REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 14 OF 2019

SIMON WANJALA...……………...…………………………... APPELLANT

VERSUS

REPUBLIC ……………………..……………………………...…RESPONDENT

(***Being appeal from the judgement of Hon G. A. Olimo, RM, delivered on 24/1/2019 in Criminal Case No 359 of 2018 in the Senior Resident Magistrate's court at Kimilili, R.v. 1. Simon Wanjala 2. Richard Kweyu***)

J U D G E M E N T

1. The appellant has appealed against his conviction and sentence of seven (7) years imprisonment in respect of the offences of burglary (count 1) and stealing (count 2) contrary to section 304 (2) and 279 (b) of Penal Code (Cap 63) Laws of Kenya, respectively.

2. The state has supported both the conviction and sentence.

3. In this court the appellant has raised six (6) grounds of appeal in his petition.

4. In ground 1, he has stated that he did not plead guilty, which is an unchallengeable fact.

5. In ground 2 the appellant has faulted the trial court for convicting him in the absence of proof beyond reasonable doubt bearing in mind that there was no link between him and the exhibits that were produced in court.

6. In regard to ground 2, the evidence of Tobias Barasa Munyundo (Pw 2) is that on 22/4/2018 he was in a market taking care of his cattle. A group of people arrived who stated that there were stolen items in a certain house in the custody of Richard Kweyu. Pw 2 reported the matter to the AP camp. The AP authorized Pw 2 to look for Richard Kweyu and arrest him. Pw 2 did so and took Richard Kweyu to the AP camp. Richard Kweyu said the items were in the house of the appellant. Pw 2 recovered the GDL woofer from the house of the appellant. The other stolen items were recovered in the house of the appellant. The recovered items were taken to the police station. The appellant used to do business in Kimilili and that Richard Kweyu was his friend. Pw 2 who was a community policing officer also arrested the appellant and took him to the AP camp.

7. The appellant was re-arrested from the AP camp by the police. Pw 2 recovered the GLD woofer from the place of the appellant in his presence. It was also the evidence of Pw 2 that the owner of the woofer produced a receipt. Finally, Pw 2 testified that the neighbours did not testify, because they refused to record statements for fear of being attacked by the appellant.

8. In addition to the evidence of Pw 2, there is the evidence of Lydia Nasimiyu Ndarako (Pw 1), who is the complainant. Pw 1 testified that she met the appellant at the police station for the first time. It was the evidence of Pw 1 that on 21/4/2018 she was asleep in her house. She heard noise in her house. PW 1 was so scared that she decided to keep silent. She then crawled and went to the bed room. She closed the door and remained there until morning.

9. In the morning at 6.00 am she went to the sitting room and found her items stolen, among them, the woofer. She also found that her window was broken including the metallic window grills. She reported the matter at the police station.

10. On 22/4/2013 she was called to the police station, where she identified her woofer. She did not find her other items such as the phone, Go TV, DVD and the decoder. The woofer was SNG/D816.

11. PW 1 identified the woofer, which was produced as exhibit 1 and the receipt for it was produced as exhibit 3. In a further cross examination of the complainant (Pw 1), PW 1 confirmed that the receipt produced in court was for the woofer GLD from Wlimax Electronics and the complainant confirmed that she was Lydia Nasimiyu Ndemaki. She also confirmed that the figure G816 was on the carton of the woofer, which figure had been interfered with.

12. Furthermore, there is the evidence of NO. 95616 PC George Kusumba (Pw 3). Pw 3 took over the case on 1/10/2018 from PC Biwott, who had been transferred. Pw 3 bonded PC Ismael, who recovered the stolen items and arrested the appellant. In a further cross examination of the complainant (Pw 1), PW 1 confirmed that the receipt produced in court was for a different woofer.

13. Upon being placed on his defence, the appellant elected to testify on oath. The appellant testified that he was a boda boda rider. He further testified that on 22/4/2018, he was at Kapsokwony stage. While there he got a call from an AP chief that he was wanted at the police station. He went there and was detained and thereafter was charged in court for reasons which he could not understood.

14. In cross examination, the appellant admitted that he did not avail receipts to show that the woofer was his.

15. This is a first appeal. As a first appeal court, I am required to re-assess the entire evidence adduced at trial and make my own independent findings. I am also requited to consider the submissions of both parties. In doing so, I am also required to defer to findings of fact of the trial court based on the demeanour of witnesses, since the trial court had the advantage of seeing and hearing those witness testify. I have done so. As a result, I find as credible the evidence of Tobias Barasa Munyundo (Pw 2) that on 22/4/2018, he went to the place of the appellant and recovered the woofer (exhibit 3), which was the property of the complainant. In law therefore, the evidentially burden of proof shifts to the appellant to explain his possession of the said stolen woofer.

