



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 152 OF 2017

DAVID JUMA TATA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by F.M. Nyakundi , RM, in Mumias SPMC Criminal Case No. 296 of 2017 dated 5/12/2017)

J U D G M E N T

1.The appellant herein was charged in count 1 with breaking into a building and committing a felony contrary to section 306(a) of the Penal Code and in count 2 with having suspected stolen property contrary to section 323 as read with section 36 of Penal Code. He was found guilty of both counts and sentenced to serve 4 years imprisonment. He was dissatisfied with the conviction and the sentence and filed this appeal. The grounds of appeal are:-

1. That the learned trial magistrate gravely erred in law and fact in presiding over an unfair trial.
2. That the learned trial magistrate gravely erred in law and fact in convicting the appellant as charged in the absence of any evidence of identification.
3. That the learned trial magistrate gravely misdirected himself in law and facts in convicting the appellant in the absence of any proof of breaking, including but not limited to photographic evidence.
4. That the learned trial magistrate gravely erred in law and fact in convicting and sentencing the appellant in light of glaring inconsistencies, contradictions , doubts and over presumptions.
5. That the learned trial magistrate gravely erred in law and fact in failing to inquire into the absence of the evidence of the witness who dealt with PW 3.
6. That the learned trial magistrate gravely erred in law and fact in convicting the appellant against the weight of evidence and shifting the burden of proof on the appellant.

2. The appeal was opposed by the state who entirely relied on the evidence adduced before the lower court.

Case for prosecution

3. The particulars of the charges against the appellant in count 1 were that on the night of 13th and 14th March, 2017 at unknown time at Eluanda village, Matawa sub- location in Mumias sub – county jointly with others not before court broke and entered into a building namely store of Abdul Rajab Ochola and committed therein a felony namely theft of one power saw machine , 10 hens and a pair of gumboots all valued at Ksh. 74,900/= the property of Abdul Rajab Ochola (herein referred to as the complainant).

4. The particulars of the charge in count 2 were that on the 19th March 2017 at 2 pm at Shibale market in Mumias Sub- County within Kakamega County having been detained by No. 49032 PC Patrick Mwakideu and No. 86077 CPL Hussein as a result the exercise of powers conferred by section 26 of the Criminal procedure Code had in his possession items (as per attached list), reasonably suspected to have been stolen or unlawfully obtained.

5. The case for the prosecution was that on the morning of 14/3/2017, the complainant in count 1 woke up and found his chicken house broken into and 10 hens and a power saw stolen from therein. He reported to the police. Bushir Abdala Suruba PW3 was arrested. He said that the chicken were sold to him by a certain person and that on the same day he sold the hens to another person. Later he identified the person who had sold him the hens as the appellant. Three of the hens were recovered from an old man. The old man did not testify in the case. The appellant was arrested. Policemen went to his house where they found goods that were suspected to be stolen. The appellant took policemen to the place he said he had sold the power saw which was recovered. The person who had bought it did not testify in the case. The appellant was charged with the offences. During the hearing photographs of the power saw, the hens and list of suspected property were produced as exhibits 1-3 respectively.

Defence case

6. When placed to his defence, the appellant stated that he comes from Harambee. That on the 15/3/2017, at 10 am he was at the market when his wife called him over his mobile phone and informed him that some people had broken the door to his house and taken away his property. He returned home at 1 pm and found the door to his house broken. He went to the police station where he found his wife. He was arrested. They took him to his house where they collected some items. He was charged.

Submissions

7. The appellant submitted that the complainant in count 1 did not produce any receipt to prove that the power saw belonged to him. Further that PW3 testified that he bought the hen from a woman and not from the appellant. That there were contradictions in the prosecution evidence. Therefore that the evidence presented before the trial court was inadequate to justify a conviction.

Analysis and determination

8. This is a first appeal. The duty of a first appellate court was stated in **Kiilu & Another Vs Republic(2005) 1KLR 174** where the Court of Appeal stated that:

“ An appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision in the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeking the witnesses.”

9. It was the evidence of the complainant in count 1 that 3 hens were found with an old man. The said old man did not testify in the case. There was then no evidence that the three hens were found with the said old man.

10. PW3 stated that the hens were sold to him by the appellant and a certain woman. That he negotiated the price with the woman but that it is the appellant who received the money from him. That the appellant gave him his mobile phone number. The said woman did not testify in the case.

