



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Criminal Appeal 80 of 2011

HARRISON ESICHU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal against the conviction and sentence of the Chief Magistrate's

Court at Kakamega in Criminal Case No. 2282 of 2010 [P. N. ARERI, RM)

JUDGMENT

The appellant, **HARRISON ESICHU** was charged with the offence of House Breaking contrary to Section 304 (i) (a) and stealing contrary to Section 279 (b) of the Penal Code.

The particulars of the offence were that on the 18th day of December 2010 at Elwanda village in Esumeya Sub-location, North Butso Location Central Kakamega District within Western Province, jointly broke and entered the dwelling house of Nelly Chibole with intent to steal therein and did steal a wallet, suitcase, one 40 kg bag of maize and a mobile phone make Nokia 1200 valued at Kshs.8,000/= the property of NELLY CHIBOLE.

The appellant pleaded not guilty before the lower court. After a full trial, the appellant was found guilty and convicted and sentenced to five years imprisonment in each limb. The sentence ran concurrently.

Aggrieved by the conviction and sentence, the appellant appealed to this court. The grounds of appeal are that the conviction was based on a defective charge sheet; there was no eye witness evidence; there was no proof of ownership of the goods allegedly stolen; the conviction was based on accomplice evidence and the sentence was harsh.

The case for the prosecution was that on 18.2.2010, the complainant, DWI CHIBOLE AMAMU had gone to the river to fetch water. When she returned to her house she found both the main house and the kitchen had been broken into. Her suitcase which contained some clothes, pouch, Mobile phone, ATM card and I/D card was missing. One bag of maize had also been stolen. The spilt maize led to the house of PW2, LORNA SAISI. The bag of maize was recovered from the house of PW2, Lorna Saisi who named appellant as the one who had sold the maize to her. The appellant was arrested and subsequently charged together with another who he had mentioned.

In his defence, the appellant gave unsworn evidence. He stated that on the material day he had gone to Bushiri area for a burial ceremony. When he returned home he was arrested. He denied the charge and stated that the complainant framed him up because of a disagreement with the complainant's husband over the price of a cow that the complainant's husband wanted to buy from the home of the appellant.

As a first appellate court, I have considered and re-evaluated the evidence on record. It is clear from the complainant that her house was broken into on the material night. Her evidence is that she left the properties stated in the charge sheet. The complainant made inquiries about her stolen properties and made a report to the police. The complainant cannot be expected to have receipts in respect of all her household goods. In any case the appellant denied any involvement with the theft and stated that he was away at a burial ceremony on the material date and did not raise any questions regarding the break in. The issue of the cow and the frame up of the appellant was not raised when the complainant testified. It is an issue that came up later during the defence case.

The evidence of PW2, **LORNA SAISI** is that the appellant was the one who sold the bag of maize to her for Kshs.180/=. The complainant's evidence is corroborated by that of PW2, LORNA SAISI. According to the complainant, she followed the spilt maize to the home of PW2 and identified her bag of maize by the pieces of paper she had used to seal some holes in the sack. Further corroborative evidence is found in the testimony of **JOASH AMUNZE ANAKAYE** (PW3). According to PW3, the appellant made inquiries from him as to where to sell the maize. PW3 who saw the maize then directed him to PW2.

PW4, **P.C. CHRISPINUS ODUOR**, the Investigating Officer has given evidence that he visited the scene and found the doors to the main house and the kitchen had been broken and household goods scattered in the house and maize spilt on the floor. PW4 produced the recovered bag of maize in court as exhibit.

With the strong evidence against the appellant, the defence raised was not plausible. There are no reasons why PW2 and PW3 would frame up the appellant. Although PW2 can be termed as an accomplice in the selling of the maize, his evidence is corroborated by that of PW3.

The conviction was based on sound evidence. The appellant handled recently stolen property. The charge sheet has no defects.

As stated in the case of *David Gichure Kanyoro & Ano. Vs R. Criminal Appeal No. 265/2005*, the Court of Appeal stated as follows;

“The position in law is that a person found in recent possession of property reported as stolen is presumed to be the thief of it unless he gives a reasonable explanation as to how he came to be in possession thereof. This is a presumption of fact arising under section 119 of the Evidence Act Cap 80 Laws of Kenya and is rebuttable [see Jethwa v. R. 1969 E.A. 459]”

Even without any eye witness, the only inference drawn is that the appellant is guilty.

The appellant was sentenced to five years imprisonment in each limb. The total value of the stolen property is Kshs.8,000/=. The sentence is harsh in the circumstances. The appellant has already served over one year of the prison term. I will reduce the sentence to the period already served. The appellant is therefore set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 11th day of July, 2012

B. THURANIRA JADEN
JUDGE