



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 110 OF 2015

REPUBLIC.....APPELLANT

-VERSUS-

FAITH KARENDI.....RESPONDENT

(Being an appeal arising from the dismissal by Hon. C. Kemei, Resident Magistrate in Maua Chief Magistrate's Criminal Case No. 1750 of 2013 delivered on 30/04/2015)

JUDGMENT

1. This is an appeal by the **State**, the Appellant herein, against the acquittal of **Faith Karendi**, the Respondent herein, who had been charged alongside three others with the main count of **Breaking into a Building and committing a Felony** contrary to **Section 306(a)** of the **Penal Code, Cap. 63** of the Laws of Kenya. The Respondent faced an alternative count of **Handling suspected stolen goods** contrary to **Section 322(2)** of the **Penal Code**. Those charged with the Respondent were **Nahashon Kirinya, Gitonga Benson** and **Pheneas Githinji** whom I will collectively refer to as '**the co-accused**'.

2. The particulars of the main count were as follows:

"On the 15th day of June 2013 at about 11:00pm at Kiraoni location in Igembe South District within Meru County jointly broke and entered a building namely shop of STEPHEN MANYARA and committed a felony namely theft of Kshs. 10,000/=, 33 bars of soap and three Ogor tubes of chemicals valued at Kshs. 2,895/= the the property of STEPHEN MANYARA."

3. The alternative count had the following particulars: -

"On the 16th day of June 2013 at Kiraoni location in Igembe South District within Meru County, otherwise than in the course of stealing dishonestly retained Kshs. 10,000/=, 33 bars of soap valued at Kshs. 1895 and three Ogor tubes of chemicals valued at Kshs. 1090/= knowing or having reasons to believe them to be stolen or unlawfully obtained."

4. The Respondent denied the charges whereas the co-accused, who were minors, pleaded guilty to the main charge and they were variously sentenced.

5. In a bid to prove the charges against the Respondent, the prosecution called 4 witnesses. **PW1** was the complainant one **Stephen Manyara** whereas **PW2** was the complainant's daughter one **Mercy Karendi**. The arresting officer, **PW3** was **No. 89121956 APC Johnson Githinji Kinoti** attached at Kiraone AP Post and the investigating officer was **No. 48469 PC Keter Muli** from Maua Police Station who testified as **PW4**. The Respondent was a wife to a son of a brother to **PW1** and she was not represented at the hearing. One of the co-accused was a son to **PW1** and the other two were **PW1**'s nephews. All the parties lived in the same homestead. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

6. The prosecution's case was that in the evening of 15/06/2013 at around 06:00pm **PW1** locked his shop at Kiraone market using a padlock and proceeded to Maua town to buy some items. That, at around 11:00pm **PW2** was asleep she was woken up by one **Joyce** (not a witness) and told that **PW2** father's shop had been broken into by the co-accused and one **Mwendi Mwatthesi**. **PW2** rushed to the scene and found police there among several other people. **PW2** called and informed **PW1** who later came to the scene.

7. **PW3** testified that as he was at the post on 15/06/2013 at around 11:00pm he received a report from one **Patrick** (not a witness) who informed him that he had witnessed **PW1**'s shop broken into at the Kiraone market by people he knew. **Patrick** asked **PW3** to visit the scene. **PW3** while in the company of his colleague were accompanied by **Patrick** and proceeded to the homes of the suspects. **PW3** testified that they arrested the co-accused and on interrogation the co-accused led the police to the home of the Respondent who was also known as **Beth**. That, on reaching at the home of the Respondent they found the kitchen not locked and on knocking a boy opened the door. The co-accused led the police inside the kitchen and removed some money under a mat which was on the floor. The police recovered the money.

8. PW3 then knocked the door to a house which was adjacent to the kitchen and the Respondent opened. PW3 knew the Respondent before. When the police told the Respondent that they were looking for some items stolen by the co-accused the Respondent stated that there were some goods that the co-accused had asked her to keep for them. The Respondent removed a sack from under her bed and handed them over to the police. PW3 opened the sack and found some soap and herbicides. The police arrested the Respondent as well and led her together with the co-accused to the PW1's shop and then proceeded to the police post. That, PW1 went to the post at around midnight and he identified the items and the money as the items stolen from his shop. PW3 led those he had arrested to Maua Police Station in the morning of the following day and handed them over to PW4 who visited the scene later.

