



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 99 OF 2015

BADI OMAR SALIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 18 of 2013 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)

JUDGEMENT

The Appellant was charged with the offence of house breaking contrary to section 304 (1) of the Penal Code. The particulars of the offence were that the appellant on the 30th December, 2012 between 8.00 am and 9.00 am at Majengo Mapya Village in Malindi District within Kilifi County, jointly with others not before court, broke and entered the dwelling house of CLARICE MBUCHE CHILANGO with intent to commit a felony namely theft therein.

The trial court convicted the appellant and sentenced him to serve six (6) years imprisonment. The grounds of appeal are that the alleged stolen items were not properly identified by the alleged owner, that the house where the alleged goods were recovered was not proved to be owned by the appellant, that no certificate of recovery of the goods was produced, that the case was not proved beyond reasonable doubt and that the appellant's defence was not considered.

The appellant filed his written submissions in support of his appeal. It is submitted that the sentence is quite harsh as he has been in prison since 11th February 2014. He has now served three (3) years in prison. He was a first offender who should be rehabilitated. He relies on the case of **THOMAS GILBERT, CHOLMONDELEY VS REPUBLIC Nairobi High Court Criminal Case No. 55 of 2006**.

Mr. Fedha, prosecution counsel, opposed the appeal. Counsel maintains that the complainant's premises were broken into and items stolen. The items were found with the appellant and the complainant identified them to be hers. PW2 corroborated the evidence of PW1. The appellant was arrested and did not give explanation as to how he got the goods.

The record of the trial court show that four (4) witnesses testified for the prosecution. PW1 CLARICE MBUCHE CHILANGO was the complainant. On 30th February, 2012 about 8.00 am she closed her house at Majengo Mapya in Malindi and went to the chemist. When she came back she found her house had been broken into and several items stolen. The stolen items included six (6) kikoyis, four (4) blouses,

five (5) shirts, a file containing her children's birth certificates, her husband's trousers and shirts, her children's shoes, bed sheets, a small knife, school documents for her children and a brief case that contained Kshs.18,000/= which she had borrowed from the Kenya Women Finance Trust. She called her husband, PW2 and informed him about the incident. PW2 advised her to report the matter to the police.

It is her evidence that she reported the matter to the police. On 8th January 2013 she got information from boda operators that there was someone selling suspected stolen items at Mbuyu Wa Kusema. She was on her to the market and met police officers who were on patrol. They went to a certain house and knocked on the door. The appellant opened the door and PW1 saw her bed sheets on a mattress. She also saw the brief case, her red blouse, birth certificates for her three (3) children, her NSSF card, and photographs together with other items which she identified to be hers. The appellant was arrested and taken to Malindi police station.

PW2 FREDRICK CHARO MASHA is the husband of PW1. He works at a hotel in Malindi. On 30th December, 2012, he left for work and at about 10.00 am PW1 informed him about the incident. The matter was reported to the police. On 8th January 2013, PW1 informed her about the selling of suspected stolen items. He joined PW1 and the police and they went to the appellant's home. Some of the stolen items were recovered.

PW3 P.C. JOTHAM CHEMOREI was attached to the Malindi police station. On 8th of January 2013 he was on patrol with a colleague when they met PW1. She told them that she had reported to the police about the theft of her items on 30th December 2012. They went to the house where it was alledged there was someone selling suspected stolen items. They knocked at the door and the appellant opened. They introduced themselves as police officers and entered the house. PW1 was able to identify some of her stolen items including among others three (3) birth certificates for her children, bed sheets and three (3) blouses. They arrested the appellant and took him to Malindi police station. The appellant was later charged with the offence.

PW4 Sergeant GEORGE MATIKA was also attached to the Malindi police station. He is the investigating officer. On 30th December, 2012 at about 10.00 am he was at the office when PW1 went to report the case. He went to the house of PW1 and found the lock had been broken into. On 8th January, 2013 two of his colleagues namely, APC ISRAEL and P.C. CHEMOREI were on foot patrol and got information that the appellant was selling suspected stolen items. They went to his house and some of the stolen items were recovered. The complainant identified those items to be hers. He caused the appellant to be charged with the offence.

In his unsworn defence, the appellant testified that he digs latrines for a living. On the 8th January 2013 he left his house and went for work at Mbuyu Wa Kusema where he was to meet his colleagues. He found that his colleagues had already left. It was about 2.00 pm. As he was waiting in his colleague's house the police went there and arrested him. He was interrogated and later charged with the offence.

The prosecution evidence does prove that the house of PW1 was broken into on 30th December, 2012 and several items were stolen. It is also established that some of the stolen items were recovered on the 8th of January, 2013. The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence of PW1 and PW2 confirms that indeed they were living at Majengo Mapya area in Malindi. Their house was broken into and several items stolen. PW4, the investigating officer visited the house and confirmed that it was broken into. It is also established by the evidence on record that on 8th January 2013 PW1 got information from boda boda operators that someone was selling suspected stolen items at Mbuyu Wa Kusema. According to PW3 they were on patrol on the 8th January, 2013 when they met PW1. They proceeded to the suspected house and managed to recover some of the stolen items. The appellant was alone in the house. The appellant's defence is that the house belongs to his colleague. He was in the house waiting for him. The trial court evaluated that defence evidence and found it doubtful. The trial court found that the alledged colleague was not called to testify and his name was not given.

The appellant contests the conviction and the sentence. It is clear from the evidence that the appellant was arrested in the house where the stolen items were recovered. The breaking into the house occurred on 30th December, 2012. The items were recovered about nine days later on 8th January, 2013. There was no explanation by the appellant as to how he came to the possession of the stolen items. The defence that the house where the appellant was arrested belongs to a third party is not convincing. It does not raise doubt on the prosecution evidence. It is established that it was the appellant who broke into the house and took the items. The prosecution proved its case beyond reasonable doubt and the conviction is proper. The appellant does not state who the colleague was. He could have given his name so that the police could have arrested him. In the absence of any evidence to the contrary, it is proved that the appellant was arrested in his house.

On the issue of sentence, section 304 gives a maximum sentence of seven (7) years imprisonment. The appellant was sentenced to serve six (6) years. The incident took place during the day and the sentence is proper under the law. Given the circumstances of the case, I do find that there is no need to interfere with the sentence imposed by the trial court.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

Dated and delivered in Malindi this 14th day of September, 2016.

S.J. CHITEMBWE

JUDGE