IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 316 of 2007

NJOMO NJOGU MUSAU ……………………..………………APPELLANT

AND

REPUBLIC ……………………………………………….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Kasango, J.) dated 1st October, 2007

in

H.C.CR.A. NO. 347 OF 2004)

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JUDGMENT OF THE COURT

The appellant herein **NJOMO NJOGU MUSAU**, was jointly charged with two others with breaking into a boutique contrary to ***section 306 (a)*** of the Penal Code. The particulars of the offence as per the charge sheet were as follows:

"**On the night of 14th and 15th day of July, 2004, at Kianyaga town in Kirinyaga District within Central Province, jointly with others before court broke and entered a building namely Wa-Ericks Boutique of JOSEPHINE MURANGI NJIRU and committed therein a felony namely theft whereas (sic) all assorted clothings and utensils valued at Kshs. 130,000/= were stolen.**"

The appellant's co-accused were each separately charged with an alternative count of handling stolen goods contrary to ***section 322 (2)*** of the Penal Code.

After a full trial before the learned Resident Magistrate at Gichugu (A. Lorot) the appellant was convicted on the main count of boutique breaking contrary to ***section 306 (a)*** of the Penal Code and sentenced to six (6) years imprisonment; while the 2nd accused ***(Peter Gakobo Mureithi)*** was acquitted on all counts. The 3rd accused ***(Anne Wambui Kiura)*** was found guilty on the alternative count of handling stolen goods, convicted and sentenced to three years imprisonment. Since she has not filed an appeal before this court we shall not be concerned with her conviction and sentence in this judgment.

The facts as accepted by both the trial court and the first appellate court were that on 15th July, 2004 the complainant ***Josepine Murangi Njiru*** (PW1) was informed that her boutique had been broken into during the night of 14th and 15th July, 2004 and property stolen from therein. She visited the boutique and found that it had indeed been broken into and several items stolen and only some pillows had been left in the boutique. She reported the matter to the police who commenced investigations which led to a

number of stolen items being found in the house of the appellant. The appellant's wife was found wearing a *lesso* which was part of items stolen from the boutique. Further investigations led to the recovery of more stolen items from the house of the appellant's girlfriend. It is important to note that the stolen items were recovered from the appellant's house on 23rd July, 2004 and that when the appellant saw ***Pc James Njue*** (PW3) and the complainant (PW1) approach his home he ran away only to be arrested weeks later while still on bond in respect of yet another case.

In his defence the appellant told the trial court that on 28th August, 2004 he was working as a casual labourer in Embu where he was arrested in a café.

In the course of his judgment delivered on 26th November, 2004 the learned trial magistrate said:

"**Jomo's wife told both the complainant and the police that her husband brought the items. He brought the items with an accomplice called Gitari. The 1st accused's wife had a young child. She was arrested and arraigned in court in Cr. 1207/04. All the while Jomo was nowhere. The police have explained how they managed to track him down, through a surety of the 1st accused in yet another case pending before the S.R.M's court in Kerugoya. He has not denied any of these. I find it logical that Jomo was a fugitive running away from the law. His luck ran out and he was arrested at Difathas. The presence of the padlock, to me holds the crucial link between the presence of the stolen clothes and the break-in. According to P.C. Njue, entry to the boutique was gained by damaging the locking system of the door, one of the padlocks was picked by use of a master key. The padlock was recovered in Jomo's house. Secondly too, Jomo's wife had taken one of the clothes to have its waistline reduced. An honest tailor brought it to the attention of the police. All the clothes were stolen from the boutique on the night of 14th and 15th July, 2004. The evidence against the 1st accused is unshaken, indeed it is sitting on a rock."**

Having so stated the learned trial magistrate proceeded to convict the appellant and sentenced him to six years imprisonment.

Being dissatisfied with both conviction and sentence the appellant preferred an appeal to the High Court which came up for hearing before Kasango, J. In her judgment delivered on 1st October, 2007 the learned Judge dismissed the appellant's appeal to that court. In the course of her judgment the learned judge stated:

"**The wife of the appellant informed P.W.1 and 2 that it was the appellant who brought the goods to the home in the company of another person. The other goods were found at the premises of the appellant's girlfriend. Does that circumstantial evidence show that the appellant committed the offence? It is more than coincidental that the stolen items were found in his house and his girlfriend's house."**

The learned Judge made reference to the value of circumstantial evidence and concluded her judgment thus: -

"**I have examined the prosecution's evidence and I make a finding that the prosecution did prove a case on the charge of breaking into the boutique beyond a reasonable doubt. I have tested the evidence and the clear inference is one of guilt of that charge. There are no circumstances that weaken that inference. The sentence of the appellant is found to be in accordance with the provision of the law."**

Still dissatisfied with the foregoing the appellant now comes to this Court by way of second and final appeal. That being so only matters of law fall for consideration by *dint* of ***section 361*** of the Criminal Procedure Code.

When this appeal came up for hearing before us on 3rd November, 2009 the appellant appeared in person while the State was represented by Mr. C.O. Orinda (Senior Principal State Counsel). In his brief

address the appellant asked us to consider his grounds of appeal and the issue of sentence.

On his part Mr. Orinda told us that he was not supporting the conviction in that the first appellate court did not re-evaluate the evidence. He further submitted that, the particulars of the charge were at variance with the evidence. Finally Mr. Orinda pointed out that there was the watchman of the boutique who should have been the best witness and yet he was separately charged.

We have given this appeal our careful attention and we wish to point out that we do not agree with the learned Senior Principal State Counsel when he conceded the appeal. We deliberately reproduced the particulars of the offence at the commencement of this judgment in a bid to clarify this issue of the charge sheet being at variance with the evidence. Prosecution witnesses testified that the boutique was broken into during the night of 14th and 15th July, 2004 and various clothing materials stolen from therein. The complainant gave details of what had been stolen therein. These were assorted clothings and utensils which the complainant valued at Shs.130,000/=. That is what was stated in the charge sheet. It was not necessary to particularize item by item in the charge sheet, on the facts and circumstances of this case. Hence we are satisfied that there was nothing wrong with the charge sheet.

In this appeal we have the concurrent findings of fact by the two courts below. This Court rarely interferes with such concurrent finding of facts unless it is shown that the two courts below were clearly wrong - see **NJOROGE v. R. [1982] KLR 388**, **KARINGO v. R. (1982) KLR 213** and **GACHURU v. R. (2005) 1 KLR 688**. The appellant was convicted on evidence of recent possession in that the boutique was broken into during the night of 14th and 15th July, 2004 and part of the stolen items recovered from the house of the appellant on 23rd July, 2004. We have already referred to the fact that the stolen items were not only recovered from the appellant's house but in his girlfriend's house too.

When the appellant saw the police officer (PW3) and the complainant he ran away until he was arrested later in Difat has. The appellant's conduct was not that of an innocent man. Taking all these factors into account it cannot be denied that the appellant was convicted on very sound evidence. The two courts below cannot be faulted in any way.

In view of the foregoing we find no merit in this appeal and we order that it be and is hereby dismissed in its entirety.

Dated and delivered at Nyeri this 6th day of November, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR