



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 125 OF 2002

(From original conviction and sentence in Criminal Case No. 383 of 2002 of the Principal Magistrate's Court, Nyahururu –G. J. C. Ombito, Esq.

STEPHEN KARIUKI MACHARIA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant has appealed against the original conviction and sentence in Criminal Case No. Nyahururu Principal Magistrate's Court No. 383 of 2002. Earlier, the appellant with another **not** before Court had been charged for two Counts of house-breaking and stealing contrary to Sec. 304 (1) and 279 (b) of the Penal Code. The third charge against them was that of burglary and stealing, contrary to Sec. 304 (2) and 279 (b) of the Penal Code. After a full trial, the learned trial Magistrate passed the following sentence:

“He risked mob wrath and Court sentence him to serve 2½ years on each alternative Count together with 5 strokes of cane, sentences consecutive.”

During the appeal, the appellant stated that he was **not** satisfied with the conviction and sentence since he was **not** found with the stolen goods that were produced in Court. Besides the above, the appellant recalled that he had gone to Ngomongo in Nyahururu to visit his girlfriend at around 8.00 p.m. However, on his way back, he met 10 people who had torches and pangas. The group stopped him and demanded his Identity Card – after which they discovered that he comes from Mau Narok, Nakuru. During the same period, some of them started assaulting him an allegation that he had gone to spy in the area before bringing criminals, to steal in the area.

Consequently, the appellant was presented to the complainant who stated that he was not among the robbers. Despite the above, the group continued assaulting the appellant and left him for the dead. Eventually, the complainant called the police who collected the appellant. According to the appellant, he was first taken to Nyahururu Police Station and on the following day, he was taken to the hospital. Apart from the above, the appellant lamented that he was charged with a person who was unknown to him. The appellant denied that he had any house in Nyahururu. Though the appellant requested the trial Magistrate to summon the landlord so that he could confirm the tenancy – unfortunately he refused to do so. In addition to the above, the appellant stated that none of the complainants was able to identify him.

On the other hand, the state through Mr. Koech, State Counsel has opposed the appeal since the appellant was properly convicted. According to Mr. Koech, the evidence on record showed that several premises

had been broken into and that the complainants had lost their mabatis. Subsequently, the PW7 interrogated the appellant who led them to a house where he was residing. While there, several stolen goods were recovered and identified by their owners. Mr. Koech concluded that the said stolen goods could not have been recovered **without** the help of the appellant. As far as the sentence was concerned, Mr. Koech decided to leave the same to the Court.

This Court has carefully perused the above together with the record of appeal that includes the judgment of the learned Magistrate. Besides the above, this Court appreciates its duty as the first appellate Court to review

the evidence afresh and reach its own conclusions. From the evidence on record, it is apparent that the appellant was **not** identified by any of the prosecution witnesses. The evidence of the PW1, PW2, PW3, PW4, PW5 and PW6 clearly states how their houses were broken into and various items stolen. They also explained how they were called to identify the recovered goods. On the other hand, the PW7 – PC Joseph Tum explained how they arrested the appellant and another suspect. The two escorted them to a house where the stolen goods were recovered.

Apparently, the principle of recent possession applies in this case. Having analyzed the judgment of the learned Magistrate, I hereby find that he had evaluated the evidence properly and reached the right decision. Since the conviction is safe and well-merited, I hereby uphold the same.

However, as far as the sentence is concerned, I hereby reduce the same to the period already served. Secondly, the corporal punishment is hereby set aside since the same has been out-lawed through new legislation. It is only to that extent that the appeal succeeds.

The Appellant should be released forthwith unless lawfully held.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of

MUGA APONDI

JUDGE

4TH FEBRUARY, 2005

4th February, 2005

Before: Muga Apondi – Judge

Koech – State Counsel – present

Appellant – absent

Koech: The Appellant was not produced.

Court: Judgment will now be read out on 15th February, 2005. Production Order to issue.

MUGA APONDI

JUDGE

4TH FEBRUARY, 2005

8th April, 2005

Before: Muga Apondi – Judge

Gumo – Ass. DPP – Present

Appellant – present

Court: Judgement read, signed and delivered in open court today.

MUGA APONDI

JUDGE

8TH APRIL, 2005