



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 42 OF 2014

GERALD OTIENO APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Bondo

(Hon. B.R. Kipyegon RM) dated the 19th February 2013 in Bondo PMCCR. No. 661 of 2012)

J U D G M E N T

The appellant was on 7th September 2012, jointly with another, charged with Burglary Contrary to Section 304(2) and Stealing Contrary to Section 279(b) of the Penal Code. The particulars were that on the night between 5th and 6th September 2012 at Bondo Township in Bondo District within Siaya County, jointly with others not before Court broke and entered the dwelling house of Tabitha Bosibori Omwenga with intent to steal therein and did steal one fridge make Kelon white in colour and T.V. LG coloured 14" property of TABITHA BOSIBORI valued at 33,000/=.

He pleaded not guilty to the charge and a trial wherein the prosecution called four witnesses ensued.

Briefly the prosecution's case was that on the material night the complainant (PW1) was away in Kisumu. At around midnight her neighbour (PW3) received a telephone call from another of their neighbours that someone appeared to be breaking in the complainant's house. He switched on his security light and also asked that

neighbour to switch on hers. He then peeped through the window and saw a person who was carrying a white fridge on his head going towards the fence. After about three minutes he heard a motorcycle being towards the exit on the fence. He had on receiving that call from the neighbour also called the complainant. When police officers went to the scene that very night he went with them to the house. The next day he was summoned to the police station to identify the person he had seen carrying the fridge. He identified the appellant's co-accused.

According to P.C. Shadrack Meli (PW2) when they went to the scene they found an LG. T.V five meters from the gate. They also found a motorcycle Registration Number KMCC 446Z which they suspected it was being used by the thieves. After confirming the house had been broken into they took the T.V. and the motorcycle to the police station.

At about 1 or 2A.M. they went back to the scene and it was then that they found the appellant and his co-accused talking on the road about 150 meters from the scene. They arrested them. The next

morning they went to each of their houses. They did not find anything in the appellant's house but they found the fridge, a dvd player and other items which his wife told them had been taken there the previous night by him and his friend. They impounded these items. The complainant subsequently identified the LG TV and Kelton fridge as hers. The appellant and his co-accused were then charged with this offence.

In his defence the appellant testified that he had gone to Sinapanga upon being

told that his fellow motorcycle rider had been attacked and that on arrival he met his co-accused who told him three people had attacked him. As they were riding towards the police station they met police officers who arrested them. He disputed that any stolen goods were recovered in his neighbour's house. He confirmed that nothing was recovered in his house. The police nevertheless identified them to the madam as the ones and the next day they were charged. He contended that he did not understand the charges and contended that it was him who stopped the police vehicle.

After hearing and considering this evidence the Trial Magistrate found the appellant and his co-accused guilty and sentenced them to seven years imprisonment. His petition of appeal raises four grounds:-

- 1. That the learned trial magistrate misdirected himself in both law and in facts by convicting him on unreliable evidence adduced by the prosecution witness PW2 without seeing that he was not placed at the scene or found with any of the exhibited goods.**
- 2. That the trial magistrate erred in both law and in facts when he shifted the burden of proof to him which always lies on the prosecution side to prove their case beyond reasonable doubt.**
- 3. That the trial magistrate misdirected himself in both law and in facts when he failed to notice the contradictions and discrepancies consisted in the evidence of PW2 about the identification at the scene of crime which was by a passing glance at night at about 12am.**
- 4. That the trial magistrate erred in law and in facts by rejecting his strong alibi defence without giving enough reason for doing so.**

Being the first appellate Court I have considered and evaluated the evidence adduced at the trial and also the submissions put forth by the appellant and prosecution counsel at the hearing of this appeal.

It is my finding that the charge against the appellant was never proved beyond reasonable doubt as required. PW3, who we can safely call the eye witness, only saw one person in the compound that night. He later identified that person as the appellant's co-accused. He was categorical that he never saw the appellant that night. The two police officers also confirmed that nothing connected to this burglary was found in the appellant's house. They categorically stated that the complainant's fridge was recovered in the house of the appellant's co-accused. The only reason the appellant was charged with this offence was because he was found on the road near the complainant's house at 1/or 2AM with his co-accused. He did, in my view, however give a reasonable explanation for being there. It is always the duty of the prosecution to prove the charge against the accused person and they are required to do so beyond reasonable doubt. In the judgment the Trial Magistrate reasoned that as the appellant could not give a full and satisfactory account of his company with the 1st accused and did not call the person who had allegedly alerted him to their colleague's plight to testify in his favour and also because the stolen items must certainly have required handling by more than one person then the appellant was an accomplice in the burglary. To my mind this amounts to shifting the burden of proof to the appellant.

In my view the appellant's defence coupled with the fact that nothing placed him at the scene and also the fact that none of the stolen goods were recovered from his house entitled him to the benefit of doubt. Accordingly this appeal is allowed, the conviction quashed and the sentence set aside. He should be released forthwith unless otherwise lawfully held.

Signed, dated and delivered at Kisumu this11th....day ofJune..... 2015

E. N. MAINA

JUDGE

In the presence of:-

Ruto for the state

Appellant in person

Moses Okumu/Rose Abondo - CC