



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 13 OF 2017

(From original conviction and sentence in Criminal Case No. 616 of 2016 of the Senior Resident Magistrate's Court at Wanguru).

PAULINE WANJIRU KAMAU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Pauline Wanjiru Kamau who was the second accused person, was convicted of house breaking and stealing contrary to **Section 304(1) and 279(b) of the Penal Code**. Before Resident Magistrate's Court Wang'uru Criminal Case 616/16. The prosecution called a total of three witnesses. In her defence, the appellant gave unsworn evidence and did not call any witness. The trial Court sentenced her to serve 3 years imprisonment on each limb of the charge and sentence to run concurrently.

The appellant filed an appeal based on the grounds, that the learned magistrate erred both in law and fact by;

- 1. Convicting her based on purely circumstantial evidence.*
- 2. Concluding that the prosecution's case was well corroborated.*
- 3. Failing to observe that the prosecution's case was full of contradictions.*
- 4. Relying on evidence of one witness which was highly exaggerated.*
- 5. Summarily dismissing her evidence which was candid and clear.*
- 6. The sentence meted was excessive in the circumstances.*

The court gave directions that the appeal be disposed off by way of written submissions. The appellant was represented by Mr. Ndana Advocate who filed submissions. It is contended that the trial Magistrate erred in law and fact by convicting the appellant based on purely circumstantial evidence which did not have enough weight.

That the three witnesses PW1, 2, & 3 never saw the house being broken into. That no witness saw the appellant breaking into the house of the complainant nor the bar. Further that no witness saw the appellant stealing the items which were said to have been stolen.

That the appellant was implicated by one witness who said he saw her with what looked like a hammer and had something heavy in a paper bag which looked like a TV. It is further submitted that none of the stolen items were recovered from the appellant. That there was no corroboration to the evidence of PW2. Reliance was heard on the case of **Joan Chebichii Sawe –v- R. C. A. Nairobi No. 2/2002** where it was stated that:-

“In order to justify on circumstantial evidence, the inference of guilt, the exculpatory facts must incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

She also relied on **Omuse Okware –v- R. C. A Eldoret CRA 17/2007** where the principle was emphasized while acquitting the appellant.

For the State, submissions were filed by Geoffrey Obiri Assistant Director of Public Prosecution. He contends that there was sufficient evidence to sustain the charge. That witnesses placed the appellant at the scene as she was at PW1's house when she was away. That the defence was a mere denial. That failure to recover the stolen items did not vitiate the prosecution's case. It is further submitted that the

evidence of the single witness was cogent, sound and believable. No particular number of witnesses is required to prove a fact.

I have considered the submissions and the record of the trial Magistrate.

Issues arising:

1. Evidence

The appellant claims that no witness stated that they saw her break into the house of PW 1 or the bar and stealing the items stated to have been stolen. In addition, the court convicted on evidence of single witness who stated she saw the appellant with an object which looked like a hammer and a yellow bag which was heavy and looked like a TV.

PW 2 evidence was that she went to the house of PW 1 on the incident date and saw the appellant standing on the door. She had an object which looked like a hammer and a yellow paper bag which was heavy and looked like a T.V. The appellant informed her that PW 1 had gone to the village. She also had noises inside the house of PW 1. The appellant was therefore placed at the scene on the material day carrying hammer and yellow paper bag. The appellant had known the complainant was there for her to be at the scene with a hammer is weighty circumstantial evidence which lead to only one inference, that of guilt of the appellant. She had no valid defence.

Though the evidence was based on single witness, the trial court held that he considered the demeanor of PW 2 and she appeared honest. In addition, was working in cahoots with accused 1 and therefore she had knowledge of PW 1's whereabouts on the material date.

This being a 1st Appeal, the court has a duty to analyse the evidence, evaluate it and make a finding. This court has to however bear in mind that it did not have a chance to see the witnesses and assess their demeanor and leave room for that. I refer to **Okeno –v- R 1972 E. A 32.**

The appellant was implicated by a single witness, that is PW-2-. The trial Magistrate was satisfied that PW-2- appeared honest and relied on her evidence. This was a finding of fact by the trial Magistrate who had the chance to see the witness and assess her demeanor. The trial magistrate was right to rely on her testimony. I find that the witness placed the appellant at the scene and she had an implement which could be used for house breaking and had something heavy in a paper bag. I find that the evidence was strong. PW-2- had no reason to frame the appellant. The evidence met the threshold for reliance on circumstantial evidence to convict. It is trite that no particular number of witnesses are required to prove a fact. Section 143 of the Evidence Act provides:-

“No particular number of witnesses shall in the absence of any provision of the law to the contrary, be required for the proof of any fact.”

The evidence of PW2 who was found to be honest was sufficient in the circumstances.

2. Contradiction

There was no contradiction in the prosecution's evidence. In any case very minor contradictions are excusable. No contradiction was pointed out in the submissions by the appellant.

3. Sentence

The appellant claims that the sentence given was excessive. **Section 279(b) of the Penal Code** the maximum sentence that can be imposed is fourteen years. **Section 304(1) of the Penal Code** the maximum sentence that can be imposed is seven years.

The appellant was sentenced to three years imprisonment on each count and the sentence to run concurrently. Meaning she will only serve three years. Sentencing is the discretion of the trial Magistrate. The appellate Court can only interfere if the sentence is manifestly excessive or unlawful. The sentence passed was lawful and reasonable in the circumstances of the case. There is no reason to interfere with the sentence.

4. Did the prosecution prove its case beyond reasonable doubt?

It is trite that the burden of proof always lies with the prosecution to prove their case.

PW 2 stated that she saw the appellant standing at the door of PW 1 with what looked like a hammer and a yellow paper bag which carried what looked like a TV. The defence of the appellant that she was sick was an afterthought and a mere denial. PW-2- had no reason to implicate her. The witness was honest and reliable.

Looking at the entire evidence adduced, the prosecution has proven his case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant stole from PW 1. The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion. The guilt of the appellant was proved beyond any reasonable doubt by overwhelming evidence on record.

In Conclusion:

I find that the appeal lacks merits and is dismissed.

Dated at Kerugoya this 18th day of October 2018.

L. W. GITARI

JUDGE