



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 27 OF 2016

PETER MULATYA MUTUNGA ALIAS 'KITINGA'APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original conviction and sentence in

Kyuso Principal Magistrate's Court Criminal Case No. 98 of 2016

by **B. M. Kimtai S R M** on 27/04/16)

J U D G M E N T

1. **Peter Mulatya Mutunga alias 'Kitinga'** was charged with the offence of **Breaking into a Building and Committing a Felony** contrary to **Section 306(a)** of the **Penal Code**. Particulars of the offence were that on the nights of **21st/22nd March, 2016** at **Kaningo Market, Kaningo Sub-Location** in **Tseikuru Sub-County** in **Kitui County**, jointly with another not before court, broke and entered a building namely **Ngamioni Bar** of **Johnson Mwendwa Mulaki** with intent to steal and did steal therein Senator Keg Lager Pump **S/No. 12162**, six bottles of Guinness Beer, cash **Kshs. 11,600/=** all valued at **Kshs. 27,620/=** the property of the said **Johnson Mwendwa Mulaki**.

2. In the alternative he was charged with the offence of **Handling Stolen Goods**, contrary to **Section 322(1)(2)** of the **Penal Code**. Particulars of the offence were that on the **29th day of March, 2016** at **Tseikuru Market, Tseikuru Location** in **Tseikuru Sub-County** within **Kitui County**, otherwise in the course of stealing, dishonestly received or retained a Senator Keg Lager Pump **S/No. 12162** knowing or having reason to believe it to be stolen property.

3. He was tried, convicted and sentenced to serve **five (5) years imprisonment**.

4. Aggrieved by the conviction and sentence he appealed on grounds that the learned Magistrate erred in convicting him yet:

- Nobody witnessed the breaking incident.
- Exhibits were not recovered in the Appellant's possession.
- There was no proof that the Appellant telephoned PW2.
- The alibi defence put up was very strong.

5. Facts of the case were that on the **22nd March, 2016** **PW3 Festus Mati** a bar attendant went to the bar which was owned by his employer, **PW1 Johnstone Musyoka** and found it having been broken into. Some six (6) bottles of Guinness, Senator Keg Pump, and **Kshs. 11,600/=** were missing. He informed **PW1** and reported the matter to the police. **PW4 No. 72917 Corporal Kenneth Kangongo** visited the scene and took note of the breakage. On **26th March, 2016** the Appellant allegedly contacted **PW2 Joseph Makau** with an intention of selling to him a keg pump. He notified **PW1**. On the **28th March, 2016** he met the Appellant and on seeing **PW1** he ran away. Later on the Accused was arrested and handed over to the police.

6. When put on his defence the Appellant who gave an unsworn statement stated that being a 'bodaboda' rider he was at **Tseikuru** on the **29th March, 2016** carrying on his business. On the **31st March, 2016** he encountered **PW1** who bought from him chicken. Later on **PW1** told him that his pump had been stolen. He took him to the police station where he was arrested.

7. The Appellant canvassed the Appeal by way of written submissions where he stated that no evidence was called to establish that the bar

was broken into in the manner that was described by witnesses. That no proof of ownership was adduced. He denied the allegation that he intended to sell the pump to PW2. That there was no evidence of any communication having taken place between him and PW2 or having ran away per the allegation without members of the public being called to their aid. He pointed out the contradiction between PW1 and PW3 in respect of the sum of money that was alleged to have been stolen.

8. The State through learned Counsel **Mr. Mamba** opposed the Appeal. He stated that the State did prove that the Appellant was found with the keg pump.

9. This being the first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(See Okeno vs. Republic (1973) EA 32).**

10. From evidence adduced, there is no direct evidence of who broke into the building if at all the building was broken into.

11. In convicting the Appellant the trial Magistrate relied on evidence of recent possession. The doctrine of recent possession was stated in the case of **Mahingi vs. Republic (1989) KLR 225** where it was stated thus:

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent, that there was no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is only the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either stole or was guilty as a receiver.”

12. The prosecution alleged that entry in the Complainant’s bar was gained through the roof. An iron sheet was cut, though no such evidence was availed to establish that fact.

13. PW1 who received information from PW3 stated that he checked the bar and noted that his keg pump was missing. In court he identified the pump by a serial number **12162** that was inscribed on it. Other than stating that he could identify the pump by the serial number he did not adduce evidence of ownership.

14. It was alleged that the Appellant ran away leaving the pump in possession of PW2 who stated thus:

“I was phoned by Peter Mulatya who wanted to see me..... I was at Ngomeni. I reached late on 27.3.2016 he also phoned me and came to see me at night he told me there was a pump he wanted to sell to me..... I met the accused and he gave me a pump and on seeing PW1 around there he took off. PW1 confirmed the pump as his Accused told me that the pump belonged to a lady who had been charged in court but changed the story later.”

15. The Prosecution had a duty of proving the alleged communication between PW2 and the Appellant. No such evidence was adduced to prove that fact.

16. There was lack of clarity in evidence adduced by PW2 on how and where he allegedly met the Appellant and how he got away. This was a matter that had been reported to the police. The witness claimed that he received information from PW1 that his pump had been stolen. If indeed he laid an ambush the police should have been involved. Circumstances in which the Appellant slipped away if he did remain uncertain therefore there was no proof beyond reasonable doubt that the Appellant was in possession of the pump alleged to belong to PW1.

17. The Appellant was arrested by PW1. In his defence he explained that he sold to PW1 chicken who later accused him of stealing his pump and took him to the police station. The Appellant having not been found in possession of the pump and circumstances in which he was alleged to have possessed it being questionable, no inference can be drawn that he did break into the bar and stole there from.

18. In the premises, the appeal has merit. Accordingly, the conviction is quashed and sentence imposed set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

19. It is so ordered.

Dated, Signed and Delivered at Kitui this 29th day of May, 2018.

L. N. MUTENDE

JUDGE