REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO 33 OF 2013

Appeal from the original conviction and sentence in Criminal Case No 236 of 2011

at Kyuso Principal Magistrate's Court (B. M. Mararo, P.M)

FRANCIS MUTIE MWENDWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

Francis Mutie Mwendwa, the appellant, was charged in the lower court with preparation to commit a felony contrary to section 308 (2) of the Penal Code. It was alleged that on 9th November 2011 at Kwamusembe village in Kyuso District within Kitui County not being in his place of abode had with him an article for use in the course of or in connection with burglary namely a sharp metal rod.

When charges were read to him on 10th November 2011 he pleaded guilty. However upon presentation of the facts he told the court that the facts were not correct. The case went to full trial where the prosecution called four witnesses. The appellant was the only defence witness. The trial court found the case proved beyond reasonable doubt, convicted and sentenced the appellant to two years imprisonment.

Petition of appeal

The appellant, being dissatisfied with the conviction, appealed to this court. His self-made grounds of appeal are badly drafted. I however understand the appellant to be disputing that the evidence was contradictory, inconsistent and inadequate; that the trial magistrate relied on evidence surrounding the metal rod which was not recovered from him and that the trial court failed to consider his defence. He submitted in support of the grounds of appeal drawing out the inconsistencies in the evidence of the prosecution witnesses and highlighting the manner in which he was arrested and the items he was found with which he claims belonged to him.

Submissions by the Respondent

The appeal was opposed. The learned state counsel submitted that there was evidence of PW1, PW2 and PW3 on what happened during the night in question; that there is corroboration of the evidence and the

three witnesses testified that the appellant threw away the exhibits that were recovered; that the appellant was identified by the witnesses and that all the prosecution evidence agreed on the issue of identification of the appellant; that the metal rod in question was mentioned by all the prosecution witnesses and that the appellant threw it away as he fled from the scene.

The offence

Section 308 (2) of the Penal Code under which the appellant was charged reads as follows:

> **Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.**

To prove that an accused person has committed an offence under section 308 (2) of the Penal Code, the prosecution has to lead evidence establishing that the accused person:

i. Was not at his place of abode when he was arrested.

ii. Has with him any article for use in the course of or in connection with any burglary

It is a requirement for the prosecution to, where any person is charged with an offence under this subsection, proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating and such proof shall be evidence that he had it with him for such use.

It is the duty of this court to examine and evaluate the evidence afresh to determine if the ingredients of this offence were proved beyond reasonable doubt.

The prosecution case

The appellant was arrested away from his place of abode. According to Muteti Muthengi, PW1, he was walking by a church known as Zion Global Ministry on 9th November 2011 in the company of one Mwendwa Kilonzo, not a witness. PW1 did not state the time of the day. He told the court that as they passed by that church they heard the door being broken and they decided to investigate. On reaching the place they found a person at the door. The person started to flee on seeing them. They followed him. He identified the appellant as that person and stated that after informing one Paul (whom I believe is Paul Musyoka, PW2) who was said to be the leader of community policing, they searched for the suspect. The suspect was later found at a fence and arrested. Several items namely pliers, torch, catapult, bicycle, metal rod and watch, were recovered from him. The appellant was handed over to the police and charged with this offence.

The defence

The appellant testified that on 9th November 2011 he was on his way home from a funeral of his friend's child. He told the court that he had had a bicycle and had carried with him a pair of pliers, penknife, patch in case of a puncture and a torch because he did not know when he would return; that he finalized with his friend at 5.30pm and he started walking home. He arrived at Kwamusembe at 7.30pm. He decided to relief himself at the bush. He said he placed his bicycle under a tree and started relieving himself; that he heard footsteps and stopped relieving himself and stood up. He saw two young men who sought to know who he was; the two left towards the shopping centre but came back with other people who interrogated him and called the chief. The chief asked him his name but was not able to show his identity card because it was being held by a police officer he named as Corporal Muvevi. The chief called police who went to pick him and take him to the station. He denied being found with the metal rod. He denied having been near the church or trying to break its door.

Determination

After analyzing the evidence, the trial magistrate stated as follows:

> **"I have considered all the material placed before me and I note that the accused does not deny that he was found in a place that was not his known abode on the day in question. He claims that he was charged when he claimed that one Cpl Muvevi had his identity card. I note that the accused did not despite been given a chance to tell court the name of his friend or better still call him as a witness which would have cleared this matter (sic). In regard to the metal rod which he claims was not found on him PW1, PW2 and PW3 with categorical (**I think he meant 'were categorical**) that he threw it into the bush when they gave chase. I am not convinced by his evidence which I proceed to dismiss."**

With that summary, the trial magistrate convicted the appellant. My view on this reasoning is that the trial magistrate shifted the burden of proof to the appellant. It is indeed true that the trial magistrate did not consider the defence at all. I agree with the appellant on this point and find the trial magistrate in error.

