



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC MISC NO. 188 OF 2017

REPUBLIC.....RESPONDENT

VERSUS

RAPHAEL MUTUAAPPLICANT

JUDGMENT

1. The Appellant was charged with offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code.
2. Particulars being that on 23/09/2014 at Ithemboni Village, Nduu Sub-location, Kithembe Location in Kilungu Sub-county within Makueni County, jointly broke Kithembe chief's office store and committed a felony namely stealing of five containers of three liters TILLY Government relief food namely salad cooking oil priced not for sale, the property of the Kenya Government.
3. The Appellant pleaded not guilty and matter went into full trial.
4. The Appellant was convicted and sentenced to serve 4½ years imprisonment on 17/08/2015.
5. Being aggrieved by the decision an appeal and set out the following grounds:-
 1. **There was no proof to the required standard the ingredients of the offence.**
 2. **The evidence did not support charges.**
 3. **The conviction was against weight of the evidence.**
6. The parties agreed to canvass via submissions. The Appellant filed same but Respondent relied on the evidence on record.

APPELLANT SUBMISSIONS

7. The appellant starts by relying on the case of **ISSAC NG'ANG'A ALIAS PETER NG'ANG'A KAHIGA –VS- REPUBLIC, CR A NO. 272 OF 2005**, where it was stated as follows:-

“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO-VS-REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

‘The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424).’

8. It is submitted that the trial magistrate erred both in law and in fact when he convicted and sentenced the appellant herein. The evidence tendered by the prosecution was so contradicting that no reasonable tribunal could safely convict on it.

9. It was the evidence of PW1 that they did not find the appellant holding any weapon which he could have used to break the window open. PW1 also stated that the window was not broken and was grilled. There were no photos brought to the court to confirm the status of the broken window.

THE DUTY OF THE FIRST APPELLATE COURT

10. The duty of a first appellate Court was set out in the celebrated case of **Okeno V. Republic (1972) E.A. 32** in the following terms;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (3365) and the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters Vrs. Sunday Post [1958] E.A. 424.”

EVIDENCE TENDERED

11. PW1 Julius Nzomo stated to court that on 23rd September 2014 at 8.20 p.m., he was at the AP Camp. They were informed by the public that there was strange noises at the area chief’s office and movement.

12. They went there with APC George Muthiani. They found a person standing by the wall outside the office.

13. They illuminated them using a torch. He headed to the person on the corridor, his colleague headed to the one outside. The one on the corridor ran away but dropped a jerry can he held. He was able to arrest him. He was the 1st accused/appellant Raphael Mutua Kathanzu.

14. His colleague was able to arrest the 2nd accused. He had 4 jerry cans in a bag. They arrested both accused and called the Chief Kithembe Location whose office was broken into. She came and confirmed the theft. They entered through the window which they had opened.

15. He identified the jerry cans accused were arrested with. They escorted them to Kilome police station where accused were charged before court.

16. On cross examination by 1st accused/appellant he stated that accused had no weapon to break into a building that they found the accused stealing the oil. That he saw them outside using a torch. That he found them in the act.

17. PW2 Ann Nduku Mwau, the area chief stated that on 23rd September 2014 at 8.00 p.m., she was called to the office by PW1. She was informed that police had arrested the Assistant Chief and another stealing relief food.

18. She went there and found the accused with police and the recovered stolen items seated outside. They had accessed the store through the window. She entered the office and confirmed that three jerry cans of oil were missing.

19. The jerry cans that were the ones in court. MFI-1, MFI-2, MFI-3, and MFI-4. On cross examination she told court that the accused were drunk.

20. PW4 George Muthiani stated to court that on 23rd September 2014 at 8.20 p.m., they went to the Chiefs office and found accused 1 and accused 2 passing olive oil through the window. They arrested them.

21. They recovered five jerry cans of oil three in sack and two on the ground. They five jerry cans were in court. They called the area chief who came and confirmed that the jerry cans were in court. The accused had gained access through the window.

