



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.33 OF 2017

JOSEPH MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

This appeal is conceded.

The appellant was charged with the offence of Hotel Breaking and committing a felony contrary to section 306(a) of the Penal Code and the alternative charge of Handling stolen goods contrary to section 322(2) of the Penal Code.

It was alleged that on the night of 6th and 7th October 2006 at Mweiga Township Kieni west sub county in Nyeri County jointly with another not before court broke and entered the hotel of Stephen Machaku and stole from therein solar panels S/Nos. 0326158118007557 and mkp/160731013584 valued at Ksh 70,000 the property of Stephen Machaku.

In the alternative that on the 25th day of October 2016 at 1630Hrs at Mweiga Township Kieni west sub county in Nyeri County otherwise than in the course of stealing dishonestly retained two solar panels having reason t believe them to be stolen property.

He pleaded not guilty to the charges.

After hearing 4 witnesses the trial magistrate put him on the defence where he gave a sworn statement of defence and called one witness.

The trial magistrate found as a fact that the prosecution had proved its case beyond a reasonable doubt.

On the alternative charge of handling stolen property contrary to section 322(2) of the Penal code, she sentenced him to serve three years' imprisonment.

Aggrieved by the conviction and sentence he filed this appeal based on 7 grounds:

- 1.The learned Magistrate erred in law and in fact in sentencing the appellant for the offence charged when there was no adequate evidence to prove the charge.*
- 2. The learned Magistrate erred in law that in finding that the appellant committed the offence of Hotel Breaking and committing a felony contrary to section 306(a) of the penal code when there was no adequate evidence to support that finding.*
- 3. The learned Magistrate erred in law in fact by relying on the evidence of the prosecution which was not cogent enough to establish a case against the accused person beyond reasonable doubt.*
- 4. The learned Magistrate erred in law and in fact in accepting and relying on evidence from the prosecution which ought not have been received and/or admitted on record.*
- 5. The learned Magistrate misapprehended in law in sentencing the appellant to serve 3 years without the option of a fine which sentence was excessive in the circumstances.*
- 6. The learned Magistrate erred in law and in fact by failing to appreciate that the testimony of the appellant was cogent, truthful and justified.*

7. The learned Magistrate erred in law and in fact by failing to appreciate the mitigation given by the appellant.

The case for the prosecution was that on 6.10.16 the complainant bought 2 solar panels and put them on the roof of hotel building at Mweiga. When he locked up he put them inside the hotel. The following day he was rang and told that his building had been broken into and the solar panels were missing.

He reported to the police. Later he was called to the police station at Mweiga to identify his solar panels. He went there and identified them. He did not know the accused person neither had he ever seen him before.

According to the police Sgt. Peter Mwilu who was PW2 he received information from an informer that there was a man suspected of house breaking and stealing electrical appliances. He and his colleague APC Wycliffe Bernard went to Mweiga town and arrested the suspect. When they took him to the police station they interrogated him and he led them to his house at Gikomo village where he was staying with some other men. He opened the door for them, and they found 2 solar panels in a sack under the bed, a CD changer in a sack, panga and radio speakers, 2 carpets behind the door among other items.

He denied the items were his but they seized them and took them to the police station. They charged him.

According to PW3 APC Wycliffe an informer told them about the accused. They arrested the accused took him to a house alleged to be his, he refused to open the door saying that he did not live there.

The officers "found" keys in his pockets with which they opened the door. They returned the keys to him, entered the house and found the recovered items.

PW4 Sgt. Reuben Kipsigei Ng'etich received the accused person with the recovered items from the 2 police officers. He called PW1 who went and identified his solar panels.

The complainant herein produced receipts from M-KOPA to show that the solar panels were his. This officer who was the investigating officer did not visit the scene. He had no evidence that the accused was the tenant of the house where the goods were recovered. He alleged that the landlord went to the station but refused to record a statement. He confirmed that the receipts produced by the complainant did not have anything to link them to the solar panels. He confirmed that the appellant was arrested on the suspicions of an informer.

The accused made a sworn statement of defence and told the court that he was a boda boda rider, and he lived at Chaka. On the material night he was in a hotel at Chaka when one Jimmy called him at around 5.00pm. When he went where Jimmy was, he found him with 5 police officers who took him to Mweiga police station, locked him up and later at 8.00pm took him to Gikomo in Mweiga, broke into a house, took out some items and took him back to the cells. They insisted the house and items were despite his protestations that neither the house nor the items were his as he lived in Chaka.

He denied stealing the solar panels.

His witness DW2 Margaret Wangechi was his landlady at Chaka. She confirmed that it was the appellant's mother who paid rent of Kshs.450/- per month for him at Chaka.

The trial magistrate found as a fact that the 2 solar panels were found in the accused person's house.

Mr. Ombongi for the appellant argued the 7 grounds together to the effect that: -

- 1) The appellant was not arrested in his house but from a hotel in Chaka and escorted to Mweiga to what the police called his house.
- 2) That the informer was not called as a witness.
- 3) No inventory was made of where and from whom the items were recovered.
- 4) No exhibit register was produced to show where the items were recovered from.

The Investigating Officer did not even bother to verify the receipt produced by the complainant as proof that the solar panels were his.

In conceding the appeal Ms. Jebet submitted that it was true that: -

- 1) The appellant was arrested on suspicion from the information of an informant.
- 2) That upon arrest the police officers took him to a place which they claimed was his home, a house which it is the informer who pointed out to the police.
- 3) There were other persons who lived in that house but nothing was said about them by the police in investigations.
- 4) There was no inventory of the recovered items, to even show where they were recovered from.

5) No evidence that the house belonged to the appellant.

The state was of the view that the conviction was unsafe.

I have carefully considered the evidence on record, the submissions by both the state and counsel for the appellant. It is clear from the evidence of the police that the appellant was arrested on information given by an informer who;

1) Gave description of the suspect

2) Named offence committed

3) Pointed out the specific house.

4) Appears to have known that the stolen panels were in that house.

5) Did not record a statement or testify

6) The police did not establish was a witness who could not be called to testify hence whose evidence was not tested on cross examination.

The record shows the police investigators did nothing to verify the information except arrest the appellant and charge him. They did not visit the scene. The complainant produced no proof that he ran a hotel, or that it was broken into.

The police without conducting any investigations arrested the person who fitted that description escorted him to a house which they claimed was his, and which somehow they knew was also occupied by other men- found the solar panels on which the charges against the appellant were premised.

There were absolutely no investigations conducted in this case and no evidence to warrant even a prima facie case (see ***Bhatt -Vs- Republic***) to warrant the appellant being put on his defence in the first place.

The appeal is allowed.

The conviction is quashed.

The sentence is set aside.

Appellant is at liberty unless otherwise legally held.

Dated, delivered and signed in open Court at Nyeri this 30th May 2018

MUMBUA T. MATHEKA

JUDGE

In the presence of:

Court Assistant: Atelu

Mr. Magoma for state

Mr. Ombongi was here

Appellant present