REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

Criminal Appeal 258 of 2006
DENNIS NYAGWOKA ONDIEKI …….……. APPELLANT
VERSUS
REPUBLIC ……..…. RESPONDENT
(From original conviction and sentence in the Resident Magistrate's Court at Kilgoris in Criminal Case No.817 of 2005 – Mr. Kaberia Esq., R.M)

JUDGMENT

The Appellant was charged before the Resident Magistrate, Kilgoris with burglary and stealing contrary to section 304(2) and 279(b) of the Penal Code, that during the night of 15th and 16th October 2005 at Nyabwoyo Estate within Kilgoris town in Transmara District of the Rift Valley Province he jointly with another before court broke and entered the dwelling house of Charles Oganda Ongaga with intent to steal and stole from therein 1 suitcase, 1 bag, 2 coats, 2 long trousers, 1 mobile phone make Nokia 110, 1 torch, 1 mirror, 1 lamp and assorted documents all valued at Kshs.14,000/= the property of the said Charles Oganda Ongaga. He denied the charge. He was not represented. Following trial, he was convicted and sentenced to serve 7 years in jail on each limb, to run concurrently. He has appealed against the conviction and sentence.

The evidence upon which the Appellant was convicted was that the complainant stays at Nyabwoyo in Kilgoris where he works but his home is in Magena. On 7/10/05 he closed his house at Kilgoris and went to Magena. He left the key with his cousin who stayed in the house until 14/10/05 when he brought the key. Complainant returned on 17/10/05. He found the padlock to the door missing. In the house his items were missing. He inquired from neighbours who told him the house had been broken into the previous night. He reported to Kilgoris Police Station and found some of his items had been recovered and Appellant was in custody as having been found with them. Police came to the scene and recovered the damaged padlock at the verandah. The recovered items were his black suitcase, handbag, 2 coats, 2 trousers, 1 lamp, 1 red mirror, 2 T-shirts, 6 Cassette tapes, 1 towel, 5 books, 1 medical prescription bearing his name, envelope bearing his mail sent from India, and other reading materials.

Joseph Gitau Maina is a manager with a fleet of matatus at Kilgoris and also lives at Nyabwoyo. On 16/10/05 at 4 a.m. he was at the bus terminus helping his driver to load passengers into "Barcelona" matatu. The Appellant, a stranger, came with a small bag after asking if the matatu was going to Kisii. Maina put the bag into the matatu. He (Maina) had apparently recently lost his chicken in a theft. He was with a Tom and a Ibrahim who nudged him. They suspected Appellant was the one who had stolen his chicken. The three went back to the matatu. Appellant had disappeared leaving his luggage. The matatu left but Maina, Tom and Ibrahim decided to follow it in their other matatu. They caught up with the matatu at Kilgoris Secondary School. Appellant had not yet shown up. They took the bag and put it in their matatu. They parked beside the road and waited for about 10 minutes. They went back to Kilgoris town. At Caltex Petrol Station they found Appellant walking towards Kisii direction. They went back to the terminus and stayed there for sometime. They started to drive in Kisii direction. The Appellant stopped the vehicle and boarded. He asked if they had seen the vehicle that had left with his bag. They told him they had to bag. They told him they were going back to the terminus for more passengers. At the terminus they interrogated him. He had a suit case and umbrella. They took him to Kilgoris Police Station and handed him over with the items.

Constable Stephen Wachira of Kilgoris Police Station was at report office that morning (he said it was about 4 a.m) when Appellant was brought with the items. He could not account for them. The bag and assortment of clothes and suitcase had T-shirts and other items. Complainant came to report and claimed these items.

The Appellant made unsworn statement in defence and did not call witnesses. He stated that that morning he had come from Magena and was going to Transmara to look for charcoal. He had bag, 5 sacks and umbrella. He arrived at Kilgoris bus stage when it was still dark. He decided to wait in a Nissan belonging to Linear Bus Company for the day to break. He told those in that he was going to Kisii. These people used to buy charcoal for him. At some point he did not have enough money and had not paid then. They wanted their money. He told them he now sold chicken, but did not have money. He sought time to pay. A third person came and alleged he had bought stolen chicken. They took him to Kilgoris Police Station. He denied breaking into the complainant's house or stealing from therein.

The trial court considered the evidence above and came to the conclusion that the prosecution had established the charge against the Appellant beyond all reasonable doubt.

The Appellant's grounds of appeal are that the trial court relied on evidence of only one witness; there was insufficient evidence to show the items found in the vehicle were his; and that the conductor of the matatu had not told the truth and there was no way of him telling the items were stolen property.

On first appeal from a conviction the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon (Okeno v. Republic [1972] EA 23 and Pandya v. Republic [1957] E.A 336).
The court has, however, to bear in mind that it did not see or hear the witnesses.

The fact that the complainant found his house broken into and property stolen from therein is not in dispute. He told the trial court that the property he found recovered were his and some of these stolen property. The Appellant has not laid claim to the property. His defence was that he was not the owner of the first bag that Maina said he had left in the matatu. The trial court heard both Maina and the Appellant and believed the former. There others v. Republic [1986] KLR 301, 305, the Court of Appeal cited with approval the following principle in R. v. Loughin 35 Cr. App R 69:

"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker."

I find there was sufficient evidence for the trial court to find that he Appellant was the one who had broken into the complainant's house and stolen the property with which he was found. However, it was not clear what time, day or night, the breakage and theft was done. The safest finding should have been a conviction under sections 304(1) and 279(b) of the Penal Code. The offence of house breaking and stealing. This is a lesser offence, when its sentence is compared to the one in respect of which the Appellant was convicted. I find the trial court erred in convicting the Appellant of the offence charged. I quash the conviction and in its place, and considering the provisions of section 179(2) of the Criminal Procedure Code, enter conviction under sections 304(1) and 279(b) of the Penal Code.

Regarding sentence, an appellate court should not interfere with the discretion of the sentencing court unless it is demonstrated that it over looked some material factors, took into consideration some immaterial factors, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case (Wanjema v. Republic [1970] EA 491). The basis upon which the Appellant was jailed for 7 years on each limb was that he had been convicted of burglary and stealing whose maximum penalty is 14 years imprisonment. The offences the Appellant has been convicted of carry a maximum penalty of 7 years in jail.

The Appellant was a first offender and the court observed he was a young man. The court did not appear to have considered the value of the property stolen, which was 14,000/=. The complainant told court that of all the stolen property only one item, a Nokia 3310 mobile

phone, was not recovered. The trial court ought to have considered this in favour of the Appellant. Had the court considered all these, I find, a lesser sentence would have been meted out.
I set aside the sentence of 7 years and substitute it with a sentence of 18 months on each limb to run concurrently.

To that extent, therefore, the appeal is allowed.

Dated, signed and delivered at Kisii this 8th day of July, 2009

A. O. MUCHELULE

JUDGE

8/7/2009

Before A. O. Muchelule Judge.

Mongare c/c

Mr. Kemo for state

Appellant present.

Court: Judgment in Open court.

A. O. MUCHELULE
JUDGE