

IN THE HIGH COURT OF KENYA

AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 1277 OF 1983

(From original conviction and sentence in Criminal Case No 7676 of 1983 of the Resident Magistrate's Court at Makadara)

MAURICE NJOROGÉ.....APPELLATE

AND

REPUBLIC.....RESPONDENT

CORAM:

MBAYA (Appellant absent, unrepresented and not wishing to be present. L G Mbarire (State counsel) for Respondent)

JUDGMENT

Appellant absent, unrepresented and not wishing to MAURICE BTJOROGE was charged with burglary and stealing in a dwelling house, contrary to section 304(2) and 279 (b) of the Penal Code (Cap 63) respectively. After trial and on conviction he was sentenced to 10 months¹ imprisonment and 2 strokes of corporal punishment on each limb prison sentences to run concurrently. He now appeals against conviction. The prosecution case was that the house of JOEL THINJI KARIHKI (P W 1)) was broken into at night on 26/5/83. The complainant lost the items which are listed in the particulars of the offence. It is the complainants wife, P W 2, who discovered that the house had been broken into. She immediately went to inform the appellant, who is her brother-in-law. The appellant initially refused to open his house for her. Eventually, he sprang out of his door and threatened to cut anybody who entered his house. PW2 left him, but the following morning, the appellant called her and showed her a bag containing one of the stolen items from P W1's house.

When she went back to her house, PW.2 found a crow bar believed to have been used to break the lock into PW house, 2 testified that he had seen that crow bar in the appellant's house in the past.

It is admitted by the learned trial magistrate in his judgment that there was no direct evidence to suggest that it is the appellant who broke into and stole from the dwelling house. The only evidence available was purely circumstantial. Having re-evaluated it, I am not satisfied that it irresistibly points to the guilt of the appellant, and that it is inconsistent with his innocence. The learned trial magistrate in arriving to his conclusion seems to have been influenced by several factors. In the first place there was a crow bar at the scene which is said belonged to the house where appellant lived. It must not be forgotten, however, that somebody else could have used it. The second factor is that the next day, the appellant showed P W 2 one of the bags that had been stolen. It is not clear on evidence where the bag came from, but there is definitely nothing to suggest that the appellant stole it. Lastly, the learned trial magistrate considered that the appellant's behaviour of locking himself in the house, and of throating his sister in law (P²) with a knife was a pointer to his guilt. With respect, it does not necessarily follow. I also observe that this whole case has an aspect of being a purely domestic affair, for the complainant's wife is appellant's sister-in-law.

For the foregoing reasons, I allow this appeal, quash conviction and set aside the sentence. The appellant will be released forthwith unless otherwise lawfully held. Dated and delivered on 30th day of January,

1984.

W MBAYA

JUDGE