



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

HCCRA NO. 59 OF 2017

KASSIM MAKOKHA KWEYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by F.M. Nyakundi, RM, in Mumias PMC Cr. Case No. 1174 of 2016 dated 12.5.2017)

J U D G M E N T

1. The appellant was convicted of the offence of having suspected stolen property contrary to section 323 of the penal code and sentenced to serve 4 years imprisonment. He was dissatisfied with the decision of the learned trial magistrate and filed this appeal. The grounds of appeal are that:

1. The learned trial magistrate erred in law and in fact in finding that the appellant confessed to PW1, 2 and 3 regarding knowledge of exhibited items yet there was no written confession statement.
2. The learned trial magistrate erred in law and fact by placing inordinate weight on evidence of recovery without considering that the search, if any, was extra judicial and in contravention of the constitution.
3. The trial magistrate failed to consider that nothing was recovered from the house of the appellant.
4. The trial magistrate failed to consider that there was no evidence linking the exhibited goods to any owner thereby convicting on the basis of mere suspicion.
5. The trial magistrate handed the appellant a harsh custodial sentence without reference and consideration of a favourable probation report.

6. The trial magistrate failed to consider the appellant's defence.

2. The appellant was jointly charged with another person who was convicted and placed on 2 years probation. The other convict did not file an appeal. The particulars of the offence against them were that on the 1st day of November, 2016 at Angola Estate Nabongo location in Mumias sub- County within Kakamega County having been detained by No. 47512 PC John Munyao as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code jointly had in their possession the following goods- one radio cassette make Sony, one pressure lamp, one chloride oxide car battery, one go Tv decoder, one star time decoder, one DVD player make LG, one DVD player make Sonny and three remote controls- reasonably suspected to have been stolen or unlawfully obtained.

3. The state opposed the appeal but relied on the decision of the lower court.

4. The case for the prosecution was that the prosecution witnesses PW1, PW2 and PW3 were community-policing officials in Mumias. That on the 1/11/2016 they were holding a meeting with members of the public at Ekeru market when they received a report that some goods had been stolen at Bookers area of Mumias town. They received information that the appellant herein was involved with the theft. They went to the house of the appellant. They interrogated him. He confessed to having stolen goods at Booker. He offered to show them where the goods were. He led them to the house of an accomplice, the (1st accused who was convicted and placed on probation). In the house of the 1st accused they found the items stated in the charge sheet. They escorted the two suspects to Mumias police station. PC Munyao charged the suspects with the offence that they were convicted of.

5. In their defence the appellant and his colleague had denied committing the offence. The trial magistrate however convicted the appellant on the grounds that when the prosecution witnesses were testifying he did not deny that he is the one who directed the witnesses to the house of the 1st accused. That the prosecution witnesses did not know the house of the 1st accused. That the recovered items were without receipts

and that the appellant knew how the items got to the house of the 1st accused. That he could not have directed the witnesses to the house of the 1st accused if he did not know that the goods were stolen and kept in the house of the 1st accused.

6. The appellant and his colleague were charged under section 323 of the penal code. The section provides that:

“Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.

7. Section 26(1) of the criminal procedure code provides that:-

A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain-

a)....

b)....

c) Any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

8. The ingredients of the charge under section 323 of the Penal Code are that:

(i) That the suspect is in the course of journey.

(ii) that the suspect is stopped, searched and detained by a police officer in exercise of the powers conferred by section 26 of the Criminal Procedure Code.

(iii) That the person is found in possession of or conveying property reasonable suspected to be stolen.

(iv) that the person cannot give an account of how he came into possession of the suspected stolen goods.

9. In this case the appellant was not arrested by the police in exercise of the powers conferred by section 26(1) of the criminal procedure code. He was arrested by civilians. He was not in the course of a journey but was arrested in his house. At the time of arrest he was not in possession of the suspected goods. He was thereby not found conveying anything in the course of a journey. The conditions precedent to a finding of guilty were thereby absent. The appellant had no case to answer leave alone being convicted of the offence.

10. It seems that the owner of the goods allegedly found with the appellant was known. PW1 stated in his evidence that the owner of the goods was a witness in the case. It was thereby not proper to charge the appellant under section 323 of the penal code where the owner of the goods was known. In **Patrick Siana Vs Republic (1993) eKLR**, the court of Appeal held that where the owner of goods is known, it is not proper for the police to charge an accused person under section 323 of the penal code. The court endorsed the statement of principles stated in the case of **Mohamed Vs Republic (1971) EA 42** where the court of Eastern Africa had held that:

“It seems to us that the provision which relate to reasonable suspicion should never be invoked where a charge of stealing or receiving could be laid. The general rule in criminal matters is that the onus of proof is on the prosecution. In certain limited classes of cases the legislature has, for good reason, placed the onus of proof on the accused, but such provisions should not be used outside the circumstances for which they were intended. We think that where evidence is available to prove ownership and the theft of any property it is clearly wrong to rely on them.”

10. In the foregoing, the appellant was unlawfully convicted of the offence. The conviction is thereby quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless lawfully held.

11. The 1st accused in the case was convicted of the said charge and sentenced to 2 years' probation. He does not seem to have filed an appeal. As the conviction and the sentence were unlawful, I do hereby exercise my powers of revision provided in section 362 of the criminal procedure code and similarly quash the conviction and the sentence against the 1st accused, Musa Turo Nyangweso.

Delivered, dated and signed at Kakamega this 31st day of July, 2018

J.NJAGI

JUDGE

In the presence of :

Appellant.....Appearing in person

Mr. Jumafor respondent/state

Georgecourt assistant

14 day Right of Appeal explained.