/2014. The trial court ignored the appellant's defence that he was working as a watchman in Embu town and went to visit his parents at Kathangari when he was arrested on 16/10/2014.

Miss Nandwa, prosecution counsel, opposed the appeal. Counsel submit that the evidence is circumstantial. On 19/7/2014, PW2 was on patrol and found PW1's house broken into. She suspected Joseph Nthiga. She went with PW3 and PW4 to Nthiga's house. Nthiga confessed that he had stolen PW1's items in the company of the appellant. Nthiga led PW2, PW3 and PW4 to the appellant's house. Some stolen items were recovered. The appellant's landlady confirmed that she had rented the house to the appellant. The appellant ran away but was later arrested. All the vital witnesses testified. The appellant's defence was considered. The case was proved beyond reasonable doubt.

Being a first appeal, this court is required to re-evaluate the evidence afresh and make its own conclusion. Before the trial court **LUCY NANCY MUTHONI** was the complainant. She is a business lady at Gikomba Market in Nairobi. On 19/7/2014 at 5:00pm she was in Nairobi. Her husband was informed by the area assistant chief that their house had been broken into. They travelled to Embu and arrived at 9:00pm. They confirmed that the house had been broken into and several items were missing. They later recovered a Meko gas cylinder (6kg), basin, torch, two paint brushes, one cap, two curtains and two bed sheets. Other items were not recovered.

**PW2 MARGARET NJERU** was the assistant Chief, Githangari Sub-location. On 19/7/2014 she was on patrol and saw PW1's house had been broken into. She notified PW1's husband. She suspected Joseph Nthiga. She took two AP Officers and went to Nthiga's house. They found him in his house. Nthiga admitted stealing the goods. Nthiga told them that he was in the company of the appellant. He led them to the appellant's house. Nthiga led them to a nappier grass farm where they found Meko (6KG) two bed sheets, and two sufurias. They later visited the appellant's house where they found two curtains and two bed sheets. The appellant escaped. The appellant was not present when they recovered items at the nappier grass farm.

**PW3 APC FRANCIS KINGORI** was with PW2 when they went to John Nthiga's house. Nthiga led them to a place with nappier grass and they recovered a gas cylinder. John Nthiga then fled. He was later arrested. Nthiga mentioned the appellant and Gichuki. They had arrested Gichuki and they were with him when they recovered the gas cylinder. They went to the appellant's house. The door was opened. They recovered two Maroon bed sheets and one container. They also found a sack in the appellant's house.

**PW4 APC CHRISTOPHER NYAGA** was with PW2 and PW3 when they made the recoveries. When the appellant realized Nthiga and Gichuki had been arrested, he ran away. They later smoked the appellant from his hide out. PW5 VIRGINIA GITHERI was the appellant's landlady at Kathangari. The appellant was paying monthly rent of Ksh 200/= She saw Police Officer remove items from the appellant's house. She couldn't tell if the appellant was present. The appellant used to live alone in the house.

**PW6 P.C DAVID WANGOMBE** was stationed at Manyatta Police Station on 23/7/2014 he was assigned to investigate the case. Two suspects had already been arrested with stolen goods. They were taken to the station by two AP Officers and the area Assistant Chief. The appellant was arrested later and charged with the offence.

In his unsworn defence, the appellant testified that on 15/2/2014 he had recited a house in Embu. He went home on 15/10/2014 to see his parents. On 16/10/2014 he went to Kathangari trading Centre and was arrested by two Police Officers. They told him that he was a burglary suspect. He was detained in the cells and later charged with the offence. Nothing was recovered from his house.

The issue for determination is whether the appellant was involved in the offence. The appellant contends that the conviction was based on the basis of an alledged confession of co-accused. He also contends that he was not present when the recoveries were made. Further, the recovered items, maroon bed sheets and curtains are not stated in the charge sheet.

The evidence shows that PW2 detected the breakage into PW1's house on 19/7/2014 while on patrol. Two suspects, Joseph Nthiga and James Gichuki were arrested that evening. They were charged separately and convicted. The evidence does establish that when some items were recovered, the appellant was not present. The evidence of PW5 is that the appellant had rented her premises. She saw the Police enter the premises and coming out with some items. PW2, PW3 and PW4 testified that they recovered two Maroon bed sheets and a curtain from those premises.

The evidence proves that indeed the appellant had rented those premises. The appellant's landlord knew him. The defence evidence that the appellant was in Embu is disproved by the evidence of PW5. The conviction is not based on the alledged confession but on the recoveries made from the appellant's house. The recovered items had been stolen from PW1's house that night. Even though the appellant was not present when the items were recovered, the evidence shows that the appellant was not available as he was at large. The Police could not have stopped entering the house simply because the occupant was absent.

The charge sheet makes reference to assorted clothes. The bed sheets and curtains comes within the category of assorted clothes. Even if they are not specifically itemized in the charge sheet, they are covered under the item "assorted clothes". The charge sheet was therefore not defective. The recovery was made as a result of the appellant's accomplice. The statements of the appellant's accomplices cannot be rendered illegal or hopeless as alledged since it is those statements which led to the recovery. The appellant's attempt to explain that he was in Embu working at a Timber yard is not clear. He did not even confirm that he was working. He stated that he talked to one Njeru who owns a timber

yard in Embu. That does not imply that he was working in Embu. The appellant assumed that his accomplices had been convicted and the matter was over. When he emerged from his hide out he was arrested and charged.

Although no one saw the appellant breaking into PW1's house and stealing therefrom, the evidence does prove that indeed the appellant was one of those people who broke into the premises and stole several items. Two bed sheets and a curtain were found soon after the burglary in the appellant's rented premises. The doctrine of recent possession applies. The appellant was not present when the recoveries were made and he could have disputed any Inventory done by the Police Officers. PW1 identified the bed sheets and curtains to be her property.

The offence of burglary under section 304 (2) of the penal code carries a maximum sentence of ten (10) years. Under section 279(b) the offence of stealing is punishable upto fourteen (14) years imprisonment. The trial court sentenced the appellant to six years for burglary and 8 years for stealing. The appellant told the court that he was in remand for one year.

Given the circumstances of the case, I do find that the sentence is excessive. The appellant was treated as a first offender. I do set aside the sentence and replace it with four (4) years each imprisonment for both burglary and stealing. The appellant shall serve four (4) years imprisonment from the date of conviction. The sentence of four years for each offence shall run concurrently.

In the end the appeal on conviction is disallowed. The sentence is set aside and replaced with four (4) years imprisonment from the date of conviction.

**Dated and signed at Marsabit this.....day of June, 2018**

**S. CHITEMBWE**

**JUDGE**

**Dated, Signed and Delivered at Embu this 11<sup>th</sup> day of July, 2018**

**F. MUCHEMI**

**JUDGE**