REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 4 OF 2015

ROBERT NGUU .....APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in criminal case No. 577 of 2013 of the Principal Magistrate Court at Mwingi – M. W. Murage).

JUDGMENT

The appellant was charged in the subordinate court with preparation to commit a felony contrary to Section 308(2) of the Penal Code. The particulars of the offence were that on 25th October 2013 at around 8.00 Pm in Migwani market, Migwani District within Kitui County not being at his place of abode had an article for use in the course of or in connection with burglary namely Tinslip. He denied the charge. After a full trial he was convicted of the offence and sentenced to serve seven years imprisonment.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. His grounds of appeal are as follows:-

1. That the magistrate erred in law and fact when admitting the prosecution evidence which was totally un corroborative.

2. That the learned trial magistrate erred both in law and fact in not considering that the prosecution failed to present before the court the person who fed the police with the information to arrest him.

3. The learned trial magistrate erred in law and fact when convicting and sentencing him very severely without considering that the police officers who arrested him had not reported the matter at their office where he was targeting to commit a felony.

4. The learned magistrate failed in points of law and facts by failing to note that there was no proof that the investigator visited his home area for more investigation.

5. The learned trial magistrate erred both in law and fact when convicting and sentencing him without considering that there were more essential witnesses who were mentioned during the case but never appeared before the court to clear the doubt.

6. The trial magistrate erred both in law and fact when convicting and sentencing him very severely without showing leniency for his future nation building as he should have considered his age.

7. The learned trial magistrate erred in law and fact by failing to consider his defence.

During the hearing of the appeal the appellant submitted orally that he was not treated properly by the police and the court. He stated that the evidence tendered by the police regarding his arrest was not consistent. He said he was arrested at Migwani but there was no first report in the OB that he had stolen from somebody. He said he was not arrested with anything and the person who called the police did not see him with anything when he called the police. According to him the reason for his arrest was not reported upon.

He submitted also that PWI worked at Nguutani Police Station which was about 40 Kms away from Migwani while the other two police officers were from a different police station which was Migwani Police Station. He submitted also that the police initially told him that he was arrested because he had some money but he was later charged with preparation to commit a felony after they took his money. He complained that the informer was not called to testify in court. According to him the informer took him on a motor bike and then demanded for more money than what was agreed and then he called the police. He submitted also that that informer came with the police to where he was arrested and they went together to the police station but he did not come to court to testify.

He also complained that though he was arrested at Migwani market at 6.30 Pm none of the members of public was called to court to testify. According to him at least two members of the public should have been called to testify.

He stated that the evidence of PW3 the Investigating Officer was contradictory to that of other witness because he stated that he arrested him on 28th while other witnesses stated that the arrest was on 26th. He said that the police officers who arrested him knew him before and that he had been arrested in 2012 from his home and charged forcefully with preparation to commit a felony but the complainant withdrew the case. He said that his defence was comprehensive but the court did not give its due consideration.

The Learned Prosecuting Counsel Mr. Okemwa stated that this being a first appellate court it should consider the evidence on record afresh. Counsel submitted that PWI stated that arrest was at a Shopping Centre which was not the appellant's place of abode. On him was found a bunch of keys, metal hinge and a scissor. In cross examination the appellant did not challenge what was found on him. The evidence was that the keys were incompatible with the locks at his place of abode. PW2 repeated the same story. Counsel submitted that the witnesses who were called were adequate to prove the case against the appellant and that there was no need for the evidence of the informer.

Counsel also submitted that there was no need for a first report in the circumstances of this particular case. With regard to previous convictions, counsel submitted that the evidence of PW3 was clear and the appellant did not deny the same.

The counsel asked this court to consider section 308 (4) of the Criminal Procedure Code on sentencing because the maximum sentence was pronounced by the court.

In response to the prosecuting counsel's submissions, the appellant stated that his previous conviction was for a different offence and it was wrongly considered by the trial court in sentencing.

During the trial the prosecution called 3 witnesses. They were all police officers.

