



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 30 OF 2019

ANTONY MWAKI NTHIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from original conviction and sentence in the Senior Principal Magistrate's Court at Marimanti in Criminal Case No. 214 of 2018 delivered by Hon. P.N. MAINA - Senior Principal Magistrate (S.P.M) on 11th October, 2018).

J U D G E M E N T

1. **ANTONY MWAKI NTHIGA** the Appellant herein was charged with offence of breaking into a building and committing a felony contrary to **Section 306(a)** of the **Penal Code** through ***Marimanti Senior Principal Magistrate's Court Criminal Case No. 214 of 2018.*** He also faced an alternative charge of handling suspected stolen goods contrary to **Section 322(2)** of the **Penal Code**. He was however convicted of the main charge after trial and sentenced to serve 7 years imprisonment.

2. The Appellant was aggrieved against both conviction and sentence and appealed to this court raising the following grounds namely:-

- i) That the learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced had irregularities and malpractices.***
- ii) That the evidence tendered were inconsistent and uncollaborating***
- iii) The trial magistrate failed to note that he was framed.***
- iv) That the trial court failed to factor in mitigating factors in sentencing him.***
- v) That the sentence meted out against him was too harsh.***
- vi) That his defence was rejected without cogent reasons.***

3. Before I delve into the grounds raised in this appeal, it is imperative that I take a look at the evidence tendered against the Appellant at the trial. The appellant was charged with one Amos Mwenda Njeru, a minor and co accused who was later discharged. Briefly the facts or evidence presented indicated that the complainant's (Elphas Gitonga (PW1) shop was broken into on 4th April 2018 during the night and an assortment of goods in the shop got stolen. Later the goods were recovered in a house which the Appellant had leased and a bush nearby. Prosecution's witnesses PW2, PW3, PW4 and PW5 all testified that some of the assorted stolen items were found in the house the Appellant rented while others were in a bush near where we resided.

4. When placed in his defence, the Appellant denied that some items were recovered in his home and insisted that all were recovered in a bush. He defended himself that he was framed simply because he had been jailed before.

5. The trial court in evaluating the circumstantial evidence found that the doctrine of recent possession applied because the stolen goods were found in his house 15th April 2018 after being stolen on the night of 4th April 2018.

6. In his written submissions the Appellant contends that the prosecution's case was not proved beyond reasonable doubt as required by law.

7. The Appellant contends that he was arrested in a different place from where the stolen goods were recovered. He claims that he was arrested with other suspects who were later released.

8. He claims that the police arrested him only because he was an ex-convict and that he was fed with that information by members of the public who singly suspect him, because of his criminal record or past.

9. The Appellant submits that the prosecution's witnesses contradicted themselves with others stating that all the stolen goods were found in a thicket while others stated that some were recovered in a bush and other items recovered in the house. He contends that the inconsistency affected the credibility of the prosecution's witnesses.

10. He further contends that some witnesses who testified were added by the complainant after he had testified. He accuses him for planning to implicate him by choosing items produced in court as his goods when the same were not.

11. The Appellant further faults the prosecution for not producing him in court within 24 hours. This ground has however been raised in written submissions as an additional ground without leave of this court which is improper. Furthermore even if the ground had been raised, I would still have found it improper because the Appellant is at liberty to take a separate legal action if he has reasons to believe that his constitutional rights were infringed by the police. He cannot bring up the issue of breach of his constitutional right in this appeal unless he is saying that the same impacted on his right to a fair trial and that certainly is not the case here.

12. The Respondent through the Office of Director of Public Prosecution has opposed this appeal. The Respondent avers that the evidence adduced against the Appellant at the trial was obtained regularly and legally. The Respondent points out that the Appellant never pointed out any malpractice during trial or cross examine the investigating officer on any irregularity on the evidence tendered.

13. The State/Respondent submits that the evidence tendered against the Appellant was clear, consistent and well collaborated. It contends that the prosecution's witnesses were unshaken during cross-examination and added that the Appellant did not give a satisfactory answer as to how he came into possession of the stolen goods. The State further points out that the Appellant did not call any witness to support his unsworn statement in defence.

14. On sentence, the State submits that the trial court took into consideration mitigation and as well as a aggravating factors which was the undeniable fact that the Appellant was a repeat offender after having been convicted of a similar offence in the past. The State has justified the sentence meted against him submitting that the long sentence was necessary to reform him.

15. The Respondent has averred that the Appellant's defence was considered and found wanting because the unsworn defence carries little probative value and that the Appellant never offered any credible account to exonerate himself.

16. This court has considered this appeal and the response made by the State. The Appellant was as observed above charged with the offence of house breaking and stealing therefrom contrary to **Section 306(a)** of the **Penal Code**. The prosecution's case mainly hinged on circumstantial evidence because the complaint stated that he locked up his shop on 4th April 2018 and the following day he realized that it had been broken into and several assorted items listed on the charge sheet stolen. There was no eye witness to the incident but a few days thereafter on 15th April 2018, some of the stolen goods were discovered, some hidden in a thicket near the house that the Appellant had leased and upon a further search more stolen goods belonging to the complainant were discovered hidden in his house.

17. The doctrine of recent possession applied and the trial court was right to apply the doctrine against the Appellant. When he was put on his defence, he gave unsworn statement claiming that nothing was recovered from his house. However when such a statement is weighed against the evidence by the prosecution's witnesses, PW1 PW2, PW3, PW4 and PW5 one can clearly see that the prosecution's evidence was overwhelming because the witnesses were clear candid and unshaken during cross-examination by the Appellant.

The complainant's stolen items were easily identified by the complainant who had earlier reported to the Area Assistant Chief (PW4) about the incident. The circumstantial evidence relied upon by the prosecution was incapable of any other inference other than the guilt of the Appellant. When given a chance to defend himself he gave unsworn statement and failed to exonerate himself on the stolen goods found in his house and in a nearby bush. This court finds that contrary to Appellant's assertions that his defence was not considered, the trial court duly considered his defence and gave it its due weight. The evidence against the Appellant was overwhelming. It proved beyond doubt that the Appellant was guilty as charged.

18. The Appellant has submitted that the sentence was harsh. I have noted from **Section 306(a) Penal Code** that that the sanction prescribed is 7 years imprisonment. The trial court exercised its discretion and factored in the aggravating factors particularly the conceded fact that the Appellant had previously been convicted at ***Shanzu Law Courts in Criminal Case No.601 of 2016***. It was clear to the trial court that because the Appellant was a habitual offender he needed sufficient period in a correctional facility to reform and transform. I do not find any reason to interfere with the sentence meted out against the Appellant given the above circumstances.

In the end this court finds no merit in this appeal. The same is dismissed both the conviction and sentence are upheld.

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

R.K. LIMO

JUDGE

27/7/2020

Judgment dated, signed and delivered in open court in presence of Momanyi for Respondent and Appellant in person.

R. K. LIMO

JUDGE

27/7/2020