REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 221 OF 2017

(FORMERLY MACHAKOS HCCRA NO. 28 OF 2016)

JIMMY MULI MULIKA ..... APPELLANT

-VERSUS-

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence of Hon. P. Wambugu (SRM) in Criminal Case No. 579 of 2015 of the Senior Resident Magistrate's Court at Kilungu, delivered on 25/01/2017)

JUDGEMENT

INTRODUCTION

1. The Appellant was tried and convicted by Hon. P. Wambugu (SRM), Kilungu Law Courts, for the offence of breaking into a building and committing a felony therein contrary to Section 306(a) of the Penal Code.

2. The particulars were that on 18/10/2015 at around 1500 hrs in Kilome Police quarters, Kilome sub-location, Mukaa Location, Mukaa Sub-County within Makueni County, the Appellant broke and entered an exhibit store and committed therein a felony namely, theft of 5 crates of "*karubu*" beer worth Kshs. 6,000/= kept as exhibit.

3. He was sentenced to 4 years imprisonment.

4. The Appellant was dissatisfied with the conviction and sentence and through his home made petition of appeal, he raised the following grounds:-

> ***a) That*** *I pleaded not guilty to the charge.*
>
> ***b) That*** *the trial Court erred in points of law and fact by basing the conviction on hearsay evidence.*
>
> ***c) That*** *the trial Court erred on points of law by not finding that none of the items recovered in my possession could have connected me with the crime.*
>
> ***d) That*** *the exhibited items could not have justified my involvement in the said crime.*
>
> ***e) That*** *I was initially charged with a case of trespass upon private land contrary to section 3(1) as read with section 11 of the Trespass Act cap 294 Law of Kenya in criminal case No. 578 only to be charged with the current case that I had no knowledge of.*
>
> ***f) That*** *the trial Court erred on points of law and facts by rejecting my defence without giving any cogent reasons for so doing as stipulated under section 169(1) of the CPC.*
>
> ***g) That*** *the learned trial magistrate erred in law and fact by dismissing the testimony of the Appellant as sham, unbelievable and in bad taste.*

5. The appeal was canvassed by way of written submissions.

6. The Appellant combined all the grounds and argued them together. He submitted that from the evidence, it is clear that PW1 did not see the person who was attempting to open the exhibit store. That the stolen items were not recovered from him and that he was not found in

possession of a tool that could be used to commit the offence.

7. He also submitted that from the evidence of PW1, the theft was a continuous process and had first been reported on 08/10/2015. That according to PW3, the store was opened on 21/10/2015. It was therefore his contention that he was charged with theft before it was even discovered.

8. Further, the Appellant submitted that the trial magistrate did not direct his mind as to who had the keys to the store before 21/10/2015. He went on to say that the trial magistrate did not properly apply the principles with regard to circumstantial evidence.

9. Further, it was his contention that the photographs of the broken window were not produced in Court and that it was wrong for the trial magistrate to find that the police station had no through way to the Appellant's house.

10. Further, the Appellant submitted that the evidence of the prosecution witnesses was contradictory with regard to the number of missing crates and as such, the trial magistrate should have found that the offence was not proved.

11. Finally, it was the Appellant's submission that the trial magistrate dismissed his defence without giving cogent reasons. He urged the Court to allow the appeal.

12. The state opposed the appeal and submitted that the case was proved beyond reasonable doubt and that the sentence imposed was within the law.

DUTY OF COURT

13. The duty of a first Appellate Court as aptly put in the case of **Okeno –Vs- Republic (1972) E.A. 32** is to scrutinize the evidence on record, make it's own findings and draw it's own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

14. Having looked at the grounds of appeal, the proceedings, the judgment and the rival submissions, the only issue for consideration is whether the offence was proved beyond reasonable doubt. I will now proceed to analyze and re-evaluate the evidence.

15. PW1 was Inspector Daniel Kariuki from Kilome police station. He said that on 18/10/2015 he was in his house within Kilome police station when he heard a person opening the exhibit store which was adjacent to his house.

16. He slowly got out and saw the Appellant who sells eggs at Kilome market. He called him out and ran after him. The Appellant dropped his hat.

17. The Appellant was wearing a faded jersey and faded jeans. He returned to the exhibit store. The door was not broken. Appellant was later arrested and had changed clothes. He found the clothes which the accused was wearing earlier on top of his bed.

