



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 22 OF 2018

REUBEN MWITI MUTURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Resident Magistrate HON. S.M. NYAGA at Marimanti in the Principal Magistrate's Court Criminal Case No. 9 of 2018 dated 27th June, 2017.)

J U D G M E N T

1. The Appellant, **REUBEN MWITI MUTURI**, was charged with the offence of Shop Breaking and Stealing contrary to **Section 306(a)** of the **Penal Code** vide **Marimanti Principal Magistrate's Court Criminal Case No. 9/2017**. The particulars as per the charge sheet presented at the trial court were that on 28th August, 2016 at Nkondi Market Tharaka South, the Appellant jointly with his Co-accused broke into a shop and stole one spade, one wristwatch and cash of Kshs.40,000/- the property of Lydia Ndega Rumuri the complainant.

2. The Appellant with his Co-accused did denied committing the offence but after trial the Appellant was found guilty, convicted and sentenced to serve 7 years imprisonment.

3. The Appellant felt dissatisfied with both conviction and sentence and filed this appeal raising 6 grounds namely:-

(i) That he pleaded not guilty

(ii) That the trial magistrate erred by rejecting his defence contrary to section 169(1) of Criminal Procedure Code.

(iii) That the learned trial magistrate erred in law and fact by not observing that no exhibit was found in possession of the appellant during his arrest.

(iv) That the learned trial magistrate erred by not observing that proof of ownership of the wrist watch was lacking.

(v) That the learned magistrate erred by not considering that the police failed to arrest the persons alleged to have stolen the watch.

(vi) That the learned magistrate erred by not considering that the Appellant was held in police custody for 5 days being produced in court.

(vii) That the sentence handed to him is too harsh and contrary to Section 322 (2) of Penal Code.

4. In his written submissions, the Appellant has contended the exhibit relied on by the trial court was insufficient to found a conviction as the exhibit was surrendered to the complainant who thereafter marked the watch "L.N" on inside the strap of the wrist watch. The Appellant has submitted that the initials on the watch indicates that the watch belongs to the complainant and yet she told the court that the watch belonged to his son. In that regard, the Appellant contends that the complainant's evidence was unreliable.

5. The Appellant states that if given a chance he can produce his Identity Card, NSSF card and account details which shows that during the time of the alleged incident he was in Kajiado.

6. On sentence, the Appellant asserts that the trial court handed him maximum sentence without considering the mitigating circumstances. He has asked this court to consider his defence and mitigation.

7. The Respondent through Office of Director of Public Prosecution has opposed this appeal. The Respondent supports both the conviction and sentence. It has faulted the Appellant for canvassing new grounds without leave of this court contrary to **Section 350(2)** of the **Criminal Penal Code**. It is the Respondent's case that the prosecution adduced sufficient evidence to sustain the conviction and that the Co accused admitted to having been given the stolen watch by the Appellant as gift over Christmas.

8. The evidence tendered at the trial indicated that the complainant's shop was broken into on 28th August, 2016 at 10 am when she briefly stepped out to another nearby shop. She claimed that when she came back she found her rear door open and a bag containing Kshs.40,000/- stolen. She also found that several items including a spade, and a wristwatch had been stolen. She told the trial court that she reported the incident at the local AP Camp at Nkondi.

9. The complainant further testified that on 2nd January 2017, she found Alice Kambura Karugara, a Co-accused to the Appellant at the trial wearing the watch and upon questioning, she surrendered the watch to the complainant implicated the Appellant stating that it was gift from him. The Co-accused in her defence corroborated that evidence.

10. In his defence, the Appellant told the trial court that he was away at the material time of burglary as he was away in Kajiado and only returned on 11th October, 2016. He conceded that he gave the watch to the Co accused on 25th December, 2016 but denied that the same was stolen stating that he picked it from his brother's house and believed that the watch belonged to him.

11. The trial court found that the prosecution's case had been proved on account of doctrine of recent possession holding that the period from the time the complainant's shop was broken to the time the stolen items was recovered showed that the doctrine still applied.

12. This court has considered this appeal and the grounds upon which it has been brought. The Appellant appears convoluted in this appeal and even appeared so in his defence during trial.