16. I find that the appellant has not offered any explanation in respect of that possession.

17. In his defence evidence, the appellant testified that on 22/4/2018, he was at Kapsokwony stage. While there the appellant got a call from the chief that he was wanted at the police station. He went there and was detained and was subsequently charged in court for reasons which he could not understood.

18. The law in respect of possession of recently stolen property was clearly set out by the Court of Appeal in *Erick Otieno Arum v Republic (Kisumu registry), Criminal Appeal No. 85 of 2005 [2006] e-KLR,* in which that court pronounced itself in the following terms:

19. "*In our view, before a court of law can rely on the doctrine of recent possession of as a basis of conviction in a criminal case, the possession must be positively proved in other words, there must be positive proof, first, that the property was found with the suspect, secondly, that the property is positively the property of the complainant, thirdly, that the property was stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.*"

20. In respect of possession of the woofer, the appellant admitted that he did not avail receipts to show that the woofer was his. I find that the doctrine of recent possessions as a basis of conviction as laid out in *Erick Otieno Arum v Republic (Kisumu registry), supra*, has been complied with. I therefore find that the appellant has failed to explain his possession of the woofer that had been recently stolen on 21/4/2018. The recovery of the woofer was within one day after it was stolen.

21. In the circumstances, I find that there is no merit in ground 1, which I hereby dismiss.

22. In ground 3 the appellant has faulted the trial court failing to find that the arresting officer did not testify and there was no inventory of the goods that were stolen. Additionally, the appellant has faulted the trial court for failing to appreciate that the police did not take photographs and also that they did not produce the record of the stolen items from their police note book. This he argues, would have provided supporting evidence. In this regard, I find as credible the evidence of Tobias Barasa Munyundo (Pw 2) that on 22/4/2018, he arrested the appellant and took him to the AP camp from where he was re-arrested by the police and charged with this offence.

23. I find that the police did not provide evidence that they prepared an inventory of the stolen items. It is clear from the evidence of NO. 95616 PC George Kusumba (Pw 3), that PC Ismael recovered the stolen goods, and arrested the appellant, but he did not testify. I find that these errors are curable in terms of section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

24. I therefore find no merit in ground 3, which I hereby dismiss.

25. In ground 4 the appellant has faulted the trial court for convicting him on discredited and unreliable evidence. After re-assessing the evidence I find that the appellant was convicted on credible and cogent evidence. This ground lacks merit and is hereby dismissed.

26. In ground 5 the appellant has faulted the trial court for convicting him in the absence of any eye witness evidence and for doing so when crucial witnesses were not called to testify. I find that the appellant was convicted on circumstantial evidence. In law, an accused may be convicted on eye witness evidence technically called direct evidence or circumstantial evidence. Circumstantial evidence is as good as eye witness evidence.

27. Furthermore, I find as credible the evidence of Tobias Barasa Munyundo (Pw 2) that neighbours did not testify, because they refused to record statements for fear of being attacked by the appellant. The appellant did not cross Pw 2 in this regard. This explains why some of those witnesses failed to testify. It is not that the prosecution deliberately failed to call those witnesses.

28. However, the prosecution should have called the police officer who recovered the stolen items. According to the evidence of NO. 95616 PC George Kusumba (Pw 3), it is PC Ismael who recovered the stolen goods and who also arrested the appellant. PC Ismael did not testify. There is also no evidence that he prepared an inventory of the stolen items. This was an important witness who should have testified. The failure of the prosecution to avail PC Ismael is not fatal to the conviction. The reason being that the complainant testified to the list of her items that were stolen.

29. 30.Furthermore, Tobias Barasa Munyundo (Pw 2) testified that the stolen goods were recovered from the appellant's place and in his presence. It therefore follows that the appellant was not in way prejudiced for lack of the preparation of an inventory. I therefore dismiss the appellant's appeal against conviction.

