



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 7 OF 2018

SAMUEL KAKAWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Garsen criminal case 148 of 2017, Hon. E. Kadima (RM) dated 8th February 2018)

JUDGEMENT

1. The Appellant was charged with two counts of burglary contrary to section 304(2) and stealing contrary to section 279(b) of the Penal Code. The particulars of the offences were that on the 28th April 2017 at Tarasaa area in Tana Delta Sub-County within Tana River County, the Appellant with others not before the court broke and entered the dwelling house of Fridah Lucas and Rehema Mabombe with the intent to steal therein and did steal therein a tv make LG, Zuku decoder, coffee table, twelve sufurias, 1 bed sheet, 1 mattress and a t-shirt valued at Ksh. 49,300 and; 1 high density mattress, electric iron, hurricane lamp, two basins, one bucket, seven sufurias, two kitchen knives, four table spoons, four cups, two pairs of shoes, one handbag and one material mattress all valued at Ksh. 69,260 respectively.
2. The Appellant was also charged with an alternative charge of handling goods contrary to section 322(1)(2) of the Penal Code. The particulars of the offence were that on the 29th May 2017 at Tarasaa area in Tana Delta Sub-County within Tana River County otherwise than in the course of stealing, dishonestly received or retained a television make LG and a decoder (Zuku) knowing or having reasons to believe them to be stolen goods.
3. The prosecution called six witnesses in support of their case. Naomi Zura Philip (PW1) stated that on 28th May 2017 she was informed by her child, Karisa, that a TV covered with clothes was seen in her house. She said that she had leased out the house to her brother Matayo. That she sent her elder son David, to the house and he confirmed what she had been told. She said on Monday she went to a mzee wa (elder of) nyumba kumi and they went to the house where they found PW1's father. She told the court that at 2pm she met the Appellant who informed her that he had broken into the house where Matayo lived to take the TV. However, PW1 was stood down and was never recalled.
4. Rehema Mabombe (PW2) was a cateress at Tarasaa High School and one of the victims of the burglary and theft. She told the court that on the 28th April 2017 she was in Gonhoni with her family when Chimeya, an accounts clerk at the school, called and informed her that the watchman had informed him that her house had been broken into. She went to the scene where she found that the external padlock and internal door were broken.
5. That in the house she found that a mattress worth Kshs.1,200/-, a ramtons electric iron, hurricane lamp worth Ksh 500, a basin worth Ksh. 240, a bucket worth Ksh.150, sufurias worth Ksh 700, two knives worth Ksh.250, four spoons worth Ksh 100, plastic cups worth Ksh. 250, two pairs of shoes worth KSh.1600, a handbag worth Ksh.500 and a trouser suit worth Ksh.800 were missing.
6. She stated that on the 29th May 2017 it was hinted to her that the TV was taken to PW1's house. She went to PW1's house together with an official from nyumba kumi where they found the TV covered with clothes. She identified the TV and it was removed from PW1's house and put in a church. She called Fridah (PW2) who came to the church from Hola and identified TV. That they moved it from the church since it was not safe and later reported to the police station. PW2 told the court that investigations revealed that Samuel, a child of mzee Kakawa was the one who put the TV in the house.
7. Fridah Lucas (PW3) was a secretary at Tarasaa High School and one of the victims of the houses that had been broken into. She stated that she was on official leave from 9th April 2017 when she was informed by Martin Chimenya, the accounts clerk at the school, that a theft had occurred. That she travelled back to the school where she found the door handle of her house broken. In the house, she noticed that a TV worth Ksh 23,000, a decoder worth Ksh 6,000, a coffee table worth Ksh 1,200, two mattresses worth Ksh 12,500, a bed sheet, 12 cooking

sufurias and, a tshirt worth Ksh 600 had been stolen.

8. PW3 stated that in May she was on her way to Hola when she got a call. She told her neighbour PW2, to go and check the TV. That when she returned from Hola the same day she went to the church, where the TV had been moved to from PW1's house. She identified the TV which she said had the front buttons missing. She told the court that she did not know the Appellant and that she has never recovered anything else.

9. Said Maro Jillo (PW4) was the security guard at Tarasaa High School. He stated that on the 28th April 2017 during the school holidays he made his rounds to the teacher's quarters and discovered that PW2 and PW3's houses had been broken into. He told the court that that PW2 and PW3 were not in the compound so he went and woke up the accounts clerk and they went and informed the deputy principal. That they reported the matter at Tarasaa police post but he did not know who committed the theft.

