REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO.54 OF 2017

PAUL WACHIRA MUTHEE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. L. Mutai – Chief Magistrate dated 31st May 2017 in Nanyuki Chief Magistrate Court Criminal Case No.1040 of 2015)

JUDGMENT

1. PAUL WACHIRA MUTHEE has filed this appeal against his conviction and sentence before the Chief Magistrate's Court at Nanyuki. Before that court the appellant was convicted with the offence of store breaking and stealing **Contrary to Section 306 (a) of the Penal Code.** On being convicted he was sentenced to serve 4 years imprisonment.

2. This court is the first appellant court. As such this court has a duty to reconsider trial court's evidence. The first appellant court's duty was discussed in the case: **DAVID NJUGUNA WAIRIMU – V- REPUBLIC [2010] eKLR** where the court held that:-

> ***"[The duty of the first appellant court] is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so. Provided it is clear that the court has considered the evidence on the basis of the law and the evidence on basis of the law and the evidence to satisfy itself on the correctness of the decision"*** *(emphasis ours).*

3. The particular of the charge against the appellant reads as follows:

> ***"Paul Wachira Muthee on the 24th day of June 2015, in Nanyuki Township, within the Laikipia County of the Republic of Kenya, jointly with others not before court, broke and entered a building namely store of the Tratiz Projects Limited and committed there in a felony namely stealing of one compressor machine valued at Ksh. 500,000/=."***

4. The prosecution's case against the appellant was that on 24th June 2015 the appellant together with two other persons, one called Michael Gathendu while the other one was unmade, went to the premises of Tratiz project Limited and by deception gained entry into those premises and thereby stole a compressor machine belonging to Tratiz project Limited.

5. Tratiz Project Limited (hereinafter referred to as Tratiz) had been contracted by Kenya Power and Lighting Company to Maintain their substation in Nanyuki. **William Gatheka Kabinya** (**PW 1**) confirmed that Tratiz owned a compressor Machine which he was informed on 25th June 2015 had been stolen. He confirmed that he went to the store of Tratiz and confirmed that the machine had been stolen. He gave the serial number of that machine as 190430626012. P W 1 also confirmed that the premises were guarded by guards of Jito Security.

6. Nancy Wanjiru Wangombe (PW 2) was a guard employed by Jito Security firm. She was assigned to guard the Kenya Power and Lighting Nanyuki substation. On 18th June 2015 while P W 2 was on duty she saw the appellant, whom was known to her, in the company of Michael Gathendu, whom she knew as an employee of Tratiz, and in the company of another man unknown to her. The three men went into the store and began to photograph the compressor machine. Michael Gathendu informed PW 2 that the appellant and the other one were photographing the machine because it required repair.

7. On 24th June, 2015 Michael Gathendu went to the premises with a mechanic whom P W 2 did not know. They had with them a trolley. They used that trolley to carry the compressor machine. PW 2 requested them to book the removal of that machine in an occurrence book (OB). Michael Gathendu noted in the OB that he had removed the machine to take it to the garage.

8. As the removal of that machine occurred the appellant was standing outside the gate of those premises. The appellant rang PW 2 and informed her that they had taken the machine.

9. Bedan Karani Maina (**PW 3**) a Project Manager of Tratiz stated that he had not authorized Michael Gathendu to remove the compressor machine from the store.

10. Peter Wachuma Kariuki (**PW 4**) stated that on a date he could not recall the appellant wanted to borrow his camera but because he could not operate it the appellant asked P W 4 to assist him to take photographs.

11. The appellant, on a date PW 4 could not recall, led PW 4 to a store of Kenya Power Lighting Company whereby PW 4 took photographs of a machine. PW 4 later gave those photographs to the appellant. PW 4 was later informed by the police that that machine had been stolen.

12. The investigating officer of this case **PC Mathews** stated that the appellant presented himself at Nanyuki police station, where the theft of the machine had been reported. He further stated that the appellant led him to PW 4, the photographer.

13. The investigating officer arranged for the complainant, PW 1, to meet with the appellant because the appellant promised to trace the person who stole the machine. PW 1 facilitated the appellant with Ksh. 1,000 to assist in tracing the thief.

14. Although prosecution adduced evidence of the call data of Michael Gathendu and appellant's cell phone number: in my view having reassessed that evidence I found inconsistencies which will lead me to discount that evidence entirely. The inconsistencies are in respect to the cell phone number of Michael Gathendu.

15. PW 5 stated in evidence that cell phone number 0719****** belonged to Michael Gathendu. PW 7 on the other hand stated that that same cell phone number belonged to someone called Jane Muthoni. Further PW 7 stated that cell phone number 0719****** belonged to Michael Gathendu.

16. Those inconsistencies rendered the prosecution's evidence on the data record of various cell phone numbers to have no evidential value.

17. The appellant gave a sworn defence. Appellant in that defence stated that he is a scrap metal dealer in Nanyuki. That he was called by the police and when he attended the police station he confirmed that he knew Michael Gathendu. On giving that confirmation he was given Ksh. 1,000 by PC Nudy to assist him in resolving the case. He said that he took the money and was later arrested, by the police, at his place of residence. This is how he concluded his defence:-

> "***Later the officer picked me up from home. I was asked about the machine. Nancy (P W 2) was there. I was told to fix Michael (Michael Gathendu) and when I refused I was arrested with Nancy. Michael used to be my friend. I was later charged with this offence. Nancy bribed her way out. I stole no machine. I am suffering because Michael happened to be my friend."***

ANALYSIS AND DETERMINATION

18. Learned counsel Mr. Wahome Gikonyo presented to court a detailed and well argued submissions in support of the appellant's appeal. Those submissions touched on the following issues:-

> ***(a) Whether prosecution proved on required standard the charge and the appellant's involvement in the store breaking and stealing;***
>
> ***(b) Whether prosecution proved ownership of the compressor machine;***
>
> ***(c) Whether PW 2 was an accomplice and if so whether the prosecution met the standard of proof of her evidence; and***
>
> ***(d) Whether the appellant raised alibi defence and if so whether the prosecution discharged that defence.***

19. The appellant argued that section 306(a) of the Penal Code required the prosecution to prove that the complainant's premises were broken into. Appellant submitted that since PW 2 allowed Gathendu and another person, he described as a mechanic, enter the premises, there was indeed, therefore, no breaking – in.

20. Section 306 (a) provides:-

> **"306. Any person who –**
>
> ***(a) Breaks and enters a school house, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling – house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or"***

21. In view of the above section and the prosecution's evidence that the appellant remained at the gate when the machine was removed, appellant submitted that prosecution had failed to prove a break in by him.

22. Learned counsel for the respondent Principal Prosecution Counsel, Mr. Tanui submitted that the prosecution had shown that the appellant was part of the group that stole the machine. In counsel's view that the appellant and Gathendu formed a common intention to steal.

23. So, was there a break – in? **Section 303 (1)** to **(3)** defines breaking and entering. While section 303(1) and (2) refer to actual forceful breaking-in and entering section 303(3) refers to a different scenario. It is important to reproduce that sub-section for better understanding:-

> ***"(3) A person who obtains entrance into a building by means of any threat or artifice used for that purpose, or by collusion with any person in the building or who enters any aperture of the building left open for any purpose, but not intending to be ordinarily used as a means of entrance, is deemed to have broken and entered the building."***

24. The word artifice is defined in the Oxford Advanced Learner's Dictionary 7th Edition as:-

> ***"Clever use of tricks to cheat – cunning."***

25. Prosecution's evidence was to the effect that on 18th June 2015 the appellant in the company of PW 4 and Gathendu went to the complainant's store and photographed the machine. On 24th June 2015 Gathendu and another person entered the complainant's store and took away the machine on a trolley as the appellant stood by the gate. When the machine was removed out of the gate the appellant telephone PW 2 and confirmed they had taken the machine away.

