Bashir Abdi Issack & another v Republic (Criminal Appeal E012 & E014 of 2021 (Consolidated)) [2022] KEHC 12432 (KLR) (23 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12432 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E012 & E014 OF 2021 (CONSOLIDATED)

A ALI-ARONI, J

AUGUST 23, 2022

BETWEEN

BASHIR ABDI ISSACK .... 1ST APPELLANT

MICHAEL KIMANZI PETER .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. This is an appeal from the judgement of Hon. Mokoross Senior Resident Magistrate, delivered on April 8, 2021 in Criminal Case No E016 of 2021, Senior Magistrates Court in Wajir.

2. The appellants had been charged with the offence of burglary contrary to section 304(2) and stealing contrary tosection 279(b) of the *Penal Code*.

3. The particulars of the offence were that on the 7th day of February 2021 at Habaswein Township within Wajir, jointly with others not before the court the two broke and entered the dwelling house of Abdifatah Aden Mohamed with intent to steal therein and did steal from therein 20 smart phones valued at Two Hundred Thousand Kshs.200,000/-, 15 keypad phones make Tecno valued at Kshs.15,000/-, 6 Nokia phones valued at Kshs.12,000/- and cash One Hundred and Three Thousand (Kshs.103,000/-) the property of Abdifatah Aden Mohamed.

4. The matter proceeded to full trial. Briefly the prosecution case was that on 7th day of February 2021 in Habaswein Township at around 3:30 am the Appellants broke and stole from the complainant's shop 41 phones when the image of the 1st appellant was captured by the CCTV camera and the police using IMEI numbers of some of the stolen Phones after a few days tracked the persons with some of the stolen phones in Wajir town. Those tracked down were both the accused. The 1st accused when arrested was found to be in possession of Tecno T301 IMEI NO. 359385346180682 and 359355436180690

and a chargeable torch black in colour. On his part the 2nd accused was found in possession of Neon Ray black in colour IMEI No. 35852108267569.

5. At the end of the trial both the appellants were found guilty of the two counts, convicted and sentenced to 10 years each for the offence of burglary and 3 years each for the offence of stealing both sentences were to run concurrently.

6. The accused persons were aggrieved by the decision of the trial court and preferred an Appeal this court on the following the grounds that:

   (a) Both were not supplied with written submissions and documentary proof before commencement of the trial.

   (b) The CCTV footage relied upon as evidence was not admissible under section 106 (B) (1) and (4) of the *Evidence Act*.

   (c) As for the 1st appellant the phone black in colour was not registered under his name.

   (d) As for the 2nd appellant he was not seen in the CCTV footage produced in evidence. &

   (e) There was no eye witness to the incident.

7. The appeal was canvassed by way of written submissions.

8. Both appellants had their first ground as lack of witness statements and documents at the trial. From the evidence on record on the very first day the matter commenced the two appellants indicated that they were ready for trial. It is therefore taken that they had witness statements and documentary evidence necessary in the preparation of hearing and at this stage to raise the issue appears to be an afterthought and cannot be taken seriously. They ought to have raised the issue at the earliest opportunity, which they failed to do.

9. According to the evidence of PW2 and PW3 the appellants broke into the shop of the complainant at 3:30 am on the material day and stole several phones and cash amounting to Kshs 103,000/-. The charge sheet on the other had states that the two entered the dwelling house of the Complainant.

10. Nonetheless the evidence of PW2 is that on the 7th of February 2021 at around 6:30 am he received a call from the PW1 and his landlord that his shop had been broken into. On arriving at the shop he found that he had lost 41 phones worth about Kshs. 325,000/- and Kshs. 103,000/- cash. He checked his CCTV that gave an indication that the shop was broken into at 3:30 a.m. He reported the matter to the police who took IMEI numbers of the phones from the phone boxes for purposes of their investigations.

11. PW3 the investigating officer, P.C. Peter Rotich informed the court that on February 7, 2021PW2 reported that his shop had been broken into and 20 smart phones stolen together with Neon phones. He got IMEI numbers of the phones and started tracking the said phones and after a few got signals of two phones. They tracker showed the person with the phones were in Wajir town. They went to Wajir town and tracked two phones with Bashir Abdi Isaack, Tecno T301 IMEI Nos. 359385346180682, 359355436180690 and black a chargeable torch. The 2nd accused, Maiko Peter Kimanzi was tracked and found with Neon Ray back in colour No. 35852108267569. Further he stated that they compared the faces in the CCTV footage and the noted that the 1st accused was captured therein.

