



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 12 OF 2019

DENNIS CHANGWE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(from the original conviction and sentence in Hamisi SRMC Criminal Case No. 70 of 2018 by M.L. Nabibya SRM dated 30.1.2019)

1. The appellant was convicted of the offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code and sentenced to serve 3 years imprisonment. He was aggrieved by the conviction the sentence and filed the instant appeal. The ground of appeal are that:-

- (1) The learned trial magistrate erred in law and facts in finding that the prosecution had proved its case beyond reasonable doubt when the evidence as presented did not support the charge as drawn.
- (2) The learned trial magistrate erred in law and facts in failing to consider the inconsistencies in the prosecution's evidence.
- (3) The learned trial magistrate erred in law and procedure in shifting the burden of proof from the prosecution to the appellant and failing to take into consideration the defence put forward by the appellant.
- (4) The learned trial magistrate erred in law and facts in convicting the appellant in the absence of compelling evidence from the prosecution.
- (5) The learned magistrate erred in law by meting a harsh sentence to the appellant without an alternative of a fine.
- (6) The learned trial magistrate erred in law by convicting the appellant against the weight of evidence on record.
- (7) The learned trial magistrate erred in law and fact in convicting the appellant basing on the finding and conviction on her personal views and opinions which were neither supported by the evidence before her nor the applicable law.
- (8) The learned trial magistrate erred in law and fact by not appreciating and disregarding the evidence of the defence throughout the case.

2. The prosecution did not make any submissions in the appeal. They relied on the record of the lower court.

3. The particulars of the offence against the appellant were that on the 6th day of December, 2016 at Mudete Market, Mudete Sub-Location within Vihiga County, jointly with others not before court, broke and entered a building namely a shop of Philemon Mwavali (herein referred to as the complainant) and committed there in a felony namely theft and did steal from therein goods (as per the charge sheet) all valued at kshs.203,360/=.

Case for Prosecution-

4. The case for the prosecution was that the complainant PW1 was a shopkeeper at Mudete market. That on the morning of 6/12/2016 at 5 am the complainant was at his home when he received a report that his shop had been broken into. He proceeded to the shop and confirmed the breakage. Everything in the shop had been stolen. Among the stolen goods was a weighing machine.

5. Meanwhile on the same day at 6 am Corporal Nelly PW2 of Sabatia AP headquarters and her colleagues were at the police headquarters

when they heard screams of “thief, thief” near Vokoli Girls School. They proceeded to the place. They saw a motor bike. On seeing them the rider dropped a weighing machine from the motor bike and disappeared on his motorbike. The police officers picked the weighing machine and took it to Mudete Police Station. On their way back they saw another motor bike and pursued it. The rider then abandoned the motor bike near a ditch and ran away. It was registration number KMDC 695N. They found a sack tied up on the motor bike. They found the sack to contain assorted shop goods. They took the motorbike and the sack to Mudete Police Station. The complainant went to the Police Station. He identified the weighing machine and the shop goods as those stolen from his shop.

6. The case was investigated by Corporal Sirena who however did not testify in the case because he had gone on transfer by the time that the case was heard in court. He had handed over the file and the exhibits to PC John PW3. During the investigation, it was revealed that the motor bike had been bought from Nakuru by Sabatia Sacco Development Fund who had sold it to one Godfrey Isaili. Godfrey was found. He said that he had sold the motor bike to one Dennis Changwe Kawai. PC John PW3 and the investigating officer went to the house of Dennis Changwe on several occasions but they did not find him. After about one year the said Dennis Changwe, the appellant, was arrested over another case. He was charged with the offence herein.

7. Godfrey Isaili did not testify in the case. He was said to have given the investigating officer a sale agreement of the motorcycle between him and the appellant. The complainant produced purchase receipts of the stolen items to the investigating officer. Photographs of the weighing machine and the stolen goods were taken. The shop goods were released to the complainant. During the hearing, photographs of the motor bike and the shop goods were produced as exhibits, PEX1 and 2 respectively. The complainant's purchase receipts for the goods were produced as PEX3. The sale agreement of the motor bike between the appellant and Godfrey Isaili was produced as PEX4.

Defence Case

8. When placed to his defence, the appellant stated in a sworn statement that on the 6/12/2016 he was at Sabatia market. He was carrying his wife on his motorbike. His wife left him and entered into the market. While waiting for her he was approached by a policeman called Sirma. He asked him whether the motor bike was his. He confirmed it. The policeman said that the motor bike was carrying some items. He denied it. The policeman took him to Mudete Police Station. He was asked to produce the registration documents of the motorbike. He told policemen that he had bought the motor bike. His wife went and brought the sale agreement. PC Sirma took it. He was escorted to his house then returned to the police station. At the police station he saw a person with a motor cycle registration No. KMD 695. He was released in the evening without any charges. He came to court to claim release of his motor bike. He was asked to pay a bribe of Ksh. 10,000/= PC Sirma told him to avail the seller of the motor bike. He demanded for a bribe of Kshs.10,000/=. Later in January 2018 he was arrested by the seller of the motor bike and the sons of the complainant. He was charged with an offence he did not understand.

9. The appellant called two witnesses, wife DW2 and a friend DW3. DW2 testified that on 6/12/2016 she was with the appellant at Mudete market. She left him on his motorcycle and went to purchase some items. She then saw the appellant with policemen. She went back. The policemen said that the appellant's motor bike had a problem. He was taken to the police station. She accompanied a business partner of the appellant to the police station. Policemen claimed that the motorbike had been carrying some items. They were told to look for money to have him released on cash bail so that he could bring the logbook and purchase receipts.

