



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 253 OF 2005

DAVID KOECH KOTUT APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a judgment of the High Court of Kenya

Kitale (Lady Justice Karanja) dated 11th October, 2005

in

H.C.CR.A. NO. 24 OF 2004)

JUDGMENT OF THE COURT

The appellant, *David Koech Kotut*, has come to us on second appeal against his conviction and sentence on two counts, the first of which was robbery contrary to *section 296 (1)* of the Penal Code and the second of burglary contrary to *section 304 (2)* and stealing contrary to *section 279 (b)* of the Penal Code, respectively. In the robbery count, the appellant was sentenced to 5 years imprisonment with hard labour, and a term of 3 years imprisonment on the second count. Clearly, the trial magistrate omitted to impose a sentence on the second limb of the second count, namely, stealing contrary to *section 279 (b)* of the Penal Code. Burglary is a distinct offence from stealing in a dwelling house. The rules for drafting charges permit the charging in one count of the two offences and the imposition of separate sentences for each limb of that count.

We note that the first appellate court did not notice this omission and we consider that the error should be corrected. But first, the background facts.

Godfrey Naibei Chesebe (PW1) was the first complainant. A robber or a group of robbers raided his house at Chepkui in Sabot, while he slept, forcibly gained entry and he was able to see and identify the appellant using torch light from a torch the intruder had. The appellant, according to the witness, stole a bicycle which was in the house along with a pair of trousers in which the witness had kept Kshs.500/=. PW1 testified that using the torch light he was able to identify the appellant.

On the same night, *Elizabeth Kapketui* (PW4) was asleep in her house in the same village. Like in the

case of PW1, the door into her house was forced open and a wall clock was stolen from inside the house. The witness did not identify the person or persons who broke into her house. Several other houses were broken into in the same night, but those are not relevant to this appeal.

The appellant was arrested the same night and the bicycle which had been stolen from PW1's house and the wall clock which had been stolen from PW4's house were recovered therefrom.

At his trial, the prosecution relied upon the visual identification of the appellant by PW1 and the recovery of the two items from the appellant in support of their case. The case was started by Mr. D. K. Gichuki, SRM and heard fully. His judgment was however read and countersigned by Mrs. H. I. Ong'udi, Senior Principal Magistrate, who then proceeded to pass sentence.

In his judgment, the trial Magistrate accepted the evidence of PW1 on the identification of the appellant and found as fact that the bicycle and clock were recovered with the appellant about two hours after they had been reported stolen and were positively identified by their respective owners. He then invoked the doctrine of possession of recently stolen items and presumed the appellant to be the thief, arguing that the appellant did not offer any reasonable explanation as to how he came by those items.

The appellant had denied he was found in possession of the two items. He implied that he was framed up because he had fought with PW1 over some two girls. But when he was given an opportunity to cross-examine PW1 on his evidence, he never suggested that there was a fight between the witness and himself over the alleged two girls. Instead he suggested to PW1 that the latter owed him money for some property he had taken on credit from him, the appellant.

In his first appeal, the appellant unsuccessfully challenged his conviction principally on two grounds, which incidentally are the same grounds raised in this appeal. The first ground was the issue of identification, and the second, the alleged failure by the prosecution to call essential witnesses, to wit the village elder who first received a report about the theft of both the bicycle and wall clock and the people who allegedly accompanied the arresting officer to the appellant's home and who witnessed the recovery of the bicycle and wall clock from the appellant's house.

On identification, it is quite clear that PW1's evidence on that score could not on its own prove that the appellant is the person who broke into PW1's house. The incident occurred at night time. The only source of light which PW1 said he used to identify the appellant was torch light. It was not shone directly on the attacker. PW1 used reflective light from the torch. Although he said that he was quite close to the intruder, the circumstances under which PW1 said he identified the appellant were difficult. However, the recovery of the bicycle and the wall clock from the appellant's house supplied corroboration to PW1's identification of the appellant.

We appreciate that the appellant denied the recovery. He submitted before us that the people who accompanied a police officer who effected the recovery should have, but did not testify. In his view their failure to testify rendered the evidence of recovery worthless. The law is quite clear. The prosecution is not bound to call a superfluity of witnesses.

Section 143 of the Evidence Act, Cap 80 Laws of Kenya, provides:-

"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

Constable Thomas Kirop Cherus (PW6) recovered the bicycle and the wall clock. He testified to that effect. He was cross-examined by the appellant at length but he remained unshaken. The trial Magistrate accepted and acted on his evidence. The prosecution did not need to call more witnesses to prove that fact. There is no law which requires that recovery of stolen items be proved by more than one witness. Besides, we cannot, in the circumstances of this case, draw an adverse inference on the prosecution's failure to call more than one witness to prove recovery of those items. The Ugandan case of BUKENYA AND OTHERS VS. UGANDA [1972] EA 549, is authority for that proposition.

The appellant was convicted on sufficient, sound and acceptable evidence. Like the first appellate court, we find no basis for interfering on that score.

We however earlier pointed out that the appellant should have been sentenced on the 2nd limb of the 2nd count. Likewise, we notice that the trial magistrate imposed hard labour for the offence of robbery contrary to *section 296(1)* of the Penal Code, which is not provided for under that section. These are errors which call for correction. In the result we order that, in count 1 the order requiring that the appellant shall serve hard labour, is set aside; and in the second count, we impose a concurrent sentence of 3 years imprisonment. Except to that limited extent, the appellant's appeal fails and it is accordingly dismissed.

Dated and delivered at Eldoret this 21st day of September, 2007.

S.E.O BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR