REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 110 OF 2013

WALTER KEFA GIKONYO.....……..……APPELLANT

-VERSUS-

REPUBLIC…….RESPONDENT

(Being an appeal against conviction and sentence in Kangema Senior Resident Magistrate's Court Criminal Case No. 261 of 2010 (Hon. D.A. Orimba) on 7th October, 2010)

JUDGMENT

The appellant was charged with the offence of house breaking contrary to **section 304 (1) (a)** and stealing contrary to section **279(b)** of the **Penal Code**. According to the particulars of the offence, on the 30th day of July, 2010 at Gitie area, Kahuti sub-location, Weithaga location, in Murang'a District within central province, the appellant jointly with another not before court, with intent to steal, broke and entered the house and did steal from therein 23 pieces of iron sheets, gauge 32, valued at Kshs.12, 000/= the property of Julius Thuita Kimani.

After taking evidence of four prosecution witnesses and the unsworn testimony of the appellant, the learned magistrate concluded that the prosecution had proved its case beyond reasonable doubt and convicted the appellant both under **section 304** of the **Penal Code** and **section 279(b)** of the same **Code**. He sentenced the appellant to three years imprisonment for house breaking and six years imprisonment for stealing with both sentences running concurrently.

The appellant has appealed against both the convictions and the sentences on the grounds that, the learned magistrate erred both in law and in fact in convicting him despite the fact that his constitutional rights had been violated since he was kept in custody for seven days before he was arraigned in court; that the learned magistrate erred in law and in fact in convicting the appellant based on the evidence that he had been seen ferrying the iron sheets yet the person who saw him never apprehended him; that the learned magistrate erred in law and in fact in convicting the appellant and letting the handler of the stolen good go scot-free; that the learned magistrate erred in law and in fact in convicting the appellant both on the main count and the alternative count yet there was no nexus established between the breaking in, stealing and the appellant; that the learned magistrate erred in law in convicting the appellant and subjecting him to harsh sentences based on the circumstantial evidence only; and finally, that the learned magistrate erred in

law and in fact in subjecting the appellant to a custodial sentence without inquiring into his health which is deteriorating as a result of the cancer of the chest.

The first prosecution witness was **Jackson Karuri Mwangi**, a barber at Kahuti centre. This witness told the court that he knew the appellant as they both came from the same region. On 30th July, 2010 at 8 pm, he was at home when the appellant approached him with iron sheets to sell. Although the witness declined to buy them, the appellant is said to have left him with the iron sheets promising to come for them later. On 13th August, 2010, the appellant finally appeared but in the company of police officers who collected the five pieces of iron sheets. When he was cross-examined, the witness said he had no idea where the appellant got the iron sheets from.

Ephantus Irungu Kiarie (PW2) was a farmer who hailed from Weithaga. He recalled that on 31st July, 2010 at around 7.45 am, he was looking after his animals at the home of one Eliud Gikonyo when he saw the appellant passing by carrying iron sheets. The appellant whom he knew before greeted him and went his way.

The owner of the iron sheets, **Julius Thuita Kimani** testified as the third prosecution witness; according to him, he was at his place of work at Nairobi when his sister, Ann Muthoni called to inform him that his house had been broken into and iron sheets stolen. The witness said that he came back immediately and reported the matter to police at Kahuti. Later, he was again called by his sister who informed him that his iron sheets had not only been recovered but that a person suspected to have stolen them had been arrested as well. The witness went to Kahuti police post where he identified the iron sheets as his and also identified the appellant who was then in police custody as having been his employee before.

Police Constable Pius Wasike (PW4) is the officer who received the report of the theft; he was then based at Kahuti police base. In his evidence, he said that on 30th July, 2010 at around 4 pm, he was at the police base when he received a report of house-breaking and stealing from Julius Thuita Kimani (PW3). The officer booked the report and visited the scene. He launched investigations into the report and after receiving a tip-off, he arrested the suspect. According to this witness' testimony, it is the appellant who, upon interrogation, led the police to where the iron sheets had been kept. He summoned the complainant who came to identify his iron sheets. The officer photographed the iron sheets and preferred the charges against the appellant and another person not before the court; when he was cross-examined on this particular person he said that he had not been arrested.

The appellant gave a brief unsworn statement; he said that he is a farmer from Weithaga and all that had been said against him by the prosecution witnesses was false. He said that he did not steal the iron sheets but that he was only hired to look for a buyer.

The task for this court as the first appellate court is to evaluate the evidence afresh and come to its own conclusions bearing in mind that unlike the subordinate court, this court does not have the advantage of seeing and hearing the witnesses. This position of the law has always been followed since the court of appeal decision in **Okeno versus Republic (1972) EA 32** where it was stated that**:-**

"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 magistrates' findings can 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 page 36).

The evaluation of the evidence afresh and the conclusions therefore are more meaningful if this task is undertaken against the background of the charge or charges against the appellant; in other words the evidence is evaluated and conclusions are made bearing in mind the offence or offences alleged to have been committed by the appellant and the interplay between the facts as established and the law stated to have been breached.

As far as this appeal is concerned, the appellant was charged with the offence of housebreaking contrary to **section 304(1) (a)** (though the charge sheet simply speaks of section 304(1)) and stealing contrary to **section 279(b)** of the Penal Code.

Section 304(1) (a) of the **Penal Code** states:-

304(1) any person who-

a. ***Breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein;***

b. **…**

is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

Section 279 (b) of the **Penal Code** on its part says:-

279. If the theft is committed under any of the circumstances following, that is to say-

(a)…

c. ***if the thing stolen is 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;***

d. **…**
e. **…**
f. **…**
g. **…**

the offender is liable to imprisonment for fourteen years.

The two main questions that concern this court are whether, from the evidence proffered, the offence of house breaking and stealing was established and if so whether the appellant was behind this crime. In addressing these questions the court bears in mind from the outset that none of the prosecution witnesses ever witnessed the break-in and the theft of the iron sheets from the complainant's house; the available evidence in this respect was, to a large extent, circumstantial.

When the complainant received a report that his house had been broken into and iron sheets stolen, he proceeded to make a report to the police of the break in and the theft. This evidence was corroborated by the police officer, constable **Pius Wasike (PW4)** who confirmed that he received the report on 30th July, 2010 and subsequently lodged investigations into the complaint.

Five of the 23 pieces of iron sheets that had been reported lost were later recovered from **Jackson Karuri Mwangi (PW1)** who confirmed that those iron sheets had been delivered to his home by the appellant who wanted to sell them; when the complainant saw them at the police station, he identified them as his iron sheets which had been stolen. **Ephantus Irungu Kiarie (PW2)** testified that he saw the appellant carrying the iron sheets though he could not tell the number.

The evidence of these witnesses was never challenged and in my view their credibility and truthfulness was not in issue. Indeed the appellant himself did not deny having been in possession of the iron sheets; his defence was that he was only hired to look for a buyer. Unfortunately, he did not name the person who had hired him and this is perhaps why the learned magistrate found his defence unbelievable.

The conclusion that one can reasonably make from this set of facts, which in my view were proved to the required standard is that the complainant's house was broken into and his property stolen in

circumstances that could give rise to the offence of house breaking and stealing as defined in section **304 (1) (a)** and section **279(b)** of the Penal Code. There is no doubt also that these set of circumstances point to the appellant as the person who perpetrated this crime.

In the court of appeal case of **M'Riungu versus Republic (1983) KLR**, at page 463, the court of appeal said that corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial of his connection with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.

The court can thus convict on circumstantial evidence as long as there is corroboration which in my view was demonstrated in this case. This was again emphasised in the court of appeal decision in the case of **Mwita versus Republic (2004)2KLR** at page 66 where the court said:-

"***It is trite that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt."***

The inculpatory facts in the case against the appellant in the trial court were incompatible with his innocence and incapable of explanation upon any other hypothesis than his guilt.

The other issue that the appellant raised in his appeal is the question of contravention of his constitutional rights because of failure by the police to arraign him in court in time. This ground does not carry much weight as far as the appellant's appeal is concerned because, the remedy for such a breach, if it is proved lies in damages and not in an acquittal. This question was settled in the court of appeal decision in the case of **Julius Kamau Mbugua versus Republic (2010) eKLR** in which the court held that the remedy for extra judicial detention in contravention of the constitution was an order for compensation and not an acquittal.

Having considered the appellants grounds of appeal and his submissions I am not persuaded that there is any merit in this appeal. The appeal is dismissed.

Dated, signed and delivered in open court this 3rd day of February 2014

Ngaah Jairus

JUDGE