



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 7 OF 2016

VENACIO NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR. 496/14 at Embu Chief Magistrate's Court by Hon. V.O. Nyakundi - RM on 4th February, 2016)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence in respect of the composite charge of breaking into a dwelling house and stealing therefrom contrary to section 304 (1) as read with section 279 (b) both of the Penal Code (Cap 63) Laws of Kenya, in which he was sentenced to five years imprisonment on the first limb and ten years imprisonment in the second limb which sentences were ordered to run concurrently by the court of the Resident Magistrate in Embu on 5th February 2016.
2. The state through Ms Mbae supported both the conviction and sentence.
3. The evidence upon which the appellant was convicted was that the appellant and his co-accused who is still at large (having absconded during trial) was that a report was made to the complainant (PW 1) that his house had been broken into and a number of household goods had been stolen. The complainant then reported the matter to the police and later he was told that some people had been seen who were trying to sell the stolen items. He was accompanied by Laban Kariuki Mbogo (PW 3) and they mounted a search which led them to Majimbo area in Embu town. While in that estate, they saw two people on a motor cycle with the stolen items. As a result, they followed them and saw the appellant and his co-accused enter one of the houses.
4. The complainant then sought the assistance of the boda boda operators who then assisted him in arresting the appellant and his co-accused. In the process of being beaten up by the boda boda riders, the police arrived and rescued them from being lynched. The complainant positively identified the items which were in a yellow bag as his stolen property.
5. When he was placed on his defence, this appellant gave sworn evidence and denied committing the offence. He testified that he had hired a motorcycle to take him to his home. Upon arrival, he entered his house. Shortly thereafter, he heard a sound of several motorcycles arriving at his house. As a result, he came out of the house to find out what was going on. He then found the motor cyclists assaulting the co-accused. He did not know why the co-accused was being attacked. They then set upon him and attacked him as well as a result of which he suffered a broken left foot, injury to the head and lost four upper teeth.

6. The appellant has raised seven grounds of appeal. In ground 1 he has stated the unchallengeable fact that he did not plead guilty to the charge. In ground 2 he has faulted the trial court for failing to accord him the opportunity to cross-examine the complainant. In this regard, the record of the proceedings shows that after he completed giving his evidence in chief, this appellant was given an opportunity to cross-examine the complainant. He declined to do so. The co-accused was given a similar opportunity and he cross-examined the complainant. In the circumstances, this ground of appeal is without merit and is hereby dismissed.

7. In ground 3 the appellant has faulted the trial court for failing to consider that the appellant was not mentioned by PW 3 during the initial report given to the complainant. The evidence of Patrick Njiru Muturi, who is the complainant in this regard is that the complainant was informed that a gentleman called "City Boy" had "items" which he wanted to sell. There is evidence that the motorcycle used by the appellant and his co-accused was labeled "a City Boy boda boda". It is true that the name of this appellant was not given to the complainant. What the complainant was told was the name of the motorcycle which was being used by the appellant and his co-accused in carrying the stolen items. The appellant and his co-accused were caught red handed for being in possession of the stolen items of the complainant within five hours following the commission of the offence. In the circumstances, I find no merit in this ground of appeal and I hereby dismiss it.

8. In ground 4 the appellant has faulted the trial court for failing to consider that there was no eye witness who saw the appellant commit the offence and that no exhibit was recovered from the appellant during his arrest that connected him with the commission of this offence. The evidence in this regard is that the appellant and his co-accused were found in possession of the complainant stolen goods, which were positively identified within five hours following the commission of the offence. It is clear therefore that the appellant was convicted on circumstantial evidence which pointed exclusively to him and his co-accused as the perpetrators of this crime. This ground of appeal is without merit and I hereby dismiss it.

9. In ground 5 the appellant has faulted the trial court for failing to consider that the complainant had sought to withdraw the charges against him after realizing that the appellant was not involved in the commission of this crime. In this regard I find that the attempted withdrawal was not effected and there is ample evidence to support the conviction entered against the appellant. This ground of appeal is also without merit and is hereby dismissed.

10. In grounds 6 and 7 the appellant has faulted the trial court for failing to give reasons in his judgement which is contrary to section 169 (1) and 212 both of the Criminal Procedure Code (Cap 75) Laws of Kenya. He has also faulted the trial court in failing to find that the offence was not proved beyond reasonable doubt. I have considered the judgement of the trial court in this regard and I find that it sets out the issues for determination and found that all the ingredients of the offence were proved. I further find that in that judgement, the trial court found that the appellant and his co-accused were the only people in that house in which the stolen goods were recovered following the commission of the offence just five hours after the breaking and theft.

11. The trial court rightly found that these stolen goods could not easily change hands and concluded that they were stolen by the appellant and his co-accused. That court went further and found that the appellant and his co-accused were caught red handed in that they were followed by the complainant and PW 3 without being lost sight of to the house where they were arrested. The defence of the appellant was considered and found to be untruthful. The court rejected his defence, that amongst other reasons, that he had hired a motorcycle when he himself operated a motorcycle. The appellant's explanation that he hired one because his motorcycle could not enter into his house was found to be incredible. It is to be borne in mind that the appellant gave sworn testimony and was cross-examined. Having considered the credibility of both the prosecution and that of the appellant, the trial court rightly disbelieved the sworn defence of the appellant. In the circumstances, both ground 6 and 7 are without merit and are hereby dismissed.

12. This is a first appeal. As a first appeal court according to *Peters v. Sunday Post Limited (1958) 424*, I am required to re-assess the entire evidence produced in the trial court and come to my own independent conclusions while at the same time I am required generally to defer to the findings of that trial court based

on credibility. I have done so. I find that there was ample evidence in support of the convictions in respect of both limbs of the composite charge.

13. As regards sentence, the trial court found that the offence was rampant in that locality and concluded that a deterrent sentence was called for against this appellant and against potential offenders by imposing a lengthy sentence. It then proceeded to sentence the appellant to five years imprisonment in the first limb and ten years imprisonment on the second limb. Both sentences were ordered to run concurrently. The maximum sentence provided for under section 304 is seven years imprisonment while the sentence provided for under section 279 is fourteen years imprisonment.

14. I find in this case that the trial court did not take into account that the appellant was a first offender. It also did not take into account that the stolen items were all recovered. I find that the trial court misdirected itself for failing to take these two factors into account. In terms of **Wanjema v. R (1971) EA 493** I am entitled to interfere with the sentence imposed because of those misdirections. I therefore confirm the five years imprisonment sentence on the first limb but I reduce the sentence in the second limb to five years imprisonment. The sentences of imprisonment will run concurrently.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 1st day of **September 2016**.

In the presence of the Appellant and Ms Matere for the Respondent

Court clerk Njue

J. M. BWONWONGA

JUDGE

01/09/2016