13. On one hand he stated that the wristwatch belong to his brother who he did not call as a witness. On the other hand, he stated that when he came back home from Kajiado, he did not find his brother home and asked for leniency if he was to be convicted. The question posed is why did he ask for leniency when he had not been found guilty?. He stated that he found a watch on the table in his brother's house and took it but again when asked whether he had contacted his brother he stated that he last saw him in April 2014 and last spoke to him in June 2016. The trial court in my view was justified in concluding that the Appellant was evasive in his defence. The appellant was not forthright in his defence.

14. I have however looked at the nature of the charge as per the charge sheet and noted that the evidence tendered by the prosecution did not support the main charge upon which the Appellant was convicted. The Appellant was charged with House Breaking and Stealing contrary to **Section 306(a)** of the **Penal Code**. The court found the appellant guilty as charged.

15. Looking at the evidence tendered by the prosecution, the complainant (PW1) told the trial court;

"On 28th August, 2016 I locked my shop and left for another shop. I did not use a padlock. On returning I found the door intact but the rear door had one hinge open."

The above is all the evidence relied on by the prosecution on the main charge. There is no other prosecuting witness who gave evidence of breaking of the door or anything of that sort. P.C John Mbale (PW3) the Investigating Officer told the trial court that he received a report that the complainant had stepped away from his shop and on coming back she realized some items had been stolen. There was no report of breaking in because had the complainant locked her shop and found the padlock or the door broken then, there would be evidence to support the charge.

16. In the absence of evidence to support the main charge, this court finds that the trial court fell into error to conclude as it did that the prosecution had proved its case on account of the doctrine of recent possession on the basis of defective charge. Although this ground was not raised by the Appellant, this court is not precluded from looking into the case in totality for the interest of justice.

17. This court finds the alternative charge could have perhaps have been a safer conviction given the evidence tendered by the prosecution and the defence.

18. There is no dispute that a wrist watch belonging to the complainant was found with the Appellant's female friend who told the trial court in defence that she was given a watch as a Christmas present by his boyfriend the Appellant herein. The Appellant conceded to those facts and looking at the legal definition of the word '**possession**' it is apparent that the Appellant was found in constructive possession of the stolen item. Possession is defined under **Section 4** of **Penal Code** as;

"to be in possession" or "have in possession" includes not only having one's own personal possession but also knowingly having anything in the actual possession or in custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use of benefit of oneself or of any other person....."

Going by the evidence placed before the trial court, I have no doubt in my mind that the Appellant set out to please his girlfriend, the Co-accused at the trial and pleasing he did as the lady told the trial court that she was over the moon with the attendant celebrations that took place thereafter. The only problem is that the lady knew very little regarding how the watch was obtained. The Appellant could not give a good account on how he came into possession of the stolen item and though he blamed his brother. I find his evidence that he last saw him in 2014 to be inconsistent to how he then came into the possession of the stolen watch. In my view the absence of proper explanation on how a person came into possession of a stolen is sufficient to prove that he is accountable to being in possession of the stolen item and hence culpability in the offence of handling stolen property contrary to **Section 322(2)** of the **Penal Code**.

19. It is on that basis that this court finds though the Appellant was not guilty of the main charge for the aforesaid reasons, there was sufficient evidence to find him guilty on the alternative charge of handling stolen goods because he was found to be in constructive possession of the stolen watch. The watch was successfully traced to him and he admitted as much.

20. In the end I find merit in this appeal only to the extent that the conviction on the main charge of Shop Breaking and Stealing contrary to **Section 306(a)** of the **Penal Code** was erroneous for the reasons noted above. The conviction is therefore reversed and set aside. In its place I enter conviction on the alternative charge of handling stolen property contrary to **Section 322 (2)** of the **Penal Code** and having considered the mitigating factors and the fact that the Appellant has served almost 1 1/2 years I will sentence him to the period he has already served as he has most probably learnt his lessons by now. I order that he be released forthwith unless lawfully held.

Dated, signed and delivered at Chuka this 27th day of February, 2019.

R.K. LIMO

JUDGE

27/2/2019

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

R.K. LIMO

JUDGE

27/2/2019