11. PW3 admitted that he handled the stolen hens. He was therefore to be treated as an accomplice in the case. An accomplice is a person unworthy of credit unless his evidence is corroborated in some material particulars. The trial magistrate in the case just relied on the evidence of PW3 that he bought the 3 hens from the appellant without considering whether PW3 was an accomplice in the case. The question was whether there was evidence to corroborate the evidence of PW3 that he bought the hens from the appellant.

12. The complainant in count 1 (PW1), the chairman of community policing PW2 and the investigating officer PW5 all testified that the appellant told them that he had sold the power-saw. That he took them to the place he had sold it and they recovered it. Pw2 said that the appellant told them that the person he had sold the power saw to was called Meja. The said person did not testify in the case.

13. The evidence against the appellant on the recovery of the power- saw was based on his confession that he had stolen the power saw and sold it to a person called Meja. Section 25 of the Evidence Act defines a confession as follows:-

“ A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence”

Section 25 A(1) states as follows:

confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.

14. The admission by the appellant that he stole the power saw and sold it to Meja was a confession that was not recorded in accordance with section 25A of the Evidence Act. The evidence was thereby inadmissible. There was no explanation as to why the person called Meja did not testify in the case

though the trial magistrate in his judgment stated that Meja had signed an inventory of goods recovered in his house. Without the evidence of Meja there was no evidence that the appellant is the one who had sold the power saw to the said Meja. The trial magistrate wrongly convicted the appellant on the basis of a confession that was inadmissible in court as evidence. It is Meja who was found with the stolen power – saw. He was therefore to be treated as an accomplice in the case. He is the one who could explain how he came into the possession of the power saw. He did not testify in the case neither was he charged over the offence. He was the prime suspect in the theft.

15. The evidence that the appellant sold the hens to PW3 was not corroborated by material evidence. Pw3 could be the one who stole the hens. In the premises the prosecution had not proved that the appellant stole the property of the complainant in count 1. The appellant was wrongly convicted of committing the offence.

16. The charge in count 2 was having suspected stolen property contrary to section 323 as read with section 36 of the penal code. Section 323 of the Penal Code provides that:-

“Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.

Section 26(1) of the Criminal Procedure Code provides that:-

(1) A police officer, or other person authorized in writing in that behalf by the Inspector-General of the National Police Service, may stop, search and detain—

(a)

(b).....

(c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

17. The conditions precedent to a finding of guilty under section 323 of the penal code as read with section 26(1) of the Criminal Procedure Code were set out in the case of **Kiondo Hamisi Vs Republic(1963) E.A 209** where the court stated that the prosecution must establish:

1. That the accused was, in fact, detained in the exercise of powers conferred by the relevant section of the Criminal Procedure Code;

2. That at the time when he was detained, the accused was in the course of a journey;

3. That at the time when he was detained, the accused had in his possession a particular thing;

4. That the thing was of such a nature, or the circumstances were such that it might reasonably be suspected of having been stolen or unlawfully obtained; and

5. That the accused refused to give an account to the court of how he came by the thing, or gave an account which was improbable as to be reasonable, or gave an account which was rebutted by the prosecution.

18. In the case before the trial court the appellant was not arrested in the course of journey. It is not him who was found with the suspected stolen goods. There was no evidence of conveying suspected stolen goods. The ingredients of the offence under section 323 of the Penal Code were not met. The appellant was therefore wrongly convicted of the offence.

19. The suspected stolen goods as per the list attached to the charge sheet were- one mattress, 7 plastic chairs(3 blue and 4 green in colour labelled E.V .ER), 3 wall clocks, 2 blankets , 16 curtains, 2 bags, one tape measure, 11 bedsheets, 64 table covers and one pairs robot boots.

20. The investigating officer did not explain why he suspected that the said goods were stolen. Some of the goods are ordinary household goods. There was no evidence why the goods were being said to be suspected stolen goods.

21. The appellant was convicted of two counts. The sentence imposed on him of 4 years imprisonment was silent as to whether it was for count 1 or count 2. It is a principle of sentencing that where there are more counts than one, sentence must be imposed on each count that an accused has been convicted of. The trial magistrate did not comply with this.

22. The latter notwithstanding, it is the finding of this court that the charges against the appellant were not proved beyond reasonable doubt. The conviction in the two counts was untenable. The conviction is thereby quashed and the sentence set aside. The appellant is set at liberty

forthwith unless lawfully held.

Delivered, dated and signed in open Court at Kakamega this 20th February, 2019.

J.NJAGI

JUDGE

In the presence of :

Mr. Ng'etichfor state

Appellant:.....present

Court Assistant.....George

14 days Right of Appeal.