



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 81 OF 2018

JOEL ONGETA ONDIEKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of the PM Hon. C.R.C (RM)

at Ogembo Court delivered on the 23rd of September 2015)

JUDGMENT

1. The appellant Joel Ongeta Ondieki alias Bernard and 2 others Duke Swanya Ogendi (2nd accused) and Bernard Saudi Unzi alias Waingooi (3rd accused) were charged with the offence of burglary and stealing contrary to section 304 (2) as read with section 279(b) of the Penal Code. The particulars of this offence were that, on the nights of 29th and 30th July 2013 at Nyamache township in Nyamache District within Kisii County, the appellant (and his co-accused's) jointly with others not before the court, broke and entered the dwelling house of P/NO 2008114413 APC Enock Momanyi with intent to steal therein and did steal (attached) the property of the said APC Enock Momanyi being of total value Kshs. 27,000/-. The appellant and the 2 others were also charged with the offence of, being in possession of public stores contrary to section 324 (3) of the Penal Code. The particulars of the charge were that, on the 20th day of August 2013 at Nyangwu market in Nyamache District within Kisii County, jointly with others not before court had in their possession public stores namely (1) One barret with an Administration police badge, (2) One green pullover, (3) One ceremonial jacket with Administration Police buttons, (4) One maroon lanyard, (5) One Jungle jacket, (6) One brown rain coat with personal number 2008114413 of APC ENOCK MOMANYI the property of a disciplined force namely Administration Police such property being reasonable suspected or having being stolen or unlawfully obtained.
2. The appellant pleaded not guilty and the matter was heard. By the time the case was being concluded only the appellant was left in the matter. The 2nd accused was discharged from under section 87 (a) and the 3rd accused escaped from lawful custody.
3. The appellant's grounds of appeal can be summarised as follows; that the prosecution evidence was flawed, prosecution did not prove their case beyond reasonable doubt, his defence was rejected without cogent reasons. The appellant filed written submissions which he relied on.
4. Mr. Otieno for the Respondent conceded to the appeal. He submitted that the trial was started by one magistrate and then taken over by another, by then 2 witnesses had testified. That when the appellant was informed of his right at the time the magistrate took over the trial court ruled that the reasons given were not compelling enough to have the witnesses recalled. That this was prejudicial to the appellant as no reasons were given as to why the police officers could not be recalled. That there is no provision that the reasons must be stated and be compelling. It was further submitted that there was no connection between the items stolen and the complainant. That it was not explained how the appellant was arrested and how the items were in his possession. That the conviction was unsafe.
5. As the first appellate court, I am required to re-evaluate the evidence independently and reach my own conclusion as to whether to uphold the conviction and sentence. I must bear in mind that I neither heard nor saw the witnesses testify (*see Okeno v Republic [1972] EA 32*).
6. Pw1 APC Enock Momanyi has rented a house from Pw3 Wilson Nyambega. On the 20/7/2013 he was away at his home in Keumbu. On the 30th July 2013 Pw3 noticed that Pw1's house was open. The padlock was open. He asked Pw1's colleague to call him. Pw1 testified that he was at his home in Keumbu when he was called by his colleague Adan that his house had been broken into. He went to his house and found things strewn all over. The items stolen were; a TV, sayona hoofer, raincoat, jacket, sweater, 2 shirts, lanyard, cap with badge, ceremonial dress, his uniform, bed sheets, 2 kgs of sugar. He reported the theft at Nyangusu police station. He was later informed by PC Macharia that the 1st and 2nd accused were arrested. He went to police station and identified a rain coat bearing no 2008114413, jacket, sweater and cap. Pw1 nor Pw3 did not know the accused persons who had been arrested. Pw2 No. 92233 PC Joel Macharia testified that on the 20/8/2013 whilst at the police station they were called and informed that members of the community were had arrested some suspects

who were about to be lynched by the public. They proceeded to Nyangusu to the plot of Pw3 and found 3 people arrested over a robbery case and some things were recovered. He identified the uniform of Pw1. Other items recovered were a green sweater, a maroon lanyard and a cap with AP badge. They arrested the 3 and took them to the Nyangusu police station. He confirmed that Pw1 had made a report about his stolen items vide OB no. 13 of 1/8/2013. Pw1 was called and identified the recovered items.

7. The appellant in his defence testified that on the 22/8/2013 he left his house in Mogonga to go look for groundnuts in Nyangusu. He sells groundnuts. Whilst at Nyangusu he decided to repair shoes, whilst seated 3 people came. They asked him where his home is he told them in Nyamira and that he sells groundnuts. The persons asked him to accompany them. They went to Nyangusu police station. He found people had been arrested. He was asked if he knew them he said he did not. They started beating him and told him to admit that he knew them. He was put in the cells. His fingerprints were taken and he was brought to court and charged with robbery. He was taken back to Nyangusu and the case was added. He did the robbery case. The uniforms are the same in the robbery case. In the robbery case people were released. He does not know this case. This case had 2 accused persons.

8. The first issue for determination is whether the trial was flawed. The case began before Hon. D. Ogola who heard 2 witnesses Pw1 and Pw2. The matter was adjourned to call the remaining witnesses. On the 29.8.2014 when the matter was taken over by Hon. Ateya section 200 was explained to the appellant. The appellant requested that the witnesses be recalled because he did not ask them some question. The trial magistrate responded as follows, "**The reasons given by the accuseds are not compelling enough to have the witnesses who have testified to be recalled. Matter to proceed from where it had reached**".

Section 200 (3) provides as follows;

(3) 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 rights:

This section does not state that there must be compelling reasons. The accused makes the request after being informed of the provisions of section 200 (3) and the magistrate considers the application and makes a decision that should not be prejudicial to the accused. The record does not show that the prosecution informed the court that the witnesses could not be found. The appellant sought to have the witnesses back to ask some questions. The reason given by the appellant was reasonable and should have been granted. Failure to do so was prejudicial to the appellant as he was denied a right to have the witnesses recalled for further cross examination on the evidence previously adduced before another magistrate. The trial was not over and there was no indication that the witnesses were not available.

9. On whether the prosecution case was proved beyond reasonable doubt I find as follows; Pw1 did not see the person who broke into his house. Pw2 who was called to arrest the appellant found him under arrest about to be lynched. The persons who arrested the appellant were never called to testify nor was the landlord of the premises where the goods were recovered. He could have shed light on whether the appellant was his tenant and was in occupation of the room where the goods were recovered. There was a gap in the prosecution evidence and the conviction on the evidence adduced was unsafe. I therefore quash the conviction and sentence. The appellant is at liberty to go unless lawfully held.

Dated signed and delivered at Kisii on the 25th day of January 2019.

R.E.OUGO

JUDGE

In the presence of;

Appellant -Joel Ongeta Ondieki In person

Mr. Otieno for the State/Respondent

Rael Court clerk