9. PW1 however testified that when he reached the scene he found the police and about 50 other people and on inspection of his shop he realized that several items missing together with Kshs. 10,000/= which was in the denominations of Kshs. 1,000/=, Kshs. 200/= and Kshs. 100/= notes. Unlike PW3, PW1 testified that he was present when the police arrested the co-accused and the Respondent. PW4 preferred the charges against the Respondent and the co-accused. He produced the recovered items and the money as exhibits.

10. At the close of the prosecution's case, the trial court placed the Respondent on her defence. The Respondent opted for and gave sworn testimony and called a witness. The Respondent denied the charges and stated that on the fateful night some police officers and PW1 went to wake her up at her house and searched her house for reasons that they were looking for stolen items. That, the police found her money, Kshs. 10,000/= on the bed-drawers, which her husband had sent to and took it. She denied the recovery of the items from her house and contended that she usually locked her kitchen with a padlock before going to sleep in the main house.

11. The Respondent's witness, **Robert Kinoti (DW2)**, testified that he was among the people who accompanied the police to the houses of the co-accused and witnessed the items recovered from the house of one **Karuti** and not the Respondent and that the money was not recovered from the kitchen but from the main house where the Respondent was.

12. By a judgment rendered on 30/04/2015 the trial court found the case not proved in law and dismissed it. The Respondent was accordingly acquitted.

13. Being dissatisfied with the acquittal, the State with the leave of this Court lodged the appeal subject of this judgment. By a Petition of Appeal dated 19/10/2015 the State preferred the following grounds: -

1. That the trial magistrate erred in law and fact by acquitting the respondent when there was sufficient evidence to convict the Respondent.

2. That the trial magistrate erred in law and fact by concluding that no evidence to show that PW1's shop had been broken into when both PW1 and PW4 informed the court that the back door had been broken.

3. That the magistrate erred in law and fact by failing to find that the prosecution had proved its case beyond any shred of a doubt.

4. That the acquittal of the respondent was against the weight of evidence.

14. The State prayed that the appeal be allowed, the acquittal be set-aside and a conviction be entered and the Respondent be sentenced according to law.

15. The appeal was heard by way of oral submissions where the State submitted that there was sufficient evidence to sustain a conviction. The Respondent denied committing the offence.

16. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

17. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offences of Breaking into a Building and committing a Felony or Handling suspected stolen goods were proved and as so required in law; beyond any reasonable doubt. To that end, I have carefully revisited the evidence, the impugned judgment, the Petition of Appeal and the submissions.

18. The starting point is the law. A count of breaking into a building and committing a felony has two limbs; that of **breaking into a building** and that of **the felony itself** which was committed. **Section 306(a)** of the Penal Code states as follows:

(a)breaks and enters a schoolhouse, shop, warehouse, store. Office, counting-house, garage, pavillion, clun, 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 workshop, and commits a felony therein."

19. Therefore for the offence of breaking into a building and committing a felony to be proved it must be proved that the Respondent broke and entered into the shop and actually committed a felony therein.

20. From the evidence, PW1 testified that he locked both doors to his shop before he left and when he returned he found that the padlock at the rear door was missing. He could not tell if the padlock was cut since the door was not damaged. PW4 who visited the scene also

confirmed that there was no sign that the rear door was broken and suspected that the intruders must have used a master key to open the padlock. It is therefore clear that no break-in was proved.

21. The felony allegedly committed inside the shop was stealing. **Section 268(1)** of the **Penal Code** defines ‘stealing’ as follows: -

“ A person who fraudently and without claim of right takes anything capable of being stolen, or fraudently converts to the use of any person, other than the general or special owner thereof, any proeprty, is said to steal that thing or property.”

22. PW1 stated, and it was corroborated by PW2, that he ran a shop at the Kiraone market. PW3 also corroborated that fact. It was hence imperative that it be proved that the alleged recovered goods were in the first instance in PW1’s shop. PW1 testified to that end. The co-accused also confirmed that they took away the recovered items from PW1’s shop. The goods were no doubt in the possession of PW1. The fact that PW1 was the owner, whether general or special, was proved. Since PW1 did not allow the goods to be removed from his shop, those goods were stolen. Theft was hence proved.

23. Having found so, the issue which now remains in contention is whether the Respondent was also among those who committed the offences. The Respondent denied committing the offences whether by herself or in collusion with the co-accused. When the co-accused were arrested, they confessed that they had taken the items to the custody of the Respondent. The prosecution led evidence that they recovered the goods from the Respondent’s house and the money from the kitchen. The Respondent and DW2 denied that the goods were recovered from the Respondent. According to DW2 he stated that he had followed the police unto the recovery of the goods and that he witnessed the goods recovered from Karuti’s house instead. He denied that the goods were ever recovered from the Respondent. The Respondent also denied that the police were led to her house by the co-accused since according to her they were not with the police.

24. The Respondent contended that she was being fixed as a result of family wrangles and that PW1 had all along been opposed to her marriage to PW1’s brother. Since then they had not been in good terms. The Respondent further stated that she was not in good terms with PW2 as well.

25. The scenario in the case pointed to an offence alegendly committed in a homestead by and among family members against a background of sibling rivalry. One of the co-accused was a son to PW1 and a brother to PW2 and the other two were nephews to PW1 and cousins to PW2. Whereas the co-accused admitted the main charge, that was not the case with the Respondent. The prosecution was therefore under a duty to establish the connection between the recovery of the goods and the Respondent. None of the co-accused was called to testify. No reasons were given for such a lapse either. The evidence of the co-accused was so crucial as it would have given the Resondent an opportunity to cross-examine them more so on the recovery of the goods and would have, may be, been corroborated accordingly. Apart from the allegation that the co-accused led the police to the recovery of the goods there was no any other evidence connecting the Respondent and the said goods.

26. There was also the evidence of two independent witnesses which was not availed. Partick and Joyce were not part of the family of the Respondent and PW1. They both witnessed the shop being broken into and goods stolen therefrom. Joyce even identified the thieves being the co-accused and one Mwendu Mwathesi who was not charged. Patrick is the one who called PW3 from the post and informed him of the break-in and that he knew the thieves. He did not however give their names to PW3. It is also not clear how PW3 found his way to the homes of the co-accused. Had Patrick testified he would have clarified who the thieves he saw were and how the police, whom he called, proceeded to arrest the co-accused. Joyce called PW2 and informed her of the theft after which PW2 called and informed her father PW1. From the position that all was not well in the family of PW1 and the Respondent, that one of the co-accused was a son to PW1 and the two were PW1’s nephews, that the two crucial and independent witnesses were not called to testify without any justification and the contradictory evidence of PW1 and PW3 where PW3 contended that PW1 was not present at the recovery of the goods but only went to the police post long after the arrest and confinement of the suspects (while PW1 contended that he was present during the recovery) indeed unavails real doubt in the mind of any reasonable person and the possibility that the Respondent was framed cannot be regarded as remote. There was need for independent evidence to corroborate what the family members stated. The prosecution glaringly failed to avail such whereas the Respondent availed DW2.

27. That aside, the money which was alleged recovered was not what was produced in court. PW1 testified that he had lost Kshs. 10,000/= in different denominations. What was produced in court were ten Kshs. 1,000/= notes. The explanation given that the money was changed into Kshs. 1,000/= notes does make any sense. Why were the exhibits interfered with? Was what was produced in court therefore what was allegedly stolen from PW1? Certainly not. PW1 did not hence prove that he lost and recovered the money. The Respondent’s position that she had been sent the money by her husband could not therefore be ignored.

28. Inevitably, from the foregone analysis, I must come to a like conclusion as the learned trial magistrate that none of the charges against the Respondent were proved. The investigating officer ignored crucial evidence and must have been excited by the admission of the main charge by the co-accused and lost track of the fact that the Respondent had denied the charges and that the charges were to be proved beyond any reasonable doubt.

29. I therefore affirm the decision of the learned trial magistrate and find that the appeal is unmerited and is hereby dismissed.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at MERU this 30th day of July, 2018.

F. GIKONYO

JUDGE