

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO.37 OF 2014

From original conviction and sentence in Criminal Case No. 358 of 2010 of the Principal Magistrate's Court at Mandera (Mr. R. Odenyo, PM)

MOHAMED ALI OSMAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

Mohamed Ali Osman, the appellant, was charged in the lower court with burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code. It is alleged in the particulars of the case that on 18th October 2010 at around 04.45am at Bulla Central Location in Mandera County he broke and entered the dwelling house of Habiba Mohamed Wario with intent to steal therein and did steal therein one metal box, mosquito net and three pieces of clothes at Kshs 1,800 the property of Habiba Mohamed Wario.

The appellant faces the alternative count of handling stolen goods contrary to section 322 (2) of the Penal Code. It is alleged that on the same date and place as in the main charge, he dishonestly received or retained one metal box, one mosquito net and three pieces of clothes all valued at Kshs 1,800 knowingly or having reason to believe they were stolen goods.

The trial court considered the evidence of five prosecution witnesses and the defence and found the case proved against the appellant. He convicted and sentenced the appellant to five years imprisonment on the first limb of the main charge and seven years imprisonment on the second limb. The sentences are to run concurrently.

The appellant is aggrieved by the conviction and sentence and has preferred this appeal.

Petition of appeal

In his petition of appeal, I understand the appellant to be contesting that the case was not proved beyond reasonable doubt and that the evidence was contradictory. The appellant made brief oral submissions that the case is fabricated against him due to existing grudge and that the witnesses who testified against him were from the same family.

The learned state counsel opposed the appeal and submitted that there were no contradictions in evidence as all the prosecution witnesses corroborated each other; that the evidence proves that the appellant was found inside the house of the complainant and did not explain where he was that night.

Determination

I have carefully read the evidence of Arab Hassan Adan, PW2; Abdinassir Hussein PW3 and Adan Adow Mohamed, PW4. Their evidence agree that around 4.45am on 18th October 2010 they were woken by screams coming from Habiba Mohamed Wario, PW1, and rushed to her house; that they found PW1

struggling with the appellant whom she held by the collar. Evidence shows that a box that the appellant had attempted to steal was next to him. Here evidence differs slightly in that PW1 told the court that when she held the appellant by the collar, he dropped the box. PW2 said he found the appellant holding the box while PW3 said he found the box on the ground. PW4 did not say where the box was when he arrived at the scene.

However, all the witnesses agree that the appellant did not escape from the house of the complainant and that he was found being held by PW1 struggling. The witnesses tied him up and took him to the Mandera Police Station where he was booked.

PC Emmanuel Ekai, PW5, found the appellant in the cells when he took over the case. He recorded statements from witnesses and took into custody the recovered items.

In his short defence, the appellant stated that he had disagreed with the complainant's son who told his mother and the mother vowed to get even with him. He said he is not in good terms with the complainant who is his neighbour and that the case has been fabricated.

I have considered the evidence. I have noted that all the witnesses said they did not know the appellant but used to see him. PW2, PW3 and PW4 denied that the case was fabricated. I find the evidence in harmony that the appellant was found inside the house of the complainant at 4.45am. I have no reason, in the absence of evidence to the contrary, to disbelieve this evidence. PW2, PW3 and PW4 were not in the same house with PW1. They went to assist her after hearing her screams. The appellant was found inside that house struggling with PW1 who held him by the collar. This evidence has not been challenged and I have no doubt after evaluating the evidence that the appellant was found inside the house belonging to PW1.

The issue I wish to consider is whether the offence of burglary and stealing has been proved. Burglary or breaking into a building is not complete without proof of breaking and entering. Section 303 (1) and (2) of the Penal Code defines breaking and entering as follows:

1. **A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever any door, window, shutter, cellar flap or other thing intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building. (emphasis mine).**
2. **A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.**

It was upon the prosecution to prove that the appellant broke into the building as defined. There is no such evidence. While there is no doubt that the appellant was found inside PW1's house, there is no evidence as to how he gained entry as to make it a break in as defined.

Further, the appellant did not manage to get out with the items. The items he intended to steal were recovered before he took them away. In my view therefore, the appellant did not steal but attempted to steal. Section 187 of the Criminal Procedure Code provides as follows:

“When a person is charged with an offence mentioned in Chapter XXIX of the Penal Code and the court is of the opinion that he is not guilty of that offence but that he is guilty of another offence mentioned in that Chapter, he may be convicted of that other offence although he was charged with it.”

In view of the above provision, it is my opinion that the appellant is not guilty of burglary. The facts of the case show that the appellant is guilty of entering into a building with intent to commit a felony under section 305 (2) of the Penal Code. For this reason, the conviction for burglary and stealing is hereby quashed and the sentences set aside. Instead, the appellant is convicted under section 305 (2) of the Penal Code. He is sentenced to serve three (3) years imprisonment. I note that he has been serving sentence

since March 2011. The sentence of three years is therefore commuted to the time already served. The result of this order is that the appellant shall be set free forthwith unless for any other reason he is held in custody. It is so ordered.

Dated, signed and delivered on this 26th day of June 2014.

S.N.MUTUKU

JUDGE