



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 212 of 2003**

**MICHAEL KARUMI KAMUNYU.....APPELLANT**

***Versus***

**REPUBLIC.....RESPONDENT**

***(Being and appeal from the judgment of L. Nyambura, Resident Magistrate dated 5<sup>th</sup> June 2003, in the resident Magistrate's Court at Kigumo, Criminal Case No. 1025 of 2002)***

**JUDGMENT**

The Appellant was charged with and convicted of burglary and stealing contrary to *Section 304(2)* and *Section 279(b)* of the Penal Code particulars being that on the night of 26<sup>th</sup> and 27<sup>th</sup> October 2002 at Kirigithu Village in Maragua District, Central Province, the Appellant jointly with Phillis Wambui Karumi broke and entered into the dwelling house of Lucia Wairimu Mwathi with intent to steal and did steal therefrom one solo spray pump, one bicycle, one panga, one claw hammer, five blankets, one wooden box and 5 kilogrammes of nails, the property of Lucia Wairimu Mwathi all to the total value to of Ksh58,000/=. The Appellant together with Phillis Wambui Kirumi faced an alternative count of handling stolen goods contrary to *Section 322(2)* of the Penal Code and the items alleged they jointly dishonestly received or retained knowing or having reason to believe them to be stolen goods were one solo spray pump, one bicycle, one panga, one claw hammer and five kilograms of nails.

The trial court found the first accused Phillis Wambui Karumi guilty of the alternative count of handling stolen goods while the court found the second accused, now the appellant before me, guilty of the offence of burglary and stealing. Each one of them was respectively convicted and Phillis Wambui Karumi was placed on probation for three years while the Appellant was sentenced to serve four years imprisonment

***“on each limb of the main count and receive 3 strokes of the cane if medically fit. Sentence to run concurrently.”***

The Appellant appealed listing five grounds of appeal upon which he relied when prosecuting this appeal which was opposed by Mr. Orinda, the Provincial State Counsel.

This was a simple and straight forward case with only three prosecution witnesses whose total evidence is that after the house of the Complainant, Lucia Wairimu Mwathi, who gave evidence as P.W.1, was broken into at night and certain items stolen, were subsequently found in the house of the Appellant and recovered. The Appellant and his wife arrested, prosecuted and found guilty, convicted and sentenced.

Somehow, however, the Prosecution and the trial magistrate allowed into the evidence inconsistencies which suggest the evidence on record may not be all that reliable. When P.W.1 told the court:

***“I reported the matter to the Police at Gacharage. I had gotten a report that some stolen items had been recovered at Karumi’s house. I went to Gacharage Police Post. I saw my items”***

that suggests she found the stolen items already recovered and brought at the Police Post.

But when she states later:

*“We were two of us when we went*

*to the home of the accused person”*

that suggests she went up to the home of the Appellant. But nothing clear comes out of her mouth on that issue.

Later P.W.2 Police Constable Peter Munene comes in with his evidence stating that P.W.1 gave him a list of the missing items. She told him, he added, she had a suspect in mind. That information is missing from the evidence of P.W.1. P.W.2 continues:

***“I went to the home of the suspect together with the Complainant. Complainant was able to identify her items, i.e. one pump, one bicycle, three blankets, nails hammer and panga. We found 1<sup>st</sup> accused person. She showed us these items.”***

That evidence suggests P.W.1 and P.W.2 were the only ones who went to the home of the Appellant. It also suggests P.W.1 found the alleged recovered items at the home of the Appellant.

P.W3 Clement Kiarie Macharia added the evidence concerning a sweater which he alleged had been stolen from his home and had been seen worn by a child of the Appellant.

P.W. 3 added:

***“We reported the matter to Gacharage Police Post. Police went to the home of Michael Karumi. There was also theft on Lucia Wanjiru’s home. Police came. We went to the home of Michael Karumi-----Lucia saw her bicycle.-----Karumi ran away-----”***

First, this witness’s evidence is to the effect that three people, and not two people, went to the home of the Appellant. Secondly, this is the only witness who said the Appellant had run away. Why did P.W.1 and P.W.2 fail to say it”

Another disturbing thing to note is the fact that the Appellant was claiming the things taken from his

house belonged to him. None of the Prosecution witnesses seems to have been ready to reveal that claim. Each was only keen to state that the items were found in possession of the accused persons and stop there. It should have come out in the evidence by the Prosecution that the Appellant claimed ownership of those items and that as a result the Prosecution adduced better evidence proving ownership than the evidence of ownership relied upon here where the court has the word of the Complainant P.W.1 against the word of the Appellant each claiming ownership of the exhibits only by word of mouth without more. Even something like a bicycle whose ownership was easiest to prove by documentary evidence, the court had oral words only, with witnesses like P.W.2 and P.W.3 claiming P.W.1 positively identified the items without showing how positive it was as against the claim of ownership by the Appellant. What marks, for example, did P.W.1 show the court which the Appellant could not claim on any of those items"

From what I am saying above therefore, I get the impression that there is a good part of the prosecution evidence, which is not reliable and that therefore the conviction of the Appellant and his wife who seems not to have appealed was unsafe. As I do not see how Phillis Wambui Karumi's conviction can remain when the conviction of her husband is quashed, she stands to benefit from the order herein made.

Accordingly, the Appellant's appeal is hereby allowed. His conviction and consequently the conviction of Phillis Wambui Karumi each quashed and the sentence imposed upon each one of them set aside.

The Appellant herein be set at liberty forthwith unless lawfully detained in some other cause.

***Dated this 20<sup>th</sup> day of December 2005.***

J. M. KHAMONI

JUDGE

Present:

Appellant In Person

M/S Ngalyuka for the Republic

Gikaria Court Clerk



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