    After seeing the 1st accused on the CCTV footage they requested Safaricom to triangulate his movements between 4th and 8th February 2021 and the data received indicated that between 5th February upto 8th February he was in Habaswein and left at 11.16 a.m. on 8th of February 2021.

12. In his defence the 1st appellant denied the offence. It was his defence that that said at the time of his arrest he was at his shop where the police found him and asked him to take them to the 2nd Appellant whom he did not know. They assaulted him and later his co-accused whom he did not know was picked. He denied that he was using someone else's sim card at the time of his arrest.

13. The 2nd appellant on his part stated that he had been tricked into meeting someone who had told him that he was looking for a mason. When he was arrested and accused of being in possession and using a stolen phone, which phone he alleged to have bought but had left the box of the phone at the shop. Further, the police refused him to take them where he had purchased the phone.

14. Notable is that in their defence the appellants do not challenge the evidence of breaking in to the complainant's shop. The 2nd Appellant does not deny being in possession of the phone mentioned at the time of his arrest other than alleging he had purchased the same in Habaswein on February 3, 2021 and having left the box at the shop. On his part the 1st accused denied being in possession of the phones he was arrested with.

15. The court finds the evidence of PW1 & PW2 that the shop of PW2 was broken into and that he lost 41 phones and cash to be credible and not challenged. The court also finds the evidence of the investigating officer PW3 to be equally truthful and sees no reasons why he would cook up a story against the two who were not previously known to him. They were found with recently stolen items and could not explain why and how they come into possession of the same.

    The complainant was able to avail boxes of the stolen phones that enabled the police track the phones. The phones were stolen on 7th of February 2021 and the appellants found in possession of the same.

16. The court agrees with the submissions of the appellants on the CCTV camera footage that they prosecution attempted to rely on. The same is not admissible without an electronic certificate. And even though the court will not rely on the CCTV footage, the Appellants are not of the hook as they were both found with recently stolen phones and the doctrine of recent possession must kick as such the burden of proof shifted to them to explain how they came to be in possession of the said phones.

17. In *Malingi v R* [1988] KLR 225 the court said the explanation given by the appellants ought to be plausible. And in *Paul Mwita Robi v R* Criminal Appeal No 200 of 2008 the Court of Appeal had this to say:

    > " Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111(1) of the *Evidence Act* Chapter 80, the accused has to discharge that burden."

18. It follows therefore that the appellants herein ought to have made plausible explanations which they failed to do and the court is entitled to drawn an inference.

19. The appellants were charged with burglary though the evidence before court would place the offence under Section 306 of the Penal Code; breaking into a building and committing a felony. Though the charge and the evidence are at variance they were both read and the Appellants understood the same and were tried and fully participated.

20. As to whether the charge sheet was therefore defective. In the case of *Peter Ngure Mwangi v Republic* (2014) e KLR the Court of Appeal referred with approval to the case of *Peter Sabem Leitu v R,* CR A NO 482 OF 2007 (UR) where this Court held thus:

> "The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

21. Section 382 of the *Penal Code* provides;

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The said section would cure any irregularity in the charge sheet such as the one on the charge sheet herein.

22. In the case of *Reuben Nyakago Mose & another v Republic [*2013] eKLR the court discussed a similar issue where the offence of burglary and stealing were combined and was of the view that there ought not to have been duplicity in the charge.

23. The appellants raised the issue of duplicity in their oral submission which was accepted by the prosecution who agreed that Stealing and breaking should be charged together as one offence to avoid multiplicity of offences being loaded on the accused.

24. In this instance the charge against the appellants ought to have been breaking into a building with intent to commit a felony. The offence of breaking carries a jail term of seven years and therefore the magistrate erred by allowing the multiple charges to stand and convicting the accused and sentencing them on multiple charges.

25. The appeal therefore succeeds in as far as the electronic evidence was inadmissible and secondly on the duplicity of the offence of the charges of burglary and stealing. In this regard the court quashes both the convictions on the offences of burglary and stealing. Further the court sets aside the 10 years and 3 years sentence meted out on the two counts and in place of the same the court convicts the appellants for the Offence of breaking into a building and committing a felony and sentences the appellants to a jail term of 5 years from the date of the first judgement.

DATED SIGNED AND DELIVERED IN GARISSA ON 23rd DAY OF AUGUST 2022

ALI-ARONI

JUDGE