



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 125 OF 2017

ISAAC LIKARE INGOSI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 661 of 2015 delivered on the 23rd day of October, 2015 by Hon. E. Kigen, RM]

JUDGMENT

1. The appellant was convicted and sentenced to 5 years imprisonment for the offence of shop breaking contrary to section 306 (a) of the Penal Code, the particulars of which were that he on the night of 5th and 6th August 2015 at unknown time at Kabarnet township in Baringo Central Sub-county within Baringo County jointly with others not before Court broke into and entered a building a shop by Cynthia Jerotich Kiptui and did steal assorted clothes and shoes as per attached list all valued at Ksh. 500,000/= and cash 20000/= the property of the said Cynthia Jerotich Kiptui. He faced alternative charge of handling contrary to section 322 of the Penal Code.
2. At the time of hearing of the appeal the appellant had served almost 3 years of the 5 years sentence with remission the sentence of imprisonment for 5 years is an actual term of 3 years and 4 months.
3. The Court has considered the evidence before the trial Court pursuant to its duty as a first appellate Court.
4. The complainant PW1 confirmed theft of goods of her shop on 6/8/15 when upon receiving a call for an unknown person about items suspected to be stolen were taken from a Petrol Station near her shop and load into a matatu vehicle, she had gone to her shop and found shirts and shoes missing from her shop.
5. Pw2 identified the appellant as the person who telephoned him to reserve a space in the Mololine Matatu Shuttle, where Pw2 worked, for purposes of travel to Nakuru from Kabarnet with goods were subsequently identified by Pw1 as her stolen goods.
6. Pw5, who was Pw2's colleague at Mololine Shuttle service, testified that the appellant had been introduced to him by Pw2 and they had produced the load luggage comprising of 4 suit cases and 1 sack into one matatu and that when the traveler's other luggage could not fit into the said matatu, the appellant was requested to await another matatu. The witness testified that the first batch of luggage went into the 2nd matatu which left at 3.30 am under the escort of the appellant's companion while the 2nd batch of luggage went with the appellant in matatu no. 3 at 5.00 am on 6/8/15.
7. Pw3 was the arresting officer who while manning a road block at Kiamunyi area on 6/8/15 at around 5.30 am, a matatu from Kabarnet came and stopped and the driver informed the Police Officer that he had received a call informing him that he was ferrying a suspect with suspected stolen goods in the vehicle, where upon he arrested the suspect, the appellant, herein with 2 sacks loaded with shoes. The complainant Pw1, later at 7.30 am identified the goods as her stolen goods.
8. Pw4, the Prison Officer who happened to have been travelling in the same matatu as one of the suspects of the theft pieced up the prosecution case as follows:

"I am 94041331 Anthony slide attached to Kabarnet GK Prison.

I recall on 6.8.15 I was travelling to Nairobi on official duties. At about 2.45 am molo line vehicle picked me from prison gate upto the office.

Shortly a passenger boarded a vehicle and sat in front, I requested him to sit at the back, he informed the driver that he had a

luggage which we picked outside a certain shop. The two loaded the luggage on the booth and when it was filled, he requested me to move to the back sit so that he could have more luggage placed at the drivers cabin. He requested his colleague to proceed with the journey as he would come with the remaining luggage using the next vehicle.

We picked a driver at a certain petrol station and he begun our journey at 3.20 a.m, after about 5 km I became suspicious and decided to peep into the luggage, on checking I saw new clothes in the suit cases. I called the driver Langat whom he had left behind and asked him where the luggage was going and if he knew the source. He replied in a message and told him that the accused had told him they were malimali wares.

I was not satisfied and asked for the complainants number since I suspected the goods were hers as they had been picked from her verandah of her shop.

The suspect kept making calls after every 10 minutes.

On reaching National Petrol Station the suspect alighted and I decided to interrogate him he informed me he was working in Nakuru main prison, I put him to task to show his job card and identity card which he did not have. I asked him if he knew the incharge prison but he did not know. I asked the driver to take him to the police station for further investigations as he looked suspicious.

We proceeded and on reaching show ground area we saw a police patrol vehicle with 3 suspects manning the road block.

We informed the police of our suspicious and handed over the suspects and the luggage which included 1 sack of shoes and assorted clothes.

I asked the driver to take the number of the police so that they could communicate. We called the oncoming driver and briefed him and asked him to ensure that the other suspect is taken to the nearest police station.

The complainant called me and confirmed that indeed her shop had been broken into and items were missing.

I was later called to record my statement which I did at Nakuru Central Police. I later learnt that the other suspect had been released under unclear circumstances.

The other suspect had 2 small suit cases which were left in the car.

The other suspect is before Court today.

9. The Investigating Officer, Pw6 confirmed that he had visited the scene at the complainant's shop and found the two padlocks had been broken and that he had received some of the stolen items in 2 suit cases and 2 sacks and when compared "some of the shoes recovered which were on display were single. We confirmed their partners were in the shop".

10. When put on his defence, the appellant denied the charge but confirmed that he was at the time, place and in the matatu shuttle vehicle as stated by the prosecution witnesses, save that he was on the way to Nakuru in response to a call from his wife at Nakuru who complained of labour pains and he had shown him to go and take her to the hospital. He confirmed knowing the witnesses Pw2 and Pw4 when he said:

"I went to mololine, and we boarded a vehicle and left. We went about 500 metres when Langat and Okal alighted and loaded luggage's into the vehicle. The vehicle was filled and we were told to go back to the office so that we could board another vehicle. I requested Harun to get me another vehicle which he did not. I boarded a vehicle which was from Kipsaraman".

The appellant also confirmed having asked Pw2 to book for him a vehicle to Nakuru from the morning of 6/8/15. Langat and Okech were respectively Pw4 and Pw2 in the trial.

Analysis of the Evidence

11. Upon weighing the evidence as a whole including unsworn statement of the appellant, I find that the appellant, together with another suspect who were not brought before the Court were found in possession of goods being clothes and shoes which were packed in 4 suit cases and 2 sacks, which had been stolen from the complainant's shop at Kabarnet on the night of 5th and 6 August 2015, the recovery whereof was made within 24 hours in the possession of the appellant and his co-suspect at large. The appellant was properly identified by Pw2 and Pw4 the Matatu shuttle service operators who had respectively booked and secured a place for the appellant in one of their matatu vehicle and helped loading the stolen goods, which were positively identified by Pw1 as belonging to her and some confirmed by the Investigating Officer, Pw6 to have been single partners of the shoes left behind in the shop. The doctrine of recent possession applies. See **R v. Muindi (1978)** KLR 44, **Ruhi v. R (1985)** KLR 373.

12. There was, however, no evidence that the appellant was involved in the breaking into the complainant's shop and stealing the goods. Although the doctrine of recent possession holding that one who is found in possession of goods recently stolen is either the thief or handler, there being no evidence implicating the appellant to the breaking and theft the conviction ought to have, as urged by the DPP, been made under the alternative count for handling stolen property contrary to section 322 (2) of the Penal Code.

Orders

13. Consequently, pursuant to the powers of the Court under section 354 (3) (a) of the Criminal Procedure Code, I alter the finding of guilty for offence of breaking into a shop contrary to section 306 (a) of the Penal Code and substitute therefor a conviction under the alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code.

14. As regards the sentence, as the appellant has substantially served the 5 year sentence imposed by the trial Court for the offence of shop breaking, the Court shall impose the sentence for the offence of handling stolen goods such sentence of imprisonment already served so that the appellant is released from custody forthwith unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.