18. He took them and produced them as exhibits. Later they realized that the store had been broken into and 5 crates of *'karubu'* were missing. He said he had no grudge against the Appellant.

19. On cross-examination, he agreed that the door was intact and that the attempted store breaking was first reported on '8th'. That on 21/10/2015, he charged the Appellant with trespass. That they realized that the Appellant had broken into the building.

20. That he found the Appellant at the scene where he left his cap. That the theft was a continuous process and there was no shortcut to the Appellant's premises.

21. PW2 was PC Moses Karani from Kilome police station. He said that on 18/10/2015 at 12.00 noon, he was at the report office with Inspector Kariuki. Inspector Kariuki went to his house and then called PW2 to ask whether PW2 had seen the Appellant passing by the station.

22. He then narrates what he was told by PW1 about the alleged theft.

23. He identified the cap as that of the Appellant. In the evening of the same day, he arrested the Appellant at Kilome market and took him to the station.

24. On cross examination, he said that he knew it was the Appellant who tried to open the exhibit store. That the OCS and PW1 found out about the stolen alcohol the same night. That they searched the Appellant's house and recovered the clothes he was wearing during the day.

25. PW3 was Chief Inspector, Charles Njinju, the OCS, Kilome police station. He said that on 18/10/2015 he was working at Katulye area. At 3.07 p.m., he received a call from the deputy OCS who narrated what had transpired at the station with regard to the alleged theft.

26. That on 21/10/2015 he took the store keys and proceeded to do inspection. He found that the window had been broken into and 5 crates of beer were empty. That the Appellant was properly identified because he is from the neighborhood.

27. On cross-examination, he said that they went to the Appellants house to search for the clothes he was wearing and that the crates were

outside the Court.

28. PW4 was CPL Reuben Nyaundi. He was the Investigating officer. He said that on 18/10/2015, he was minuted to investigate the case. On the same day, the Appellant was spotted in Kilome town and taken to the station.

29. He was booked for trespass and breaking. Later, the OCS went to the store and found that in fact there had been a theft of 5 crates of alcohol (*karubu*). He produced the 5 crates as exhibits.

30. On cross examination, he said that on 21/10/2015, the Appellant was charged with trespass. That the evidence of breaking and stealing was; the Appellant broke the window, he was found there, Inspector Kariuki said so. That he saw 6 empty crates, only 5 had alcohol

31. After the close of the prosecution's case, the trial magistrate found that the Appellant had a case to answer and accordingly, put him on his defence.

32. The Appellant gave an unsworn statement and did not call any witness. He stated as follows. That he worked as a casual labourer. On 18/10/2015, he went to plant grass at Robert Mutisya's compound.

33. At 7.30 a.m., he went to Kilome market to look for transport and found teacher Maina's car which ferried the grass to Robert's compound. He was paid Kshs. 3,500/= for the work.

34. At 9.00 a.m., he went back to Kilome shopping centre where he found his wife and children on their way to church. He gave them Kshs. 2,500/= for their use. He then proceeded to a wines and spirits shop where he drank alcohol for 45 minutes.

35. He then bought some take-a-way alcohol and went home. He decided to use a shortcut through the police station. It was not his first time to pass there. On reaching the junction near the OCS's house, he heard noises and was asked to stop. He didn't. He hid in the bushes for 10 minutes.

36. He then got out and his cap fell while he was running. He didn't go back for it as he was afraid. He went home and slept as he was drunk. He then woke up, bathed and passed through the same route looking for his cap.

37. He played pool at Kilome shopping centre. At 6.30 p.m. he went back to the wines and spirits shop and continued drinking. At 7.30 p.m. PC Karani and others told him that the OCS needed him.

38. He went to Kilome police station and on getting there, he was shown a cap. He admitted it belonged to him. He asked what he had done and was told to hand over the clothes he was wearing in the morning. They went to his house and recovered the clothes. He was then locked up in the cells.

39. On 19/10/2015, he asked PC Karani what the charges against him were and was told about trespass. He asked for forgiveness. He was then charged with trespass, pleaded guilty and was fined.

40. He was then charged with breaking and stealing which he denied.

ANNALYSIS

41. Section 306 of the Penal Code, Chapter 63 Laws of Kenya provides as follows;

> **Breaking into building and committing felony.**
>
> ***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***
>
> ***b) Breaks out of the same having committed any felony therein,***
>
> ***Is guilty of a felony and is liable to imprisonment for seven years.***

42. The identification of the Appellant is not in dispute. He admitted to have been within Kilome police station on the day the alleged offence took place.

