



REPUBLIC OF KENYA



KENYA LAW
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**Mokoro v Republic (Criminal Appeal E006 of 2023)
[2023] KEHC 21350 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E006 OF 2023**

JN NJAGI, J

JULY 28, 2023

BETWEEN

DDI MOKORO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. S. K. Arome, PM, in Marsabit Principal Magistrate's Court Criminal Case No. E0226 of 202 delivered on 22/03/2022)

JUDGMENT

1. The Appellant was facing a charge of breaking into a building and committing a felony contrary to section 306(a) of the *Penal Code*. The particulars of the offence were that on the September 8, 2022 at Marsabit town in Marsabit Central sub-county within Marsabit county he broke and entered the shop of Asha Nune (herein referred to as the complainant) stole 15 dozens of shoes, 5 dozens of body lotions, 10 dozens of clothes, and 10 bags all totalling at Kshs 163,000/- the property of the above said complainant.
2. The Appellant was facing an alternative charge of handling stolen goods contrary to section 322 (1) (2) of the Penal Code. The particulars of the offence were that on the September 15, 2022 at Manyatta Makaa village in Marsabit Central Sub County within Marsabit County, otherwise than in the course of stealing dishonestly retained 2 pairs of shoes, 9 boxes of quick lighting perfume, 7 pairs of dresses, 4 bags, Noor cream, 4 dodo body cream, 5 bottles of body lotion, 2 sachets of henna and 6 bottles face wash all totalling Kshs 29,700/= knowing or having reason to believe them to be stolen goods.
3. The Appellant was tried of the offence and convicted on the alternative charge of handling stolen goods and was sentenced to serve two years imprisonment. The Appellant was aggrieved by the conviction and the sentence and filed the instant appeal.



4. The grounds of appeal are that the prosecution failed to prove that the appellant was found with the alleged stolen items; that the prosecution failed to prove that the complainant was the owner of the alleged items; that there was inconsistency in the evidence tendered by the prosecution witnesses; that key witnesses were not called to testify in the case and the trial court failed to take into consideration the alibi defence of the Appellant.
5. The Appellant filed written submissions. He submitted that the house where the goods were found belonged to his father and the prosecution failed to prove he was found with the alleged stolen goods.
6. It was submitted that the complainant did not adduce any evidence to prove that she was operating a shop from which the alleged property was stolen from.
7. The appellant submitted that the prosecution witnesses adduced contradictory evidence. That the complainant testified that they found the appellant inside the house while her husband said that they found the house locked.
8. The prosecution conceded to the appeal on the ground that it was not proved that the house where the goods were found belonged to the Appellant.
9. This being a first appeal, the duty of the court is to analyse and re-examine afresh the evidence adduced at the lower court and draw its own independent conclusion - see *Okeno -v- Republic (1972) EA 32*.
10. In convicting the Appellant of the alternative charge of handling stolen property the trial magistrate said that the Appellant was found in possession of the stolen items.
11. The case for the prosecution was that on the material day a lady who operates a shop near the shop of the complainant PW3 was at her shop when she received a report that the shop of the complainant had been broken. She called the complainant and informed her. The complainant went to the shop and found that the padlock to the door had been broken. She found the items stated in the charge stolen from the shop. She reported to the police. PC Mwaniki PW4 visited the scene and took an inventory of the stolen goods. He collected the broken padlock.
12. After about a week the complainant received information from an informer that the Appellant was selling her shop goods at his house. She reported to the police. She went to the house where the goods were being sold with her husband PW2 and PC Mwaniki PW 4. They found the Appellant at the place but he escaped after a short while. They found a locked house. They peeped through the window and saw shop goods inside. There were two other young men at the home. They unlocked the door. They collected the shop goods. Later the Appellant was arrested and charged with the offence. During the hearing the broken padlock and the recovered goods were produced in court as exhibits.
13. When placed to his defence the Appellant stated in a sworn statement that on the September 13, 2022 he was on a journey. That he returned home on the September 28, 2022. He heard that his house had been broken and items removed. He was later charged over breaking into the complainant's shop. He denied committing the offence or being found with stolen property. He said that the goods that were found in the house belonged to him.
14. It was the evidence of the complainant that they found the Appellant and two other young man at the house. She did not know the Appellant before. The Appellant talked to them for some time before they realised that he had escaped. They broke into the house of the Appellant where they found 7 dresses, 2 packets of nail henna, 3 pieces of rose body essence, 8 boxes of premium quick lighting charcoal, Noor herbal beauty cream, 4 bottles of Dodo cosmetic, papaya face wash, 2 pairs of shoes and 4 balls. It was further evidence of the complainant that the house belonged to the Appellant's father. That they found the Appellant and 2 others in the house.



15. The complainant's husband PW2 testified that they went to the Appellant's house with the police. They found the Appellant in the house. His house was locked. They talked to him for about 5 minutes and he escaped. They cut the padlock to the door to his house and found the goods stated above in the house.
16. It was the evidence of PC Mwaniki PW4 that the Appellant's brothers opened the door for them after the Appellant escaped. The officer said that there were many houses at that place.
17. I have considered the evidence adduced against the Appellant. Whereas the complainant's husband said that they broke the padlock to the Appellant's house, PC Mwaniki said that it is the Appellants' brothers who opened the Appellant's house for them to inspect. So, did they break into the house or it is the Appellants' brothers who opened the door for them? PC Mwaniki said that there were many houses at that place. It is to be noted that the Appellants' brothers did not testify in the case. If there were many rooms there, which room did the brothers open for the policemen to check – the one belonging to the Appellant or another room? The prosecution did not call a witness who knew the occupant of the room where the goods were found. There was no evidence that the room where the goods were found belonged to the Appellant.
18. The complaint claimed that the goods that were recovered belonged to her. She however did not show any identification marks on any of the items to prove that the goods belonged to her. There was thus no sufficient evidence that the goods belonged to her.
19. The complainant testified that she was informed by an informer that the Appellant was selling goods stolen from the complainant. The informer was however not called to testify. There was no evidence that the Appellant was selling goods stolen from the complainant. There was no evidence that he handled stolen property.
20. It is the duty of the prosecution to prove the case against an accused person beyond reasonable doubt. In this case the standard of proof was not attained. There was no sufficient evidence to sustain the charge of handling stolen goods against the Appellant. The Appellant was wrongly convicted of the offence and as such the prosecution rightly conceded to the appeal. In the premises the appeal is upheld. The conviction entered by the trial court is quashed and the sentence imposed thereto set aside. The Appellant is to be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 28TH JULY 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ngigi for Respondent

Appellant – present in person

Court Assistant – Jarso