10. Samuel Abaganda (PW5) was a lay preacher with the Lutheran church. He stated that on the 29th May 2017 while in his house he heard people speaking of a stolen TV. That he went out and met the Appellant who asked him to assist him to break into PW1's house to retrieve the TV but he declined. He told the court that the Appellant broke PW1's door.

11. Ibarhim Jillo (PW6) was the investigating officer. He stated that on the 28th April 2017 at around 2pm, he received a call from Mr. Philip Balessa, the deputy principal at Tarasaa High School, who informed him that two houses in the school compound had been broken into. That the following day, the deputy principal and two security guards made a report. PW6 sent two officers to the scene of the crime and they began investigations. PW6 told the court that they got information that a boy of Watta ethnicity was selling iron sheets. That on the 3rd June 2017 with the help of members of the public, they found a LG TV belonging to PW3. He produced a photograph of the TV (P.Exh1) and a certificate from crime scene support service (P.Exh3).

12. PW6 told the court that an informant pointed out the Appellant as a possible suspect and that PW3 named the Appellant as the person who brought the TV to the house. That on 3rd June 2017, the public gave valuable information of the whereabouts of the suspect and he was arrested by the public on 27th June 2017 and handed to Garsen police station.

13. When placed on his defence, the Appellant elected to give a sworn statement. He stated that in June 2019, he was on his way to a drinking joint when four youths informed him that they had been instructed to arrest him. That they arrested him and took him to Tarasaa police post and later to Garsen police station where he learnt that PW1, who was his sister-in-law, was the complainant. He stated that he had a grudge with PW1 because she gave him manual work and chose to pay him with food instead of money. He said that the TV had been found in her house and her brother could not point out who had brought it there. That the story was changed to frame him as the thief.

14. At the end of the trial the learned trial magistrate found the Appellant guilty and sentenced him to pay a cash fine of Kshs.100,000/- and in default to serve a jail term of three years on each count. The sentences were to run concurrently.

15. Aggrieved by the conviction and sentence, the Appellant lodged his homemade petition of appeal on 21st February 2018. On 5th November 2019 he filed an amended Petition of Appeal on three grounds which paraphrased are to the effect that there was no identification at the scene of crime and therefore he was arrested on mistaken identity; that the prosecution did not prove its case to the required standard of law, and; that his defence was not considered.

16. The Appellant filed his written submissions on 5th November 2019 which was to the effect that the prosecution failed to prove its case beyond reasonable doubt. He faulted his arrest on the ground that he was not found with the stolen goods. He placed reliance on the case of **Erick Otieno Arum vs Rep (2006) eKLR**. He further submitted that he was not found at the scene of the crime. He urged that no direct or circumstantial evidence linked him to the crime and therefore the prosecution had failed to prove its case. He urged the court to allow his appeal.

17. During the hearing, Mr. Mwangi learned counsel for the Respondent, conceded to the appeal on the grounds that there was no evidence to link the Appellant to the crime and that he was convicted on the evidence of an informer who was not called to testify. Additionally, there was a security guard at work who said that he never saw the Appellant and that the TV was found at the house of a person, one Naomi, who never testified.

18. Despite the Respondent conceding the appeal, it is trite that an appellate court should examine the facts for itself in considering merit of the prosecution's concession. In **Odhiambo vs. Republic (2008) KLR 565** the Court held that:-

“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”

19. I have therefore, being a first appellate court revisited the evidence that was before the trial court, re-evaluated and analyzed it and come to my own conclusions as expected of me. See **Okeno v R (1972) EA 32; Eric Onyango Odeng' v R [2014] eKLR**. I have also considered the grounds of appeal, the record and submission of the parties and found the only issue for consideration to be whether the prosecution proved its case to the required legal standard.

20. There is no doubt that there was a burglary and theft in the respective houses of PW2 and PW3. They informed the court that they both received a phone call from one Chimenya, the accounts clerk at Tarasaa High School who informed them that their houses had been broken into. This was confirmed by the evidence of PW5 who was the security guard at the school on the night of the crime and who informed the said Chimenya about the break-ins. Additionally, PW6 confirmed that he received a call from Mr. Philip Bellessa, the deputy principal of Tarasaa High School who informed him that there were two houses which had been broken into.

