



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 130 OF 2014

MUTHIANI MWANIA.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGMENT

1. Appellant with another person were charged before the Senior Principal Magistrate's Court at Voi with two Counts of burglary and theft contrary to Section 304(2) and Section 279(b) of Penal Code and one count of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code. Appellant was convicted as charged and sentenced to serve nine (9) years for Count 1 and nine (9) years on Count two and six (6) years for Count three. This appeal is against both conviction and sentence. I am aware that as the first Appellant Court I am obligated to re-evaluate the evidence tendered during the trial and to come to my own conclusion and inferences, taking into account that I did not have the opportunity to see the witnesses testify – see **OKENO –Vs- REPUBLIC [1972] EA 32.**

2. In respect to the first count the particulars of the offence were-

“(1) JACKSON MUTUA (2) MUTHIANI MWANIA: On the night of the 17th & 18th day of November 2008 at Kariokor Village in Taita Taveta District of the Coast Province jointly broke and entered the dwelling house of MARY WAMBUA with intent to steal therein and did steal therein a mobile phone make G-tide, curtains, B/sheet, cash money 7,000/-, ATM card, ID card, pictures, stove, shoes, long trouser, Bag, 4kg of rice, 4kg of Beans all valued at Kshs. 23,312/- property of said MARY WAMBUA.”

3. Mary Wambua PW1 on 18th November 2008 on returning to her house, at 1.00am, after working at a bar found the door to her house open. She found her clothes were on the floor and her bag, stove, two curtains, two 'sufurias', plates, bed cover, sport shoes, ATM of Post Bank and Identity Card, phone missing. On 17th February 2009 she was requested to view some items that had been recovered and there she identified her curtains of blue yellow stripes. She also identified a telephone which she identified by the defect it had. She also identified photographs. On being cross examined Wambua stated that she was informed that the goods were recovered from Appellant's house by the Police.

4. The particulars of the offence in respect of the second count were-

“1. JACKSON MUTUA (2) MUTHIANI MWANIA: On the 10th day of December 2008 at Kariokor village in Taita Taveta District of the Coast Province, jointly broke and entered the

dwelling house of CAROL KOKI with intent to steal therein and did steal there in a television set make GLD, VCD, Bag, Blanket, Cash money Kshs. 7,300/-, all valued at Kshs. 28,200/- the property of the said CAROL KOKO.”

5. Caro Koki PW3 stated in evidence that on 10th December 2008 at 2.00am on being alerted by a neighbour she went to her house and found the door was ajar. She found missing from her house television of GLD make, Impex deck machine, a bag containing documents and cash Kshs. 7,000/-. That on 27th February 2009 she attended the Police Station on being informed that certain items had been recovered. At that Police Station she found the television, her bag without its content and the deck.

6. On Count 3 the particulars of the offence were-

“1. JACKSON MUTUA (2) MUTHIANI MWANIA: On the night of 12th & 13th February 2009 at Kariokor Village, in Taita Taveta District of the Coast Province jointly broke and entered a building namely a Bar of Eunice Musau and therein committed a felony namely theft of Radio make Sony, 3 crates of beer, one bottle of wine, Ten pkts of cigarettes, 2 chairs, 3kg of meat, 3 pairs of bed sheet, credit cards all valued at Kshs. 28,220.”

7. In respect to that Count Eunice Musau, an owner of a bar found on 13th February 2009, in the morning, the door to her bar broken. On entering to the bar she found missing 3 crates of beer, 6 packets of cigarettes and credit of airtime. She later realized that her radio cassette, 2 chairs, tooth picks and bedsheets were missing. She was requested on 17th February 2009 to go and view some goods that had been recovered. She identified there her missing chairs, toothpicks, serviettes, beers, wine, panga and a saw.

8. PW5 Abel Mwangemi the Chief of Voi Location stated on 17th February 2009 said an informer called him and told him that there was a house where it was suspected to store stolen goods. He in the company of an AP Officer, PW6 went to that house. The door to the house was ajar and Appellant was inside. Appellant confirmed the house was his. PW5 found the house full of things for which Appellant was unable to prove their ownership. PW5 found flour, television and radio. PW5 requested Police to investigate further. His evidence was corroborated by PW6, the AP Officer.

9. PW4 P.C Maurice Odhiambo was the Investigating Officer of the case. He stated that on 17th February 2009 PW5 brought to the Voi Police Station two suspects one of whom was the Appellant. PW4 stated that the items recovered following that arrest were television, beers in a crate, bottle of wine, chairs, deck, assorted tooth picks, curtains, ‘panga’ hacksaw and a damaged mobile phone.

10. The Trial Court on finding that Appellant had a case to answer invited Appellant to indicate whether he would defend himself. Appellant chose to give an unsworn statement.

11. Appellant stated on 17th February 2009 he went to his work place and was arrested when he went to his house for lunch. He was taken to Police Station where his finger prints were taken and the following day he was arraigned in Court. He denied the charge and stated that the items recovered by Police were recovered from his co-accused.

12. Appellant’s statement not being under Oath is of less value than being under Oath. Further statements by Appellant in that statement from the dock, not under Oath, are an afterthought since Appellant did direct his cross examination of prosecution witnesses on the same or even as to where the stolen goods were recovered.

13. Appellant in his written submissions to this appeal faulted his conviction on evidence that he stated it was inconsistent. He specifically singled out evidence of PW6 and stated it was not corroborated by the other witnesses. That in my view is incorrect. The evidence of PW5, the Chief, was well corroborated by PW6 and PW4’s evidence. Indeed all those witnesses sufficiently corroborated each other.

14. Appellant also stated that the Investigating Officer's evidence, that is of PW4, could not be relied upon because he did not mention the mobile phone as one of the items recovered. In that respect Appellant erred. PW4 clearly stated that one of the many items recovered was handset of mobile.

15. On the whole I do support the conviction of the Appellant by the lower Court. That conviction was well supported by the evidence tendered by prosecution.

16. The Learned Trial Magistrate however in sentencing Appellant failed to note that Count number one and two had two limbs and the sentencing thereof should have been in respect of both those limbs. Learned Trial Magistrate ordered Appellant to serve nine (9) years imprisonment in respect of Count one and a similar sentence in respect of Count two. In exercise of my discretion as provided under Section 354 of the Criminal Procedure Code I interfere with the sentence of both Count one and two.

17. In conclusion I do hereby dismiss Appellant's appeal on conviction but in regard to sentence I do in addition to the sentence of the trial Court order Appellant to serve six (6) years imprisonment in respect of the 2nd limb of Count one and another six (6) years of imprisonment in respect of the 2nd limb of Count two. Those sentences shall run consecutively with the sentence imposed by the trial Court.

It is so ordered.

Judgment by:-

MARY KASANGO

JUDGE

In the presence of:-

..... for Appellant

..... for Respondent

DATED and DELIVERED at VOI this 5TH day of NOVEMBER, 2014.

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JUDGE