10. In cross examination the witness said that the appellant had been at home on the night before 6th.

11. DW3 testified that the appellant used to carry him on his motor bike. That on the 6/12/2016 he was at Mudete stage. He saw the appellant and policemen heading towards the police station. They were with the appellant's motor bike.

Submissions

12. The advocate for the appellant, **Mr. Malala** submitted that there was no eye witness that the appellant was the person who broke into the shop of the complainant. That there were two motor bikes that were being held at the police station, the one abandoned at a ditch and the one found with the appellant at Mudete market. That the sale agreement of the motor cycle indicated that it was between Godfrey Inzahuri and one Dennisfield Changwe Kawai who was not the same as Dennis Changwe. That the two people who witnessed the agreement were not called to testify. That the appellant was not identified as the buyer of the motor cycle.

13. Counsel took issue with the judgment of the trial magistrate where the learned magistrate stated that “in defence, the accused generally denied the offence.” He submitted that this meant that the magistrate had shifted the burden of proof upon the appellant. That the burden of proof was on the prosecution to prove the case which they failed to do.

Analysis and Determination

14. This being a first appeal, the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while being in mind that the trial court had the advantage of seeing and hearing the witnesses testify. See **Okeno – vs – Republic (1972) EA32 and Kiilu & Another – Vs – republic (2005) KLR 174.**

15. There was no doubt that the shop of the complainant was broken into and shop goods stolen. Evidence was adduced that a rider to motorcycle registration KMCD 695 N was confronted by policemen while carrying a sack containing goods stolen from the shop of the complainant. The rider abandoned the motorcycle and disappeared. The ownership of the motorcycle was traced to the appellant through one Godfrey Isaili who said that he had sold it to the appellant. The appellant in his defence stated that he did not abandon his motor cycle as alleged by the police. He alleged that he was arrested while in the possession of his motorcycle at Mudete Market. That he was taken to Mudete Police Station where his motorcycle was detained. The question then was whether the motorcycle in issue was abandoned by the appellant while carrying the stolen goods or whether the appellant was arrested while riding it at Mudete Market.

16. The trial Magistrate held that it is the motorcycle sold to the appellant by Mr. Godfrey that was found at the scene of recovery of the

stolen shop goods on the same day of the breakage of the complainant's shop. That the appellant failed to explain who could have had his motorbike if he was not the one. That it was therefore proved that the owner of the said motorbike, the appellant, was involved in breaking into the complainant's shop and his motor bike used to ferry away the stolen goods.

17. PC Nelly PW1 testified that the motorcycle that was abandoned by a rider on which they found a sack of shop goods was KMDC 695N boxer red in colour. During the proceedings the appellants made an application dated 29th August, 2018 seeking that the said motorcycle be released to him on the grounds that he was found with it at Mudete market and that it had no connection with the charge that was before court.

18. PC Nelly PW1 was categorical that the said motor is the one that was abandoned by a rider and which they found carrying shop goods in a sack. When the appellant cross-examined PC Nelly in court he did not allude that he was arrested at Mudete market while in possession of the said motor cycle.

19. PC John in his evidence testified that the motor bike registration no. KMDC 695N was recovered by administration police officers after its rider escaped. The appellant never put any questions to PC John that he was arrested while in possession of the motorcycle at Mudete Market. There was thereby no truth in the appellant's defence that the motorcycle was found with him at Mudete market. PC. Nelly was telling the truth that the motorcycle was abandoned by its rider when they confronted the rider and found him ferrying stolen goods with it.

20. The appellant claimed motorcycle registration No. KMDC 695 N to be his. He said that he had brought it from a certain person. Though a person by name Godfrey Isauli did not testify in the case, a sale agreement was produced indicating that the appellant had bought the said motorcycle from the said person. There was no then doubt the motorcycle is the one that was found ferrying away the stolen goods. It was upon the appellant to explain how his motor cycle came to be found ferrying away stolen goods.

21. The appellant did not give an explanation on how he came into the possession of the stolen goods. The question was whether he was the thief of the complainant's goods.

22. The goods were stolen from the complainant's shop on the same day that the appellant's motor cycle was found ferrying them away. The question was whether the appellant was found in recent possession of stolen goods.

23. The factors that the prosecution has to prove in a case based on recent possession of stolen properties, were stated by the Court of Appeal in **Isaac Ng'a ng'a Kahiga alias Peter Ng'ang'a Kahiga – vs – Republic , Nyeri Criminal Appeal No. 272 of 2005** to be as follows.

“It is trite that before a court can rely on the doctrine of recent possession as a basis for 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 identified as the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently 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”

24. All the four factors were present in this case. The complainant proved that his shop had been broken into on the material day. He identified the goods found with the appellant as those stolen from his shop. They were found with the appellant on the same morning that they were stolen. The prosecution did prove that the appellant was found in possession of recently stolen goods. The appellant did not give an explanation of how he came into the possession of the goods stolen from the complainant on the same morning that he was found with them. The inevitable conclusion was that he was the thief. There was thereby overwhelming evidence that the appellant was the thief.

25. In the premises the appellant was convicted on solid evidence. The prosecution did prove the charge against the appellant beyond all reasonable doubt. The defence raised by the appellant did not create any doubt in the prosecution case.

26. The trial court sentenced the appellant to 3 years imprisonment. The maximum sentence for the offence that the appellant was facing was 7 years imprisonment. The value of the property stolen was kshs.203,360/=. In my view the sentence of 3 years was neither harsh nor excessive.

27. The upshot is that there is no merit in the appeal. The same is thereby dismissed in its entirety.

Dated, signed and delivered at Kakamega this 17th day of December 2019

J. N. NJAGI

JUDGE

In the presence of:-

N/A for Appellant

Miss Omondi for state/Respondent

Appellant.....Present.....

Court Assistant.....Polycap.....

14 days right of appeal.