



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 12 OF 2018

MOSES MUGAMBI NJIRU.....1ST APPELLANT

STELLAH MWENDE MICHENI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being appeal from original conviction and sentence in the Chief Magistrate's Court at Chuka in

Criminal Case No.454 of 2015 delivered by HON. M. SUDI. SRM (Senior Resident Magistrate on 22nd March, 2018).

JUDGEMENT

1. **MOSES MUGAMBI NJIRU** and **STELLA MWENDE MICHENI**, the first and 2nd Appellant respectively were both charged with the offence of burglary contrary to **Section 304(1)** as read with **Section 304(2)** of the **Penal Code** through ***Chuka Chief Magistrate's Court Criminal Case No.454 of 2015***. The particulars of the charge were that on diverse dates between 13th June 2015 and 17th June 2015 at Gakuuni village Karingani Location within Tharaka Nithi County jointly with others not before court broke and entered the house of **PATRICK MUNDI NGAI**, and stole therein assorted properties worth **Kshs.60,000/-** the property of **PATRICK MUNDI NGAI**, the complainant in that trial.

2. The two also faced an alternative charge of handling stolen good contrary to **Section 322(1)** as read with **Section 322(2)** of the **Penal Code** with the particulars of the alternative charge being that on 18th June 2015 at Gakuuni village, Karingani Location within Tharaka Nithi County the two jointly likewise that in the course of stealing, dishonestly retained, one green house net roll, one chain link wire roll, 3 plastic 20 litre jericans, one pair of safari boots, one pair of gumboots, 2 plastic basins, one blanket, one hurricane lamp, one sufuria , one coffee table, one panga, one piece of plywood and one cereals threshing sack knowing or having reason to believe them to be stolen or unlawfully obtained.

3. The Appellants denied committing the offences in both counts but after trial, the court found them guilty of the 2nd court and convicted them and sentenced them each to 6 years in jail.

4. The Appellants felt aggrieved and filed this appeal raising the following grounds namely:-

i) *That the learned magistrate convicted them on insufficient evidence.*

ii) *That the trial court erred by shifting the burden of proof to them.*

iii) *That the learned magistrate misdirected herself on the explanation given to them regarding ownership of the exhibits tendered in court.*

iv) *That their unchallenged defence was not considered.*

v) *That the trial court erred and misdirected itself by conceding that the items were for the Appellant and at the same time finding that the same required strict proof of ownership*

vi) *That the sentence passed was too harsh.*

4. **Brief summary of the prosecution's case at trial:**

The prosecution's case against the Appellants indicated the complainant named **PATRICK MUNDI NGAI (PW1)** resided in Nairobi though he had a house at Gakuuni village which was broken into between 13th June 2015 and 17th June 2015 and items mentioned on the charge sheet stolen. The culprits were unknown as the incident was said to have taken place at night. On 18th June 2015, the police were notified by the complainant that they suspected the two Appellants who lived nearby and were reportedly selling beans cheaply at Kshs.50/- instead of the market price of Kshs. 150/-. The complainant then led the police in a raid in the 2nd Appellant house where the stolen items were found.

5. When placed on their defence, the 1st Appellant pleaded ignorance and stated that the stolen items were found with the 2nd Appellant and he did not know that the items were stolen. He also denied being married to the 2nd Appellant stating he used to stay with a cousin named Muthoni.

6. The 2nd Appellant on her part claimed that the items listed as stolen were not stolen but belonged to her late husband who was a brother to the complainant. She claimed that the complainant had taken all her late husband's properties and all she did was to go and bring them back which according to her led to her arrest.

7. The trial court upon evaluation of the evidence found that the evidence tendered was insufficient to sustain Count I but that the evidence tendered sustained Count II because it showed that the 2nd Appellant knew that the items listed as stolen did not belong to her but took them without permission and were later found looking for buyers at throw away prices.

The Appeal:

8. When this appeal came for hearing, the 1st Appellant maintained his innocence saying that he was a stranger in that locality doing casual jobs. He further stated that he was unaware of the fact that the items were stolen and that he was a religious person who had never committed any crime before. He further prayed for reduction of the sentence saying that 6 years prison sentence was too harsh.

9. The 2nd Appellant on her part maintained that the items listed as stolen belonged to her late husband and that the items were forcefully taken away from her after the demise of her husband and that she went back to recover the items from the complainant who was her brother in law.

10. The State denied that there was any relationship between the 2nd Appellant and the complainant stating that she was simply a neighbour. The Respondent through Mr. Momanyi learned counsel for the Respondent pointed out that the 2nd Appellant had in fact initially pleaded guilty to the 2nd count but later changed her mind. The State maintained that the listed items were stolen and were found in the house of the 2nd complainant and no satisfactory explanation was given by either of the Appellants as how they came into possession of the items.

11. This court listened carefully to the claims made by the 2nd Appellant and upon observing her demeanor, I found that it was in the interest of justice to allow for additional evidence to be taken at least to establish the relationship if any between her and the complainant with a view to ruling out underlying issues related to succession wars in regard to her late husband if at all.

12. In view of the above, I directed a social inquiry to be conducted and social inquiry report dated 20th February 2020 was later filed I have gone through the report which indicates as follows:-

" the relationship between the Appellant (2nd Appellant) and the complainant is that of in-laws in that she was married to his late brother as confirmed by the uncle and the Area Chief. She was chased away from the matrimonial home by the complainant on the allegations of misconduct and was denied use of the land which is now being utilized by the complainant's sister....."

13. The social inquiry report of course brought a new twist in this appeal but the trial court appears to have fallen into error when she misdirected her mind away from the legitimate claim by the 2nd Appellant which she maintained in her defence and in this appeal. When this court heard the allegations the court suspected that the complainant might have conspired to fix her sister in law with a view to not only disowning her but to also banish her away so that she does not claim any part of the estate of his late brother. Well he almost succeeded but only just because as the saying goes the arm of the law is long enough to get you even if you try to hide and it is equally long to establish the truth and render justice to all whether weak or strong.

14. This court finds that the trial court misdirected herself regarding the ownership of the listed items reported to have been stolen. It is now quite apparent that had the trial court directed her mind properly on the claims of ownership of the items made by the 2nd Appellant, the verdict may have been different. This court finds to note that the complainant did not tender any evidence to prove that the listed items were his in the first place. The finding that the items were stolen and that the Appellants knowingly or dishonestly held the goods knowing that they were stolen was erroneous in my view. The evidence tendered was insufficient to sustain a charge either under **Section 304 of Penal Code** or **Section 322 of the Penal Code**.

15. On that ground alone, this court finds merit in this appeal both the conviction and sentence are hereby set aside and reversed. The two appellants shall forthwith be set free unless they are lawfully held. The 2nd

Appellant is at liberty to pursue her claims under **Law of Succession Act** and recover the items that were released to the Appellant or their value indicated as **Kshs.60,000/-**

Dated, signed and delivered at Chuka this 27th day of February 2020.

R. K. LIMO

JUDGE

27/2/2020

Judgment dated, signed and delivered in presence of Momanyi for Respondent and Appellants in person

R. K. LIMO

JUDGE

27/2/2020