26. PW 2 was categorical that she only allowed the machine to be taken away because Gathendu, whom she knew to be an employee of Tratiz, was present and because he had previously informed her that the machine needed to go for repairs.

27. It is clear from the prosecution's evidence that Gathendu had been sacked by Tratiz two weeks prior to the theft. Gathendu, therefore had no right to gain access to the store. He used trickery to gain access. Breaking into the store was therefore proved, by the prosecution, as required under section 303(3) of the Penal Code.

28. The appellant was outside the gate when the machine was being removed. The appellant confirmed to PW 2 that they had taken the machine.

29. Mr. Tanui, quite rightly, submitted that the evidence proved that Gathendu and the appellant formed a common intention to steal the machine. The fact appellant, who was not an employee of Tratiz, was at the gate when the machine was removed from the store and then confirmed its removal, to PW 2; and the fact that appellant obtained assistance, six days earlier than the day of theft of the machine, to photograph the very same machine which was subsequently stolen, suffices to show a common intention with Gathendu.

30. Although learned counsel for the appellant submitted that the prosecution did not prove that the machine was stolen from the store or that the machine belonged to Tratiz those submissions are rejected. There was clear evidence f PW 1, PW 2 and PW 3 that the machine was in the store. That evidence was not contradicted by cross examination. Further PW 1 in his evidence stated that the stolen machine belonged to Tratiz and went further to give its serial number. The fact that he did not produce receipt of the same did not reduce the value of his evidence that the machine belonged to Tratiz.

31. I am persuaded by the High Court decision in the case **MICHAEL MAUNDU WAMBUA VS REPUBLIC [2006]eKLR** where the court considered whether there had been breaking when the appellant opened the door with a key. The court stated:-

> ***"With respect I do not buy the appellant's interpretation of what amounts to "breaking". The breaking must not necessarily result into some sought of damage. What is critical is gaining access into a store against the wish of the owner and or without his permission. In the instant case, the appellant gained entry into the store using a master key. By using the master key to access the store which was not his and without having sought or obtained the permission of the owner (PW 1) to my mind amounts to breaking in. simply put the appellant by his own machinations gained unauthorized access to the store. That act amounted to "breaking in". In my view therefore the prosecution led sufficient evidence to show that the appellant broke into the store."***

32. In my view there is no evidence, nor was it suggested when PW 2 was cross examined, that she was an accomplice. There is no basis for submitting so because at the time PW 2 gave evidence she knew she was not accused of theft.

33. The appellant submitted that the prosecution had failed to discharge the alibi defence he offered.

34. The appellant in his sworn defence merely denied the theft of the machine. He did not state in his defence that he was not at the gate of the premises when the machine was stolen. He did not therefore raise an alibi defence. He simply denied the theft. That denial was met by the prosecution's clear evidence that the appellant was instrumental in having machine photographed and then on the material date telephoned PW 2 and confirmed to her that they had taken the machine. There can be no clearer evidence of the appellant's involvement of theft of the machine.

35. In view of the analysis, herein above, the appellant's appeal against conviction must and does fail.

36. As stated before the trial court sentence the appellant to 4 years of imprisonment.

37. The maximum sentence under section 306(b) is 7 years imprisonment. The appellant did not submit that the 7 years sentence was excessive. I also do not find that sentence to be excessive bearing in mind that a firm lost a valuable machine valued at Kshs.450,000. The

firm did not recover that machine. The appellant sentence, in my view is well deserved.

38. In view of the above discussion the appellant's appeal against conviction and sentence is dismissed. The trial court's conviction is upheld and the sentence is confirmed.

DATED AND DELIVERED AT NANYUKI THIS 18TH DAY OF APRIL 2018.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Accused: Paul Wachira Muthee …….

For Accused ……

For the State: ….....

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE