REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 95 OF 2015

STEPHEN GITONGA WAMBUGU……..……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Appeal from original conviction and sentence in the Senior Resident Magistrates' Court Criminal Case No. 274 of 2015 (Hon. B.M. Ekhubi, SRM) on 9th December, 2015)

JUDGMENT

The appellant was charged with the offence of burglary and stealing contrary to **section 304 (2)** as read with **section 279 (b)** of the **Penal Code, (cap 63).** The particulars were that on the night of 3rd and 4th June, 2015 at unknown time, in Thunguri village In Nyeri county, the appellant broke and entered the dwelling house of John Gichabi Wambugu with intent to steal therein and did steal 2 beds, 3 mattresses, 3 blankets, 3 cushions, 4 trousers, 1 pillow, 2 sweaters, 1 jacket, 1 jumper, 2 T-shirts, 1 pillow cover, 1 leso, 1 bedsheet, 1 towel, 1 inner pant, a black handbag and a green basket all valued Kshs. 40,000/= the property of the said John Gichabi Wambugu. He faced the alternative count of handling stolen goods contrary to **section 322 (1)(2)** of the **Penal Code** the particulars being that on the night of 3rd and 4th June, 2015 at the time and place mentioned in the principal count, otherwise than in the course of stealing, the appellant dishonestly retained the items particularised in that count knowing or having reason to believe that they were stolen goods. He was convicted of the principal count and fined Kshs 100,000/= or in default, to serve five years in prison.

Being dissatisfied with the conviction and sentence, the appellant appealed to this court and in his petition of appeal he raised the following grounds:

1. The learned trial magistrate erred in law and in fact in believing that the exhibits were found in the physical possession of the appellant;

2. The learned magistrate erred in law and in fact in convicting the appellant on the basis that he had made a confession and yet no cautionary statement had been taken to that effect;

3. The learned trial magistrate erred in law in convicting the appellant yet the charges against him were not proved and in particular, neither the inventory of the recovered items was taken nor were they dusted to prove that there was any link between the appellant to the alleged offence;

4. The learned magistrate erred in law and in fact in convicting the appellant on the basis of doubtful and inconsistence prosecution evidence; and,

5. The learned magistrate erred in law and in fact in rejecting the appellant's defence that was not challenged by the prosecution evidence.

According to the record, the complainant, **Mr John Gichabi Wambugu (PW1),** was in Nairobi on 4th June, 2015 when his **mother (PW4)** called and informed him that his house at Thunguri village in Nyeri county, had been broken into. Indeed, he returned to find that the padlock with which he had locked his house broken and several items from the house stolen. When he made a report to the police at Othaya police station, they told him that his properties had in fact been recovered. He identified them at the police station and also in court where they were exhibited in evidence.

Peterson Maina Wanjoki (PW2), a taxi driver, was on his way from Othaya when he saw an assortment of household goods besides the road; this was around 12. AM. He called his neighbour Sistu Kihara and a village elder, Karori Thuita who summoned the police.

As they waited for the police with the village elder, the appellant arrived on a motorcycle where he was riding as a pillion passenger. The appellant informed them that those items were his and that he was in the process of moving house. As a matter of fact, he had brought the motorcyclist to ferry the goods to his new house; he alleged that the vehicle he had hired for this purpose had abandoned him on the road apparently because he did not have sufficient money.

The rider of the motorcycle, **James Muriithi Karema (PW3)** testified that the appellant woke him up at 1.00 am on 4th June, 2015 and requested him to carry some goods for him. He knew him because he, the appellant, was his uncle. Together they proceeded to the scene where the goods were. There they found **Wanjoki (PW2)** and some other person. The appellant told them that the goods were his. This witness identified the goods in court as those that were at the scene.

The complainant's mother, **Elizabeth Gachambi (PW4),** was informed by one Kaguchu at about 2 AM on 4th June, 2015 that he had seen some goods on the road. She proceeded to the scene and identified them as being her son's household items.

Sergeant Philip Wachira (PW5) investigated the case against the appellant; he was then attached to Othaya police station and he was the duty officer on the night of 4th June, 2015. At about 2 AM, apparently, the following morning, the officer in charge of the station, chief inspector of police Marete called him and asked him to proceed to Thunguri village. It was his evidence that when he went there, he found the appellant and a mob of people. The complainant's properties were also at the scene; he prepared an inventory of those goods but the appellant refused to sign it though he had claimed the properties to be his and which he was moving to his new house. In the course of his investigations, the officer proceeded to the complainant's house where he established that indeed it had been broken into and in fact he recovered the broken padlock at the door.

When he was put on his defence, the appellant opted to give unsworn statement and stated that on 3rd June, 2015 he had been working in Othaya town until 10:30 PM when he went to a bar and later hired a motor cycle to take him home. While on their way, they encountered a motor vehicle with lights on. Out of curiosity, they stopped and met **Wanjoki (PW2)** and the village elder at the scene. These two people, according to the appellant, alleged that he claimed the goods to be his and it is then that he was arrested and taken to Othaya police station.

Section 304 of the **Penal Code** under which the appellant was charged states as follows:

304. Housebreaking and burglary

(1) Any person who—

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

(b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof,

is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.

According to this provision of the law, an offence is committed either when one breaks and enters into any structure used as a human dwelling with intent to commit a felony or, once he has gained entry of such a structure, he goes a step further to commit a felony. The timing of the break-in is material because if it is at night the offence is that of burglary and attracts a severer, maximum sentence of ten years' imprisonment; on the other hand, if the offence is committed during the day, the offence is that of housebreaking and the accused person is liable to a maximum sentence of seven years' imprisonment. Read in its entirety, this provision of the law defines both the offences and the penalty thereof.

The prosecution case was that the offence was committed at night and this explains why the appellant was charged under **subsection 2** thereof as read with **section 279 (b)** of the Penal Code which, on its part, prescribes an offence of stealing from a dwelling house. The theft is undoubtedly one of those felonies contemplated **section 304 (1)(b)** of the **Penal Code.**

The prosecution evidence which I hold, as the learned magistrate did, was uncontroverted was that the complainant's properties were found on the road at 12 AM. This simply means that the complainant's house was broken into and his properties stolen at night, before this time.

The evidence that the complainant's house was broken into was also not displaced. The testimony of the complainant himself, that of his mother **(PW4)** and also the evidence of the investigation officer **(PW5)** were all consistent that the house had been broken into. The broken padlock which the complainant used to secure his house was recovered and exhibited in evidence in proof of the fact of the break-in.

As to whether a felony had been committed after the break-in, both the complainant and his mother led consistent and uncontroverted evidence to the effect that those items or properties found by the roadside were the complainant's. That these items were carted away from the complainant's house after it had been broken into appears to me to be a logical conclusion.

In view of these established facts, there was ample evidence to support the charge of burglary and stealing and to this extent, I agree with the learned magistrate that the prosecution proved its case beyond reasonable doubt. The only question is whether he came to the correct conclusion that the appellant perpetrated this crime.

Having carefully examined the record, I have not found any reason why the learned magistrate should have doubted the evidence of **Wanjoki (PW2)** that he found the complainant's properties abandoned on the road and that the appellant claimed them to be his. His evidence was corroborated by the testimony of **James Muriithi Karema (PW3)** who was candid that the appellant hired him to carry the properties and that together they rode to the scene where these properties were found. It is obvious that **Karema(PW3)** would not have known where these items were if the appellant had not led him there. I accept his evidence together with that of **Wanjoki (PW2)** that the appellant claimed the goods to be his. In the same vein, I reject the appellant's explanation in his defence that it was by sheer coincidence that they stopped where the complainant's properties were out of curiosity.

The appellant could not have led **Karema(PW3)** to the scene and laid claim on the complainant's properties if he was not the person who brought them there. By the same token and considering the available circumstantial evidence, the appellant must have been the person who broke into the complainant's house and stolen these properties. In this regard, I echo the words of the Court of Appeal in Republic **versus Kipkering Arap Koske & Another (1949) XVI EACA 135** where it held that:

> ***In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.***

I am persuaded that the inculpatory facts which the prosecution proved to the required standard were incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Accordingly, I have not found any circumstances that would otherwise have been considered to have weakened or destroyed the inference of guilt on the part of the appellant.

In the final analysis, I find that the appellant was properly convicted and sentenced. His appeal does not have any merit and it is hereby dismissed.

Signed, dated and delivered in open court this 2nd June, 2017

Ngaah Jairus

JUDGE