



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL APPEAL 557 OF 1984
Nyaga.....Appellant
v
Republic.....Respondent

Criminal law - burglary and theft from dwelling house - circumstantial evidence - whether appellant was convicted on proper consideration of evidence.

The appellant was convicted of the offence of burglary and theft from a dwelling house contrary to section 279(b) of the Penal Code. On the material night he was on guard duty at the residence of the complainant.

At some point in the night the couple found windows open and some items missing from the cabinet. The appellant was arrested and charged.

On conviction he was sentenced to a total of 1 year on both counts plus 4 strokes corporal punishment. He appealed both against conviction and sentence.

Held:

1. The fact that the appellant was on duty on the material night alone is not sufficient to prove that he committed the offence at best it made him a suspect.
2. The conviction was on insufficient circumstantial evidence and the conviction therefore could not stand.

Appeal allowed.

Cases

No cases referred to.

Statutes

Penal Code cap 63 section 279(b)

Advocates

DN Ngatia for Appellant

Mbai for Respondent

August, 1984 Aluoch J delivered the following Judgment.

The appellant, John Mwangi, was convicted of Burglary and Theft from a dwelling house, contrary to sections 304(2) and 279(b) of the Penal Code, and sentenced to a total of one year imprisonment on both counts, plus 4 strokes of the cane. His appeal is against both conviction and sentence. As was rightly pointed out by both counsels, the prosecution relied on circumstantial evidence in this case, evidence which revealed that, the appellant was employed as a watchman by the complainant. During the nights of January 24 and January 25 this year, the complainant returned home at about 3.30 am. He came in his car and the appellant, who was on guard duty at the gate, opened for him and he drove in. The complainant at once noticed that the lights in the sitting room were on and one of the windows was opened. Also, he noticed that a door in the sitting room was opened, plus a door leading to the bedrooms. He, nevertheless, opened the main door, using his key and went straight to the bedroom. As he was about to start changing, he noticed that the wardrobe was opened, and also saw a clock container on the floor. He became suspicious, and started looking around the house. He also woke up his wife and questioned her as to what had happened, and the wife, who was (PW 2) answered that, she had heard somebody touch the wardrobe, but she thought it was her husband, (PW 1). Both of them went to the sitting room and noticed that the TV, 2 radios, one amplifier, 2 speakers, 2 table cloths, a camera, and a pair of goggles, were all missing items. The appellant denied any knowledge of them, saying that he had been on duty throughout the night and did not see anything unusual, and did not even notice that a window was opened.

Because the complainant suspected the appellant, he took him to Njiru Police Post, where he made a report. He returned with the policemen, who also had a dog, but no arrests were made. A further report, from the neighbours, revealed that a vehicle had been heard in the neighbourhood, but appellant denied any knowledge of it. The complainant's wife, on the other hand, stated that, that night she left the house at about 9.30 pm to visit her friend, and returned at 10.30 pm and went to sleep. At about 3.30 am, her husband returned home and woke her up, saying that windows were opened in the house. It was then, that they both went to the sitting room and saw items, listed on the charge sheet, missing. The complainant's wife, denied having had any male visitors in the house that night. The appellant was later summoned to the police station and arrested and charged with this offence.

The appellant made an unsworn statement in defence during the trial, explaining how he worked on the nights, of January 24 and January 25, this year. The appellant said he was on duty alone that night as his companion was off duty. He was not feeling well. He conducted his round and at about 9 pm, went to the guard house, when he came out, he found PW 2 with 2 men, whom she described as her husband's friends. The men left carrying a black suit case. Later, at 3 am, the complainant returned home, went into the house and came out asking him why windows were opened in the house. The appellant denied any knowledge of such a thing, saying that, it was PW 2 who would know, since she had had visitors at night.

The learned trial magistrate, after considering the evidence on record, said at page 9 of the judgment:

“ After considering the whole evidence, it seems quite clear that the accused was definitely on duty on the material night and this fact he readily admits. The break in and theft then took place while there, so he must have fully taken part in the burglary.....”

With respect to the learned magistrate, the fact of the appellant having been on duty that night alone, is not sufficient to prove that he committed the offence. No doubt, it made him a suspect, but no more. On my own assessment of evidence, I have found the evidence of PW 2 rather unsatisfactory, and not of much assistance. I say this for 2 reasons; 1st, in answers to questions put to her by the appellant, she

answered that when she returned to the house at 10.30 pm, she did not see the appellant. The question is, by that time had the burglary and theft occurred or not? Her evidence is silent on that point. Secondly, when her husband, PW1 arrived in the night, and questioned her about windows and doors being left open at night, her husband is recorded as having said.

“She woke up quickly and told me that she heard a man touch a wardrobe and thought I was the one...”

I found this answer rather absurd! It would appear that a stranger got into the bedroom of this witness whilst she was in bed, she heard him but assumed it was her husband and just went on sleeping. I found that this witness, PW2, was an unreliable witness. I further found that, the prosecution evidence against appellant, only shows that he was a suspect, but does not go beyond that. The fact that he was found on duty, also makes it difficult for the prosecution to prove intent, because, if he had broken into the house and stole the items as alleged, why did he find it necessary to remain on duty on the compound? Surely, he could have run away if he so wished! On the evidence as it is, I find that, it is possible that the appellant could have been the burglar or indeed might have known how the house was broken into and items stolen from it, however, I find that prosecution has failed to prove that, he was either involved personally or through other people. I find that appellant was convicted on insufficient evidence, as such, I allow this appeal, quash the conviction and order that the appellant be released forthwith, unless otherwise lawfully held.