I also find it is not true that the evidence of PW1, PW2 and PW3 corroborate each other. In my considered view these witnesses were inconsistent. The evidence of PW1 gives an impression that they found the person attempting to break into the church door at the scene and he attempted to flee. However, PW1 continued to state that they followed the suspect and greeted him but the suspect did not respond. Let me paraphrase PW1's evidence for emphasis.

> **"We heard the church door being broken. We decided to investigate with Mwendwa Kilonzo. We found a person at the door. When he saw us he got up and started to flee. We followed him and greeted him. He did not reply. <u>We found Musyimi. He told us what was stolen. He told us to tell Paul</u>. Paul is of community policy (sic). <u>We told him and we went with him and we began searching in the forest.</u> <u>The person was at the fence holding a catapult.</u> I approached him stealthily. I told him to sit down. We asked him who he was. <u>He said his name</u>. We asked him what he was doing. He said he was from Mataka and he had opted to sleep in the forest. <u>He gave us a different name.</u> He had a torch. We asked him why he did not seek assistance. We saw he had a bicycle. Paul called Musyimi. Accused stood up. He wanted to attack Paul. He had a knife, pliers, metal rod on a tree. He took them and fled. He fled and we chased him into a field but he threw things away safe for the knife which he was left holding. <u>We called Musyimi and he came</u>. He called the chief who called the police."(**emphasis is mine**)**

PW1's evidence is confused and contradictory. If Musyimi told them to call Paul (PW2), how could Paul be the one to call Musyimi? Again, how could the said Musyimi tell PW1 what was stolen when the evidence of PW2 shows that nothing was stolen from the church and that of PW4 shows that the suspect did not succeed to enter the church?

PW1's evidence further shows that the suspect started to flee and they followed him. If it is true they greeted him and he refused to respond it can only mean that they caught up with him. Why, then did they not arrest him? Why did they start searching for him after PW2 joined them? Is the person they found at the fence whom PW1 identified as the appellant the same person that they found attempting to break into the church? Again, what name did he give them? Prosecution evidence does not provide answers to these questions.

PW2 told the court that after PW1 called him they decided to visit the scene using different routes. This, in my view, means that the person they found at the fence may not be the same person who was attempting to break the church door.

The evidence of PW3 introduces a new angle. He testified that on 9th November 2011 at 4.00pm he was on his way home when he met two young men who told him of a stranger they had seen and he told them to inform the youth wingers. He said that while at home he was called by PW2 and informed that the

stranger had been arrested. PW3 went to the scene and called the chief. The chief interrogated the stranger whose answers were not satisfactory. Was the appellant arrested and handed over to the police because he was a stranger in the area or because he was found attempting to break into the church?

There is also the issue of the metal rod. This article forms the basis for the charges against the appellant. According to PW1, the appellant had, among the other items, the metal rod. However, the other witnesses, PW2, PW3 and PW4 testified that the metal rod was recovered the following morning.

The other items, bicycle, knife, pliers, torch and watch belonged to the appellant. That is what he told the court and given no one claimed the items as belonging to them, this court has no reason to doubt that these items belonged to the appellant. It is not disputed that the appellant was at Kwamusembe on the night in question and that he was a stranger in that area. He has stated as much in his defence and has explained the circumstances under which he was at that place at that time.

Given this contradictory and inconsistent evidence by the prosecution witnesses, this court has doubts regarding the appellant being the suspect found attempting to break into the church. One thing is for sure, that the person, if any, found attempting to break into the church was not positively identified. He could not have been the appellant in my considered view. The evidence does not add up. One does not find a suspect attempting to commit an offence and greet him and let him get away. If indeed PW1 and his friend found the appellant as stated, the logical thing to do was to chase and attempt to arrest him while calling for help.

I do not believe the evidence of PW2 and PW3 that the appellant had the metal rod and threw it away when he was chased. PW1 did not mention seeing the suspect whom he thinks is the appellant with the rod or even the other items including the bicycle.

I have considered the appellant's defence. It is a plausible one. Given the contradictory and inconsistent prosecution evidence, the appellant's defence raises reasonable doubts in my mind. I believe that the prosecution witnesses, especially PW1 and PW2 were lying. It could be true that there was a suspect trying to break into the church but that person has not been positively identified as the appellant. In my considered view, the appellant was arrested because he was a stranger in the area. The items he had belonged to him. I find no evidence that the appellant had the metal rod or that he threw it away. I believe the evidence that when he was arrested, he did not have it and there is no evidence as to the exact place where it was recovered.

This appeal has merit. There are serious doubts in this case and the appellant will benefit from these doubts. It is unfortunate that he had to serve substantial period of his sentence before this appeal could be heard.

Having evaluated and examined all the evidence critically, I find that the prosecution did not prove this case beyond reasonable doubt. There ought not to have been a conviction. I hereby quash the conviction, set aside the sentence, whatever is remaining of that sentence, and order immediate release of the appellant from custody unless for any other reason he is so held. I make orders accordingly.

Dated, signed and delivered this 11TH day of March 2014.

S.N.MUTUKU

JUDGE