30. I have also considered the submissions of the appellant. I find that he only has raised one new matter that is not contained in his petition of appeal. This is in relation to the two learned magistrates, who tried him. The first learned magistrate (Hon. C.Menya) heard all the evidence, prepared and proceeded to deliver judgement. The second succeeded learned magistrate (Hon. G.A. Olimo) completed the trial process by sentencing the appellant to seven years' imprisonment**.**

31. I have considered the foregoing issue. I find that the issue raised is one of law and not evidence**.** The provisions of section 200 (3) of the Criminal Procedure Code (Cap 75) Laws of Kenya, do not make provision for the succeeding magistrate to sentence the convicted person. Section 200(3) of the Criminal Procedure Code directs that: *"where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."* It is important to bear in mind that magisterial subordinate courts do not have inherent powers in criminal matters, which could have enabled the second succeeding magistrate to sentence the appellant. I am aware that the subordinate magisterial courts and the High Court are vested with inherent powers by section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya; whose provision provide as follows: "*Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends or justice or to prevent abuse of the process of the court."* There are no such similar provisions in the Criminal Procedure Code. The reason for this striking difference lies in the fact that the subordinate magisterial courts are courts of limited jurisdiction and the impact of the jury, which applied in this country until 1963, when it was abolished. It therefore follows that the succeeding magistrate lacked jurisdiction to sentence the appellant. I therefore set aside the order sentencing the appellant.

32. In the interests of the expeditious determination of the instant appeal, I hereby proceed to sentence the appellant. I have considered the mitigation of the appellant that he has a young family and pleads for lenience.

33. I have also taken into account that the appellant is a repeat offender.

34. I have further taken into account that the stolen items were recovered.

35. Additionally, I have also taken into account the period the appellant has been in custody in terms of section 333 (2) of the Criminal Procedure Code. The trial court failed to into account the foregoing matters in sentencing the appellant. I am therefore entitled to interfere with the sentencing discretion of the trial court.

36. After taking into account all the foregoing matters, I hereby reduce the sentence of seven years to three years' imprisonment in both counts 1 and 2 which will run concurrently pursuant to this court's powers in terms of section 354 (3) (a)(ii) of the Criminal Procedure Code. This sentence will begin to run from the date of this judgement.

37. There are two matters of public concern that merit attention. The first is in relation to the taking over of a matter that is under investigation by a second succeeding police officer. It has come to my notice that in many appeals that the second succeeding investigating officer assumes the role of the original investigating officer in terms of testifying. In the instant appeal, in terms of the evidence of Pw 3, the first investigation officer was PC Biwott, who had been transferred. Pw 3 took over the investigations from PC Biwott. Only PC Biwott can testify as to what he did or did not do in the case. His testimony cannot be transferred to his successor in office. For this reason, the role of the police officer taking over the case is limited to safe keeping of the exhibits and the original police file; since prosecutor has or should have a duplicate of the police file. It is also his duty to avail the investigation file to the prosecutor when the prosecution is going on in court. Even if he has read the investigation file, he cannot testify as to what the witnesses told the original investigating officer. Any attempt to do so will amount to his testimony being declared to be inadmissible hearsay.

38. It is for this reason that when the investigating officer (Pw3) was testifying in cross examination by this appellant in respect of the receipt, he testified that: "*I am succeeding PC Biwott who was transferred.*

39. *Court- I note that the receipt availed is in the name of Simon Wanjala. I shall order that PC Biwott attends court to clarify the issues."*

40. I therefore find that the foregoing practice should be discouraged if not stopped in the interests of effective presentation of evidence in court.

41. In ground 6 the appellant has faulted the trial court in relying on the weakness of the evidence to convict him. I have perused the judgement of the trial court. As a result, I find that the appellant was convicted on the basis that the defence evidence was not credible. I also find on my own re-assessment that the appellant was convicted on circumstantial evidence which exclusively pointed to him as the burglar and thief.

42. In the circumstances, I find no merit in the defence evidence, which I hereby dismiss for lacking a ring of truth.

43. A copy of this judgement should be served upon the Offices of the Director of Public Prosecutions (DPP) and the Attorney General by the Deputy Registrar of this court to consider amending section 200 (3) of the Criminal Procedures Code due to the lacuna in that section as pointed out in paragraph 31 of this judgement.

44. In the premises, the appeal fails and is hereby dismissed in respect of conviction. The sentence of seven years' imprisonment is hereby reduced to three years' imprisonment in both counts 1 and 2, which will run concurrently. This sentence will begin to run from the date of this judgement.

Judgment signed, dated and delivered at Narok through video link this 25th day of August 2020 in the presence of the appellant and Ms. Nyakibia for the Respondent.

J. M. BWONWONG'A.

J U D G E

25/08/2020.