21. On their part PW2 and PW3 both testified that upon being informed of the break-ins, they both hurried to the school where they found their doors broken and their household goods stolen including a LG TV which was later recovered.

22. The only issue of contention is whether the Appellant was the one who committed the crime. There was evidence against him by PW5 who claimed that the Appellant asked him to assist break into the house of PW1 that he could retrieve the TV that had been discovered. PW2 on her part told the court that investigations revealed that it was the Appellant who put the TV in the house. PW6 stated that an informer pointed out that the Appellant was a possible suspect while PW3 told him that it was the Appellant who put the TV in the house.

23. A critical look at the evidence shows that the TV was recovered in the house of PW1, who was stood down in the process of giving evidence and was never recalled thereby lowering the probative value of her incomplete testimony. There was no further evidence to link the Appellant to the house. There was no evidence that the Appellant lived in or had access to the said house. PW2, PW3 and PW5 all referred to the house as belonging to one Naomi.

24. The importance of establishing the ownership of the house where stolen goods are recovered was critical as the owner or occupant would be able to explain how the goods found their way into such premises or the link between the stolen goods and the accused. This was clearly highlighted in the case of **Dan Imbiri Agoi & 2 others v Republic [2019] eKLR** where Musyoka J stated thus:-

*“...It was said in **Boniface Gitonga Muchira & another vs. Republic [2013] eKLR**, that the ownership of the house where stolen goods are recovered as critical for it provides an essential link between accused person and the goods allegedly recovered. It would also eliminate the possibility that the goods were in the custody or possession of persons other than the accused. See also **James ole Silanga vs. Republic [2010] eKLR**...It was critical in the circumstances to obtain further evidence as to who owned the particular house where those recoveries were made as that was the only way to link the 2nd appellant to it.”*

25. I also take issue with the evidence provided by the informer. According to PW6, he was informed by an informer that the Appellant was a possible suspect. The role of informers was espoused in the distinguished case of **Kigecha Njuga v Republic [1965] EA 773** where it was held that: -

“informer play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desires the court to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”

26. The Court of Appeal in **Joseph Otieno Juma v Republic [2011] eKLR** pronounced itself thus:-

“Concerning the failure to ask the informers to testify in this case our view is that in the circumstances of this case in their evidence was not necessary to determine the innocence or otherwise of the appellant because the prosecution’s other evidence served the purpose. However, we think that if the evidence of the informers is necessary to prove the guilt of the appellant it would have been necessary for them to have testified perhaps outside the glare of the public.”

27. I am fortified by the above decisions that where the evidence of the prosecution is inadequate it would be necessary for the prosecution to call the informer to give their evidence. In this case the evidence adduced by the prosecution was insufficient as there was no evidence linking the Appellant to the commission of the offences. He was neither caught in the act nor properly identified by any of the witnesses. I find that it was necessary to call the informer to prove the guilt of the Appellant.

28. I found the evidence of PW5 incredible. PW5 stated that the Appellant sought his help to break into PW3’s house. Why did PW5 not raise an alarm and stop him or make a report. Was he (PW5) an accomplice? These are questions which ought to have been dealt with in the trial.

29. I have also looked at the Appellant’s defence. He categorically stated that he was framed by PW1 who was his sister-in-law and who had a grudge with him. He categorically stated in the trial and in this appeal that PW1’s brother who lived in the house in question was unable to point out who brought the TV to the house. His defence created doubt as to whether he was the one who put the TV in the house. It is to be recalled that PW1 who might perhaps have tied up the loose ends in the prosecution case was not recalled to complete her testimony.

30. In the upshot, I find that there was insufficient evidence to convict the Appellant. The Evidence raised a strong suspicion that the Appellant committed the offence. The same did not however prove the case to the required legal standard. I allow the appeal, set aside the judgment of the trial court and substitute therefor judgment acquitting the Appellant for lack of sufficient evidence.

31. The Appellant is set at liberty forthwith unless otherwise lawfully held.

32. Orders accordingly.

Judgment dated delivered and signed at Garsen on this 30th day of April, 2020.

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R. LAGAT KORIR

JUDGE

This judgement has been delivered to the Appellant via video link to Malindi GK prison (due to COVID – 19 regulations), in the presence of T. Maro (Court Assistant), Ms.Sombo (holding brief for Mr. Mwangi for the Respondent) and the Appellant(virtually present).