22. PW5 PC Wilson Nderitu stated to court that on 23rd September 2014 at 9.00 p.m. He was called to the station by the OCS Kilome. He went to the station and found APC Julius Nzomo and APC Muthiani with two suspects Accused 1 and Accused 2.

23. They also held a sack containing five jerry cans of vegetable oil. He rearrested the accused persons and took possession of exhibits.

24. On 24th September 2014 he visited the chiefs office and ascertained that the store contained 50 cartons of oil. One carton was near the window but five jerry cans were missing.

25. The jerry cans belonged to the Government of Kenya. He produced the five jerry cans and a sack as evidence before court.

26. The accused were both put to their defences. They both elected to give unsworn evidence.

27. DW1 Raphael Mutua stated to court on 23rd September 2014 at 3.00 p.m., he went drinking at a bar at Nunguni market. At 7.30 p.m., they headed home. Police gave them a lift and requested for money which they refused to give.

28. They then took them to the police station and locked them up. They then charged them with the offences before court. That the offences before court were all false.

29. DW2 Stephen Mutua stated that on 23rd September 2014 they were at sweet waters bar. They headed home at 7.30 p.m. Administration police gave them a lift on a vehicle. Inside the vehicle were oil gallons.

30. The police asked for money which they refused to give. They then took them to the police station and the following day charged them.

ISSUES, ANALYSIS AND DETERMINATION

31. After going through evidence on record and the submissions on record, I find the issue is;

- **Whether prosecution proved its case beyond reasonable doubt?**

32. The trial court after considering the evidence on record and having the opportunity of hearing and observing all witnesses their demeanor, concluded that all prosecution witnesses were telling the truth and were credible witnesses.

33. The trial court had no doubt that on 23rd September 2014 a theft occurred at Kithembe Location Chiefs office. The thieves entered or accessed the office through an opened window where five jerry cans of cooking oil were stolen.

34. PW1 and PW2 who are the police officers were tipped of the commotion created during the stealing. They went to the scene and found both the accused persons in the act of removing the jerry cans.

35. They arrested both accused, took them to Kilome police station and handed them over to the police and accused were charged before court.

36. Section 306 (a) of the Penal Code states;

“Any person who breaks and enters a school, house, shop, warehouse, store, office counting house, garage, pavilion, club, factory or workshop or any building or part of a building licensed for 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 workshop and commits a felony there in is guilty of a felony and is liable to imprisonment for seven years.”

37. Section 303(I) states that;

“A person who breaks any part whether external or internal of a building or opens by unlocking, pulling, pushing, lifting or any other means whatever any door, window, shutter, cellar, flap or other thing intended to close or cover an opening in building or any opening giving passage from one part of a building to another is deemed to break the building.”

38. The accused gained entry of the Chiefs office through opening the window by pushing or pulling it then they broke into. They are then squarely falling under the provisions of Section 303(i) and 306(a) of the Penal Code.

39. They committed an offence theft which is a felony they stole five jerry cans of cooking oil the property of the Government of Kenya.

40. Thus it was proved beyond reasonable doubt that it is indeed the accused who were found in the act of stealing the cooking oil. Identification or recognition would not be relevant as accused were arrested in the act.

41. The accused defences that they were lifted by the Administration Police after they failed to part with cash are not only unbelievable but in bad taste. The 1st accused/appellant was an Assistant Chief and Administrator known to the Administration Police Officers.

42. Secondly the accused did not give any reason to court to show why the police officers would begrudge them to the extent of fixing them with this case.

43. Also the area chief, who was accused 1 senior officer, did not have anything against them. Their defence was therefore a sham and could not be believed. In a nutshell the prosecution proved its case beyond reasonable doubt.

44. The trial court found both accused guilty of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code, thus convicting them under section 215 of the Penal Code.

45. Thus the court makes the following orders;

- i. Appellant appeal has no merit and the same is dismissed, conviction and sentence are affirmed.**

SIGNED, DATED AND DELIVERED THIS 18TH DAY OF JUNE, 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE