



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Criminal Appeal 29 of 2009

DANIEL

**MALANGA MUSA Alias
MICHAEL MUKOKHA.....APPELLANT**

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

The Appellant was charged with the offence of House breaking Contrary to **Section 304 (1)** and Stealing contrary to **Section 279 (b)** of the Penal Code. He also faced an alternative charge of neglect to prevent a felony contrary to **Section 392** of the Penal Code. He was found guilty of the main charge and was sentenced to serve three (3) years imprisonment.

The appellant filed this appeal. The main grounds of Appeal are that the charges were not proved, the conviction was against the weight of evidence, the burden of proof was shifted, Appellant's evidence was dismissed, the charge was substituted at the close of the Prosecution Case, the charge was defective, that the mitigation was not considered and that the sentence is excessive.

Mr. Khayumbi, Counsel for the appellant, submitted that the appellant was convicted on evidence of mistaken identity. Counsel further contended that section 214 of the Criminal Procedure Code was not complied with. The charge was amended before PW5 who was the last witness testified and after PW5 testified the prosecution closed its case. The witnesses who had testified were not recalled.

Counsel further submitted that the person charged was Michael Makokha. He was charged for stealing from where he was employed at Cartwheel Security services. The appellant is Daniel Malanga and not Michael Makokha. All the witnesses gave hearsay evidence as the person who noticed the theft died before he could testify.

Mr. Karuri, learned State Counsel, conceded the appeal.

The prosecution's case was that on 3rd August, 2008 at about 8.45 a.m., PW1, Sospeter Mbugua left his home and headed to church at Webuye. Later at around 11 a.m. his son went to the church and told him that some items had been stolen from the house and he suspected the appellant who was the one left manning the gate. He was a new watchman who had been sent to the complainant's house by Cartwheel Security Services and had also disappeared. PW1 went home and found some items had been stolen. The stolen items were a wireless phone, two CD player, speakers, a car radio and one radio.

PW2, Antony Waithaka, is PW1's son. He was at home that day when his brother woke him up and told him that some items were missing and the watchman had disappeared. PW2 was asleep.

PW3, Linus Angedi Khaseti is a Manager with Cartwheel Security Company. He testified that the appellant went to his office on 26th July, 2008 looking for employment. He gave him the required conditions to fulfill which the appellant did on 28th July, 2008 when appellant forwarded his application letter and a copy of ID card that was a waiting card. The name on the waiting card read Michael

Makokha. He was to give a letter from the Assistant Chief too. The application letter was dated 1st August, 2008. PW3 employed the appellant who reported on duty on 2nd August, 2008, and was deployed at Webuye town along Kenyatta Avenue that night. On 3rd August, 2008, the appellant was deployed at Mr. Waithaka's residence, the Complainant.

PW3 was called by the complainant on 3rd August, 2008 and was informed about the theft. He looked for the appellant and found him at the Police Station having been arrested for another offence. He was shown his Identity Card that had the name Daniel Malanga Musa. This was on 18th August, 2008.

PW4, Wycliffe Wanyonyi Makokha, is an employee of Cartwheel Security Company. He deployed the appellant on 2nd August 2008 on night duties. On 3rd August, 2008 the appellant requested for overtime and was deployed on day time duties at the residence of Mr. Waithaka.

PW5 was the Investigating Officer. He was notified about the theft on 3rd August, 2008. He visited the scene and confirmed the theft. He went to cartwheel Security Company where he was told the watchman who was deployed at the complainant's home was a new employee. They looked for him and on 7th August, 2008 one of the Directors of the security firm informed him that the person he was looking for was at the Police Station. On 18th August, 2008 the appellant went to the Police Station to collect his items and he was detained. The appellant had been arrested over another offence.

The appellant in his defence denied the charge. He testified that he was charged with another offence and he was released on bond, when he went to collect his items at the Police Station he was arrested. He never worked for Cartwheel Security Company.

On the first count, no one saw the accused breaking into the complainant's house. The appellant is alleged to have been the watchman that day. He had worked overnight and had requested for extra work so as to meet his financial needs.

From the evidence on record, it is possible that the appellant used someone else's waiting card when applying for employment. His name as per the Identity Card is Daniel Malanga while the waiting card has the name of Michael Makokha. The two witnesses from Cartwheel Company were quite sure that it is the appellant whom they had employed. He had worked for a night-shift on 2nd August, 2008 and was put on day time duties on 3rd August, 2008. The Police ought to have verified the records of Michael Makokha from the Registrar of Persons. The appellant was supposed to have provided a letter from his Assistant Chief but he promised to forward the letter the next day. I do not think that the two witnesses from Cartwheel Security Company were mistaken on the identity of the person they had employed.

I would only allow the Appeal on two grounds. First, Section 214 of the Criminal Procedure Code was not complied with. The charge was amended after four witnesses had testified. This was on 20th January, 2009. The trial court did not inquire from the appellant whether he wanted to have the witnesses who had testified recalled as required by Section 214 (ii) of the Criminal Procedure Code. Secondly, the Investigators did not testify as to when the appellant was arrested for the first offence and when he was charged in court. This could have cleared any doubt as to whether the accused was in custody when the offence was committed. PW5 was notified that the appellant was in Police custody on 7th August, 2008. He didn't tell the court when he had arrested the appellant over the other Criminal Case.

I do allow the appeal on these two grounds. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated, and Signed at Kakamega on the 3rd day of November, 2009.

SAID J. CHITEMBWE

J U D G E