



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 54 OF 2011

MARTIN OCHIENG OPIYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in Principal Magistrate's Court at Winam criminal case no. 1417 of 2010 Before Hon. Mr. C.N. Sindani]

J U D G M E N T

1). The appellant herein was convicted and sentenced to serve seven (7) years imprisonment for the offence of Burglary contrary to section 304 (2) and Stealing contrary to section 299 (b) of the penal code.

He was dissatisfied with the conviction and sentence and has filed this appeal.

2). The appeal comprises five (5) grounds as per the supplementary petition of appeal. The net effect of the said grounds are that the prosecution based on the evidence adduced did not prove its case beyond reasonable doubt. There were glaring contradictions in the prosecution evidence and witnesses and that the trial court failed or ignored the appellants defence.

3). The brief facts of the case are that the complainant on 6-8-2010 at around 3 p.m locked up his house and went to church. He stayed overnight and when he arrived the following morning he found that his house had been broken into and all his household items stolen. He immediately went to the police station and reported.

4). On the same day he received some information from some boys concerning the whereabouts of his items. He went back to the police station where in the company of police officers they went and searched the appellant's house. They recovered most of the items. The appellant as well as his wife were arrested. The appellant also took them to the house of a co accomplice where a mattress was recovered. He was also arrested.

5). **PW2 Geoffrey Tonye**, is the police officer who carried out the search. He gave similar fashion of the story as stated by the complainant. He further told the court that the appellant was with his two wives but the appellant implicated the 3rd accused.

6). **PW3 Corporal Faresi Nyakongo**, was the investigating officer. He also participated in the search and arrest of the appellant. He told the court that they went as far as the appellant's former house at Kibos area to search but did not recover further items.

7). When put on his defence, the appellant gave unsworn evidence. He told the court that he had been arrested while escorting his pregnant wife back home after seeing a doctor. He denied the charge.

8). This court is enjoined to evaluate the evidence afresh and come up with a fresh independent finding.

9). Counsel for the appellant argued that the charge sheet was defective and therefore the appellant did not know which charge to plead to or defend. This position was equally conceded by the defence.

10). I have read the charge and I respectfully disagree. The offence was well grafted as was committed. The burglary took place as well as stealing.

There was reasonable evidence that the items were stolen after breaking. These items were later recovered. I do not see how this prejudiced the appellant. The charge sheet in my opinion did not contravene section 135 of the Criminal Procedure Code.

11). Equally, if there was any defect in the charge sheet then the provisions of section 382 of the Criminal Procedure Code could easily be invoked. Nonetheless, I do not find any prejudice or embarrassment suffered by the appellant to necessitate me invoking the provisions of section 382 of the Criminal Procedure Code.

12). The appellant argued strongly that there was contradiction by the prosecution witnesses especially in regard to the recovery of the mattress. Some of the witnesses especially PW2 said that the same was recovered from accused 2's house, whereas the complainant said that it was recovered from the appellant's house.

13). My finding is that this alone cannot be a sufficient cause to fault the judgment. Whichever house the mattress was found other items were recovered from the appellant's house.

14). In his defence the appellant did not refute this fact. Equally, the complainant through production of receipts was able to establish that the recovered items were his and not the appellant.

15). The appellant argued that the prosecution did not call the boys who informed the appellant about the lost items and where they were. I do not think that this was relevant or it in any way prejudice the prosecution case. As the practice is, the prosecution is always at liberty to call the witnesses they deem relevant to their case. Those witnesses called were able to establish the prosecution case.

The upshot of my finding is that the respondent was able to establish their case beyond shadow of doubt. The stolen items were recovered less than 24 hours after they were stolen. They were recovered from the house occupied by the appellant. The appellant was unable to give a cogent explanation on how he came to be in possession of the said items.

The complainant on the other hand was well able to prove including production of receipts to back up his evidence. In the premises the appeal is hereby dismissed.

Dated, signed and delivered at Kisumu this 4th day of July, 2013.

**H.K.
JUDGE**

CHEMITEI

In the presence of:

.....for the state

.....for the appellant

HKC/va