



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 25 OF 2019**

**BRIAN AKANGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(from the original conviction and sentence in Vihiga SPMC Criminal Case No. 126 of 2017 by Jacinta A. Owiti ((Mrs), PM, dated 5/3/2018)*

**JUDGMENT**

1. The appellant was convicted in count 1 of the offence of vandalism of electrical appliances contrary to Section 64 (4) of the Energy Act No. 12 of 2012 and sentenced to serve 10 years imprisonment. He was also convicted in Count 2 of the offence of stealing contrary to Section 268 (a) as read with Section 275 of the Penal Code and sentenced to serve 2 years imprisonment. He was convicted in Counts 6, 7, and 9 of the offences of burglary and stealing contrary to Section 304 (2) and 279 (b) of the Penal Code and sentenced to 2 years imprisonment on each of the counts. He was convicted in Count 8 of the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code and sentenced to 2 years imprisonment. The sentence in all the counts was ordered to run consecutively. The appellant was aggrieved by the convictions and the sentence and filed this appeal. The grounds of appeal are that:-

- (1) The prosecution did not prove the case beyond all reasonable doubt.
- (2) The trial magistrate did not consider the appellant's defence.
- (3) The sentence was harsh and excessive.

2. The appeal was expounded by the written submissions of the appellant. The State did not make any submissions in the case.

3. The case for the prosecution was that on various dates between March, 2016 and January, 2017 the houses of the complainants in Counts 6, 7 and 9 and the shop of the complainant in Count 8 were broken into and property stolen. That on the 27/1/2017 APC Cpl. Simon Waswa PW7 received a report from the complainant in Count 8 of breakage into his shop. An administration policeman PW6 received information that the appellant was selling some credit cards suspected to have been stolen. On the 1/2/2017 administration policemen went to the house of the appellant. They searched the house and found many goods among which were property stolen from the houses of the complainants herein. The appellant was also found with transformer oil and copper winding suspected to have been stolen from Kenya Power. He was charged accordingly.

4. When placed to his defence the appellant gave an unsworn statement in which he stated that he was a boda boda operator. That on the 31/1/2017 at 3 a.m. he was at his house when policemen went to his house. They said that they were looking for items stolen from the house of Francis Asitiva, the complainant in Count 8. They conducted a search in his house but they did not find any stolen property. They picked his personal effects from the house. He was later charged with the offences. The items that were recovered from his house were not produced as exhibits.

5. In his submissions the appellant stated that the prosecution did not prove the charges beyond all reasonable doubt. That the police officer who searched his house PW7 did so without a search warrant. That Article 31 of the Constitution of Kenya 2010 grants the right of privacy which includes the right not to have their home or property searched. That Article 50 (4) provides that evidence obtained in a manner that violates any right or fundamental freedom in the bill of rights, shall be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. That there was no inventory made of the goods recovered. That PW2 and PW3 did not produce recent receipts to show that the property belonged to them. Neither did they show any peculiar marks on the items to prove that the property was theirs.

6. The appellant submitted that the trial magistrate disregarded the appellant's defence without giving any reasons.

7. The appellant further submitted that Count 1 carried a mandatory sentence of 10 years. That a mandatory sentence is unconstitutional in

that it deprives the court of its discretion to impose any proportionate sentence. That the trial magistrate erred in sentencing him to a cumulative period of 20 years and failed to consider that some of the offences emanated from the same transaction. That the sentence imposed by the trial court was harsh, excessive and not proportionate to the offences charged.

8. This being a first appeal the duty of the court is to analyse afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Okeno –Vs- Republic (1972) EA 32**.

9. In Count 1 the appellant was charged with vandalism of electrical appliances contrary to Section 64 (4) of the Energy Act No. 12 of 2012. The particulars of the offence were that on the 2<sup>nd</sup> January, 2017 at Ebusilatsi village Elukongo Sub-Location Esibuye Location within Vihiga County jointly, wilfully vandalised a transformer serial number 54696, G655807 of 25 KKWA valued at Ksh. 1,500,000/= the property of Kenya Power & Lighting Company.