43. He also submitted that PW1 knew him very well as he used to see him selling eggs in Kilome market.

44. The million dollar question however is whether the Appellant committed the offence. It was curious for PW1 to say that the theft was a continuous process and that attempted store breaking had first been reported on the '8th'. The date did not come out clearly but the fact remains that there had been an initial report. There was no evidence to show that the store was inspected after the initial report.

45. Further, the prosecution's evidence is that the offence was committed on 18/10/2015 on the same day that the Appellant was arrested. It is not in dispute that the Appellant was charged with an initial offence of trespass which he admitted and was fined.

46. However, it is on record that the officers discovered the alleged theft on 21/10/2015. The Appellant raised a valid point about the keys to the store. There was no guarantee that the store was totally inaccessible to anyone else between the day of arrest and when the theft was discovered.

47. Further, the fact that no evidence was led to show that inspection was conducted after the first attempt, it could not be ruled out that any missing item was not because of that first attempt.

48. PW3 testified that when he went to inspect the store on 21/10/2015, he found that the window had been broken into.

49. It is therefore clear that the broken window was discovered way after the Appellant is said to have stolen from the store. If the broken window was discovered on 21/10/2015, it is possible that the said breakage occurred during the first attempt hence my opinion that anything found missing after the discovery could be attributed to the first attempt.

50. It is however intriguing that a window to the exhibit store, which was within the vicinity of the officers, could be broken and none of the officers noticed for all those days.

51. There was also the issue of the short cut. The trial magistrate in his judgment noted that there was no through way to the accused's home through the police station. It is not clear how he arrived at this conclusion as it is not indicated anywhere in the judgment that he actually visited the scene.

52. Further when PW1 called PW2 to ask whether he (PW2) had seen the Appellant passing through the station, the implication and as rightly submitted by the Appellant, was that they used to see him passing by. It is my considered view that there was no basis upon which the trial magistrate could reach such a conclusion.

53. With regard to the exhibits produced by the prosecution, I really do not see how they helped their case. First, the only direct evidence was from PW1 in that he perceived some activity from the store through hearing.

54. Apart from performing roles which are incidental to an arrest, all the other witnesses gave hearsay evidence.

55. PW1 did not see the Appellant breaking into the store. He also confirmed that the door was intact. It was also his evidence that none of the stolen items was recovered from the Appellant.

56. The Appellant's clothes did not in any way establish that he was involved in the alleged theft. This brings me to the issue of circumstantial evidence.

57. The Trial Magistrate relied on the case of **Abanga alias Onyango -Vs- Republic; Criminal Appeal No. 32 of 1990 (UR)** where the Court of Appeal set out the principles to apply in order to determine the sufficiency of circumstantial evidence in a case. The principles are that;

> ***a) The circumstances in which an inference of guilt is sought to be drawn must cogently and firmly be established.***
>
> ***b) The facts should be of a definite tendency unerringly pointing towards the guilt of the accused.***
>
> ***c) The circumstances taken cumulatively should form a chain co complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and nobody else.***

58. The authority is by all means an excellent one however; it is my view that the trial magistrate did not properly apply the enumerated principles to the case.

59. In light of what I have highlighted above, it cannot be said that the cumulative circumstances of this case were so complete that no one else could have broken into the store apart from the Appellant.

60. Finally, there was the issue of the stolen items. PW1 said that 5 crates were missing from the store, PW3 said that 5 crates were empty, PW4 said there was theft of 5 crates and then in cross examination, said that he saw 6 empty crates and only 5 had alcohol.

61. The inconsistency in the evidence of the prosecution witnesses raised eyebrows and in light of the foregoing analysis, it definitely created doubt as to whether the Appellant was culpable.

62. It is trite that any doubt in the Court's mind in criminal cases should be exercised in favour of the accused person. The upshot of the foregoing is that the prosecution's case was underwhelming and it is my considered view that the Appellant's conviction was unsafe.

CONCLUSION

63. The appeal has merit and same is allowed on the following terms:-

i. The conviction is quashed and sentence set aside.

ii. Accused is released forthwith unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED THIS 31ST DAY OF JULY 2018, IN OPEN COURT.

……

C. KARIUKI

JUDGE