PW1 was P.C Joseph Mbugua of Nguutani police station. He stated that on 25th October 2013 while at the police station he received a call from P.C Sosten Letin informing him that he had received a phone call that a person with an alias name of Akasokora had been traced within the town at Migwani market

and was to be arrested with the case of

stealing. He accompanied PC. Leting and Karumba and arrested the appellant whom they found with a Tinslip and bunch of keys. They suspect that the Tinslip was for a planned commission of a felony. They arrested him and escorted him to the police station. According to him, the investigating Officer PC Leting conducted a search. He identified the bunch of keys and the Tinslip which were recovered from the appellant. He also talked of a catapult that was recovered from the appellant.

In cross examination, he stated that he was the arresting officer but was not the person who conducted the search. He said that they were three police officers during arrest.

PW2 was P.C Jackson Karumba. It was his evidence that on the 25th October 2013 at 7.30 Pm while at Migwani Police Station he was informed by P.C Leting that an informer had told him that a well known person had been spotted within Migwani market where he was preparing to commit a felony. They then called P.C Joseph Mbugua and proceeded to the market where they found the appellant and challenged him. They recovered one Tinslip, a bunch of keys and a catapult on conducting a search on him. He identified the items which were recovered from the appellant. He stated that he had come into contact with the appellant because he had severally charged with house breaking and stealing.

In cross examination, he stated that PC Leting talked to him about the informer. He could not disclose the name of the informer. He stated that whenever the appellant was spotted a breakage normally occured. He maintained that they arrested him because he had the exhibit 1, 2 and 3. He denied that they took away his money. He stated that when the appellant was searched there were no other people.

PW 3 was PC Sosten Leting of Migwani Police Station. It was his evidence that on 28th October 2013 at 7.30 Pm while at the station with PC Karumba they got information that a known criminal had been spotted at Migwani Town. PC Karumba informed PC Mbugua about the report and the three of them laid an ambush to corner the appellant. He gave the description of the appellant to PC Karumba. He saw the accused pass and on noticing him, the appellant tried to run away but he arrested him, searched him and recovered a Tinslip on the left side of the trouser which was used to cut iron sheets and a bunch of union keys in the right side of the appellant, which they suspected to be master keys. He also recovered a catapult. He escorted the appellant to the Police Station and on the following day they went to his home and found that he did not have a house but lived in his brother's house which had no locks. They thus charged him. He stated that exhibit 1, 2, and 3 were the things recovered from the appellant. It was his evidence also that in 2010 the appellant was charged in Cr. Case No. 1080 of 2010 and was put on one year probation. In 2012 he was arrested 10 Kms away from his home with a panga and a metal rod. He was charged with preparation to commit a felony in Cr. Case No. 560 of 2012 and the matter was later withdrawn by the complainant. Later he stole from his brother and was subject of Cr. Case no. 127 of 2014 which was also withdrawn by his brother.

In cross examination, he stated that they suspected the appellant because there was a house that had been broken and items recovered near his home. He stated that he searched him in the presence of other witnesses and went and found his father and brother at home and was told that he did not have a house. He stated that the keys were master keys and were about 10 in number. He stated that the time of arrest was 8.00 Pm and that though people were passing by they were not concerned about what police were doing. He denied taking money from the appellant.

In re-examination he stated that he was saying the truth and that informers were not Government employees and only gave information which they could not disclose.

In his defence the appellant tendered unsworn testimony. He stated that on 25th October 2013 he came from Nairobi in a bus to

Migwani and arrived at 3.30 Pm. He met many people operating boda boda motor cycle business and paid one of them Kshs 100/= to take him home. That person later told him to add him Kshs 200/=

because he knew that he had stolen money. The appellant then took his bag into the house, changed clothes and went back to Migwani at 4.30 Pm.

While at Migwani market, he saw the person who had carried him on the motor bike and before he could take a few steps, he was stopped by police officers who asked him where he was coming from. They told him that they were looking for him and wanted to interrogated him. They pulled him along the streets and searched him and the man who carried him on the motor bike also came. They took his phone and Kshs 12,000/= after asking him where he got the money. They handcuffed him and said he had been reported to have taken some money from another person and that they suspected that the money belonged to the complainant. He was then taken to the police station and locked in the cells. Thereafter PC Kalumba came and asked him if he had another Kshs 8,000/= to add to the money they had taken in order to release him. The following day his finger prints were taken and he was put into a motor vehicle and taken to Mwingi police station and later charged. He was surprised that he was charged with possession of weapons. He stated that he was framed up in order to make him lose his money. He asked the court to assist him in order to recover his money.

From the above evidence the trial court found that the prosecution had proved its case against the appellant beyond reasonable doubt. The court convicted and sentenced him. Therefrom arose the present appeal.

This being a first appeal, I have to start by reminding myself that I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I am also required to take into account that I did not have the opportunity to see witnesses testify to determine their demeanor and to give due allowance to that fact***. See the case of Okeno -vs- Republic (1972) EA 32.***

I have re-evaluated the evidence on record. The appellant has raised several grounds of appeal.

The appellant has stated that the prosecution evidence was not corroborative. I have perused the evidence of the witnesses who were all police officers. The evidence was in my view consistent and corroborative. They stated that they were given information about the appellant having visited Migwani Trading Centre. The information was

that he was preparing to commit a felony. They went to Migwani and spotted the appellant, a person they had known before. He was searched and found with items that were described in the charge sheet. They came to the conclusion that he intended to use those items to commit a felony. He was thus charged with the offence. It thus dismiss that ground of the appeal.

The appellant has complained that the informer was not called in court to testify. Indeed the said informer was not called to testify in court. However that informer did not see the appellant commit the offence. It was a search by the police led to them charging the appellant. Though he said that the informer came to the scene and also accompanied the police to the police station, there is no allegation that the informer planted any of the items on him. The defence story was that the informer demanded for more money for hire of his motor bike. That demand had nothing to do with the offence charged. Therefore in my view, the fact that the informer was not called to court to testify did not prejudice or weaken the prosecution case.

The appellant has complained that the police officers who arrested him did not make a report of the matter in their office on the intended site of theft. That issue was not raised in the trial court. It was not part of the defence of the appellant. It cannot therefore be an issue to be raised in this court on appeal. In addition, the law does not require that a particular place be identified as the place of the intended offence.

The appellant has complained that there was no evidence to prove that the investigator re visited his home area. The evidence on record was that the police actually visited his home area and found that the appellant lived in his brother's house which did not have doors that could be opened using the bunch of 10 keys which were found on the appellant. Though the brother of the appellant was not called by the prosecution as a witness, there was no indication that the appellant himself had a problem calling him as a

witness. In my view if indeed the appellant wanted to show that the police did not visit his brother's home, he could have called his brother to support that position.

The appellant has stated on appeal that his defence was not considered by the trial court. I have perused the judgment and in my view the learned magistrate considered both the prosecution and the defence case and came to the conclusion that the version of the defence was not believable. The court also felt that the appellant could not have possessed the items found on him unless he was up to some bad intention. I therefore find that the defence was considered.

With regard to sentence, the sentence provided under section 308 (2) of the Penal Code is a maximum of 10 years imprisonment. Before the appellant was sentence a report was submitted to the court from the Community Service Officer, which indicated that the appellant had been put on probation in another Cr. Case No. 1088 of 2010. The probation was for one year. The learned magistrate sentenced him to serve 7 years imprisonment.

In the circumstances of this case, I do not see the gravity of the offence which would justify the sentence of 7 years imprisonment. In my view the sentence was harsh and excessive. I am aware that sentencing is a discretion of the trial court, but in my view the sentence in the case here was too harsh. I will therefore interfere with the sentence imposed and order that the sentence be reduced to two years imprisonment.

Consequently I dismiss the appeal on conviction. I will uphold the conviction of the trial court. As for sentence, I set aside the sentence imposed and order that the appellant will serve 2 years imprisonment from the date on which he was sentenced by the trial court. It is so ordered.

Dated and delivered at Garissa this 3rd December 2015.

GEORGE DULU

JUDGE