10. In Count 2 the appellant was charged with stealing contrary to Section 268 (a) as read with Section 275 of the Penal Code. The particulars of the offence were that on the 2<sup>nd</sup> day of January, 2017 at Ebusilatsi village Elukongo Sub-Location Esibuye Location within Vihiga County jointly stole copper winding and transformer oil valued at Ksh. 35,000/= the property of Kenya Power & Lighting Company.

11. It has to be noted from the outset that the offences that the appellant was facing were felonies. The police did not require a warrant to search his house where he was suspected of committing felonies.

12. In his evidence in court the witness from Kenya Power & Lighting Company PW4 never stated that there was any particular transformer that was vandalised. He did not produce any photographs of the transfer that was vandalized. The trial magistrate did to address her mind to this aspect of the case. She thereby erred in convicting the appellant for the offence of vandalism when there was no evidence to prove that there was any transformer that was vandalised. The trial court wrongly convicted the appellant of the charge in Count 1.

13. As for Count 2 where the appellant was charged with stealing a copper winding and transformer oil, the witness from Kenya Power PW4 did not identify the copper winding as the property of Kenya Power. In fact he never made any mention of a copper winding when he testified in court. The administration policeman PW7 who recovered goods from the house of the appellant never stated that the copper winding was one of the things that they recovered from the house. Though the said witness said that they found transfer oil in the house of the appellant he did not identify the oil that they recovered from the house of the appellant. The oil was not before court on the day that he testified. It is therefore not known whether the oil that PW6 found in the house of the appellant is the same one that the investigating officer took to the government analyst. With this kind of evidence there was no basis of the trial court finding the appellant guilty of the offence stated in Count 2.

14. **Hellen Ayuma**, the complainant in Count 6 and who was PW5 in the case testified that on the night of 10/11<sup>th</sup> September, 2016 she was sleeping at her house. It was raining. She woke up at 5 a.m. and she found some items missing from her sitting room. She noticed that the lock to the window was broken. Missing from the house were cushions, chicken, speakers, an amplifier and an iron box. On 31/1/2017 she received a report that some goods had been recovered and taken to the Chief's office. She went there and identified 2 cushions and a charcoal iron box. During the hearing the items she identified were produced as exhibits, P.Ex.30 and 31.

15. The complainant in Count 7 **Moses Victor Olepha** (PW3) testified that his house was broken into on 3 occasions between March and November, 2016 and property stolen. That on the 31/1/2017 he was alerted by his area Chief that some items had been recovered. He went to the Chief's office where he found the appellant and 2 others. Some items were poured out from a sack. Among those things he found his stolen chisel. The appellant told the chief that there were other items elsewhere. Other items were brought by the father of the appellant. He identified his other stolen goods among the items that were brought by the appellant's father. During the hearing the items he identified were produced as exhibits, P.Ex 26 (a) – (g).

16. The complainant in Count 8, **Francis Asitiva** who was PW1 in the case testified that his shop was broken into on 27/1/2017 and various goods stolen. He reported the matter at Mukho Police Patrol Base. A report was received that the appellant was selling some suspected stolen goods. On 30/1/2017 he proceeded to the house of the appellant with policemen, the Assistant Chief and a village elder. In the house of the appellant they recovered many items stolen from him. During the hearing the items were produced as exhibit, P.Ex 7 – 10.

17. The complainant in Count 9, Dorris Awinja (PW2) testified that on the night of 6/8/2016 she returned to her house at midnight and found the door to her house broken and some goods stolen from therein. She reported to the police. In 2017 she received a report that some goods had been found in the house of the appellant. She went to his home. She found the area Assistant Chief at the home. At the home she identified her metallic kettle, aluminium cups and 2 serving spoons. She reported to the police. During the hearing the items she identified were produced as exhibit, P.Ex 23 – 26.

18. From the evidence adduced before the lower court there was no doubt that the administration policeman PW7 recovered some goods in the house of the appellant. This evidence was corroborated by PW1 and PW2 who went to the home of the appellant and saw the goods that had been recovered from his house. It was therefore a lie for the appellant to state that no stolen goods were found in his house. The trial court did not err in finding that the goods were found in the appellant's house.

19. Before an accused person can be convicted of theft based on evidence of possession of stolen goods, the prosecution has to prove that –

(1) The accused was found with the goods,

(2) The property is positively identified as the property of the complainant,

(3) The property was stolen from the complainant and that

(4) The property was recently stolen from the complainant.

See **Isaac Ng'ang'a Kahiga Alias Peter Ng'ang'a Kahiga –Vs- Republic Nyeri COA Cr. App. No. 272 of 2005**. In the case the court added that the proof as to time will depend on the easiness with which the stolen property can move from one person to the other.

20. The administration policeman PW7 did not identify the particular goods that he found in the house of the appellant as the goods were not before court when he testified. The complainant in Count 6 Hellen Ayuma and the complainant in Count 7 Victor Olepha identified their goods at the Chief's office. Since the administration police officer PW7 who recovered the goods did not identify the goods for PW6 and 7 as having been recovered from the house of the appellant, there was no evidence that the stolen goods of the complainants in Counts 6 and 7 were recovered from the house of the appellant. There was then no basis of convicting the appellant with the offences in Counts 6 and 7 when it was not proved that the goods in respect to the said counts were recovered from the house of the appellant.

21. It was however clear that the complainants in Counts 8 and 9, Francis Isitiva (PW1) and Doris Awinja (PW2) went to the home of the appellant where they found their stolen goods. The goods were removed by the administration policemen from the house of the appellant. PW1 recovered many goods including USB cables, phone chargers, LG radio, a soldering iron rod, volcano flash box, a torch etc. PW8 identified the goods as his. The said goods had been stolen 3 or so days before they were recovered from the house of the appellant. The appellant was therefore in possession of goods recently stolen from PW1. He did not give an explanation of how he came into the possession of the goods. The conclusion is that he is the one who broke into the house of PW1 and stole the goods. Count 8 was therefore proved against the appellant beyond all reasonable doubt.

22. The goods of PW2 were stolen from her house on 6/8/2016. They were recovered from the appellant on 1/2/2017. This was six months after the theft. The goods recovered included a metallic kettle, 20 or so aluminium cups and 2 serving spoons. PW2 did identify the goods as hers. For the appellant to have been found with the utensils of PW2 six months after the theft was recent possession of stolen property. Utensils are not things that can change hands often. The appellant did not give an explanation of how he came into the possession of PW2's utensils soon after the theft. The conclusion was that he was the thief. Count 9 was therefore proved beyond all reasonable doubt.

23. The upshot is that the conviction in Count 1, 2, 6 and 7 are quashed and their sentences set aside. The conviction in Counts 8 and 9 are upheld.

24. The appellant was sentenced to serve 2 years imprisonment in respect to Count 8 and 2 years imprisonment in respect to Count 9. The sentences were ordered to run consecutively.

25. The offence in Count 8 is breaking into a building and committing a felony. The maximum sentence for the offence is 7 years imprisonment. I am of the considered view that the sentence imposed by the lower court of 2 years is not harsh. The sentence of two years is therefore upheld.

26. The offence in Count 9 is burglary contrary to Section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code. There are two limbs in this charge but the trial court did not impose sentence for the two limbs. I will therefore correct the error and sentence the appellant to 2 years imprisonment on each of the limbs. The sentence in the two limbs to run concurrently.

27. It is to be noted that the offence in Count 8 was committed in January, 2017 while the offence in Count 9 was committed in August, 2016. The offences were therefore not from the same transaction. In such circumstances the order that the sentences were to run consecutively was proper. The sentences in both Counts 8 and 9 are therefore to run consecutively from the date of sentence by the trial court.

**Delivered, dated and signed in open court at Kakamega this 27<sup>th</sup> day of February, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Mutua for State/Respondent

Appellant - present

Court Assistant - Polycap

14 days right of appeal.