



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 6 OF 2015

(An appeal from the Judgment of the Ag. Principal Magistrate, Runyenjes in CMCR. Case No. 545 of 2014 dated 11/12/2014)

ROBERT MAWIRA NJIRU..... APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

J U D G M E N T

The appellant was convicted by Runyenjes Ag. Principal Magistrate of the offence of house breaking and stealing contrary to Section 304(1)(b) and Section 279(b) of the Penal Code and he was sentenced to serve 3 years imprisonment on the 1st limb and 2 years imprisonment on the 2nd limb. The sentences were to run concurrently.

The appellant lodged this appeal against the judgment of the trial magistrate. In his petition of appeal filed on 3/2/2015 he relies on the following grounds:-

1. *That he was wrongly convicted on the evidence of a single witness.*
2. *That the prosecution failed to produce the stolen items in court and thus violated his constitutional rights.*
3. *That the prosecution's evidence was full of contradictions.*
4. *That the trial magistrate ignored the fact that there was a dispute between the appellant's mother and his father and the complainant which prompted the complainant to frame up the case against the appellant.*

In his written submissions the appellant stated PW2 did not raise alarm to alert the neighbours about what was going on. He argued that being a son of the complainant the appellant knew where the keys were kept and there was no need of breaking into the house. The stolen items were not found in possession of the appellant and were never produced in court. Evidence to connect him with the offence was therefore lacking. There is long standing domestic dispute between his mother DW2 and his father PW1. It is his constitutional right to be protected from parental abuse.

The appeal was opposed by the respondent who argued that the prosecution proved the case against the appellant beyond reasonable doubt. Ms. Matere for the respondent submitted that the offence was committed at 10.00 a.m. in broad daylight and that PW2 knew the appellant before the incident. The respondent argued that there was no possibility of mistaken identity. Since PW2 saw the complainant break into the house and

take away the stolen items. PW2 talked to the appellant asking him why he was breaking into the house. The appellant armed himself with a panga and chased PW2 from the scene.

The appellant alleged in his submissions that he was not supplied with witness statements. It is the respondent's submission that the record is clear that the magistrate made an order after taking the plea that the appellant be supplied with the statements. When the matter came up for hearing on 13/11/2014 the appellant said he is ready to proceed. All the prosecution witnesses were heard on that day and the appellant was put on his defence. During the hearing the appellant participated fully by cross-examining all the prosecution witnesses. His constitutional rights as to fair hearing were therefore not violated.

The respondent argued that the appellant was not entitled to be given an advocate contrary to his claim in his submissions. It is not an absolute right for an accused person to be allocated a counsel to represent him in a criminal trial.

According to the respondent, the defence of the appellant was sufficiently considered in the judgment and rejected for good reasons. The sentence was within the law and need not be interfered with on appeal.

The duty of the 1st appellate court was explained in the case of **OKENO VS REPUBLIC [1972] EA 32** where it was stated as follows:-

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

The evidence of PW1 was that on 4/11/2014 at around 2.00 p.m. he was at Kathageri market when his employee PW2 informed him that his house had been broken into by his son the appellant. He went to his house and confirmed the breaking in and the theft of his television set, DVD player and a meko gas. He reported the matter to the police who later arrested the appellant.

PW2 testified that he was employed by PW1 as a shamba boy. On the material day he was at home clearing the compound when he saw the appellant going to the house. He gained access into the house by breaking the door. PW2 talked to him as he was removing the television set, DVD player and the meko gas. He asked him why he had broken into the house and stolen his father's property. The appellant became hostile, armed himself with a panga and chased PW2 away.

PW1 made a report at Runyenjes police station on the same day. PW3 PC William Kiprop visited the scene in the evening of the material day. He testified that he confirmed that the house had been broken into by damaging

the padlock. He took as exhibit the said padlock and the shutter which was later produced in evidence.

The appellant gave an unsworn statement. He stated that on 4/11/2014, the complainant went to his mother's home and accused the appellant of breaking into his house and stealing a television set and a gas cooker. The appellant denied breaking into PW1's house or stealing anything from therein.

The appellant called his mother DW2 as a witness. She testified that on 4/11/2014, she went to the house of PW1 with the appellant. It is PW1 who had requested DW2 to go to his home with the appellant. PW1 stayed with them for a while and later excused himself. The following day the appellant was arrested by the police on allegation that he had stolen from the father.

The appellant faces the charge of house breaking and stealing. Section 304(1) provides:-

1. Any person who-

(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 house breaking and is liable to imprisonment for seven years.*

Section 279 provides:-

"If theft is committed under any of the circumstances following, that is to say: -

(a)

(b) *If the thing is stolen in a dwelling house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling house.*

(c)

The offender is liable to imprisonment for fourteen years".

The appellant faulted the court for not providing him with a counsel to represent him during the trial. Section 50(2) provides:-

Every accused person has the right to a fair trial which includes the right -

(a)....

(g) *to choose, and be represented by, an advocate, and to be informed of this right promptly.*

Article 50(9) provides:-

Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

The right to be represented by an advocate is a progressive right which requires legislation to be enacted by parliament to provide for the manner in which the rights under Article 50 can be actualized. Parliament is yet to enact the said legislation. The appellant was therefore not denied his constitutional rights by the court.

The evidence of PW2 on how the appellant broke into the house of PW1 and took away the television set, DVD

player and a meko gas was very consistent. There is evidence that the complainant had separated with his wife and that they were living separately. The appellant was living with his mother at the material time. The offence was committed in the daylight and the issue of mistaken identity does not arise.

PW2 knew the appellant well before the incident. He saw him break into the house and remove the items named in the charge sheet. PW2 had a conversation with the appellant trying to enquire why the appellant was stealing his father's property.

The defence of the appellant was a mere denial lacking important details as to his whereabouts on the material day. The evidence of his mother as to what allegedly transpired on the material day was not convincing. PW2 who was at the scene at the material time did not see the appellant's mother. It is therefore unlikely that she visited PW1's home on the material day. Assuming that she visited the home, it must have been at a different time other than the material time.

The trial magistrate found the evidence of PW1 and PW2 credible and consistent. The appellant alleged that there was a domestic dispute between his parents which led to PW1 framing up the case against him. It is important to note that PW2 was not a member of the family and it is him who witnessed the incident and report to his employer. The allegation that the case was framed up against the appellant cannot be true.

PW3 visited the scene and confirmed that the house had been broken into by damaging the padlock. He produced the damaged padlock and shutter in evidence. This evidence corroborates that of PW1 and PW2 concerning the incident.

The prosecution adduced overwhelming evidence which satisfied the trial court that the appellant broke into and entered the dwelling house of PW1 with intent to commit a felony and stole from therein the items complained of.

It is not a requirement of the law as alleged by the appellant that exhibits must be produced in a criminal case for a conviction to be sustained. It is clear from the evidence that the exhibits in this case were not recovered. In the case of **PETER KIHIA MWANIKI VS REPUBLIC [2010] eKLR** the Court of Appeal held that it would have been proper to avail the exhibits but that failure to produce them was not fatal to the prosecution's case. The court observed that no injustice arose to tender those exhibits.

In the case of **JOHN WACHIRA MUTHIKE VS REPUBLIC [2014] eKLR** the court held that failure to produce exhibits is not necessarily fatal to a prosecution case and that each case depends on its own particular circumstances.

The appellant referred to the evidence of the prosecution as contradictory. However, he did not point out what contradictions were in the said evidence. From the proceedings, I find that the evidence of the prosecution was clear and consistent. There is no merit in the allegation that the evidence was contradictory.

The trial magistrate warned himself on convicting on the evidence of a single witness as required by the law.

Nevertheless he found the evidence of PW2 to be firm, consistent and overwhelming.

It is my considered opinion that the case was proven beyond any reasonable doubt and the conviction was safe.

Section 304(1) provides for a sentence of imprisonment for seven (7) years while Section 279(b) provides for fourteen (14) years imprisonment. The sentences meted out by the learned magistrate were within the law.

However, I give due consideration to the fact the applicant is the son of the complainant and that the two parents have separated which state of affairs could result to unprecedented emotions. I also take note of the fact that the appellant is a first offender.

For the foregoing reasons, I find it appropriate to consider a non-custodial sentence by referring the appellant for a probation report which I hereby do.

The appeal on conviction has no merit and hereby dismissed. The conviction is hereby upheld. The sentences of imprisonment are quashed subject to the suitability of the appellant for a non-custodial sentence.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Matere for Respondent

Appellant present