



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO. 222 OF 2010

DOUGLAS AVEDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by P.O.Ooko, RM, in Kakamega

CM's Court Criminal Case No. 1427 of 2008 dated 29/10/10).

J U D G M E N T

1.The appellant was convicted of the offence of stealing contrary to section 275 of the Penal Code and sentenced to a fine of Kshs. 40,000/= in default to serve two years imprisonment . He was aggrieved by the said conviction and the sentence and filed this appeal.

2.The grounds of appeal are :

1. That the learned trial magistrate erred in law by sentencing and convicting the appellant on a charge whose basis was contract and civil in nature.
2. That the learned trial magistrate erred in law by failing to discern from the evidence on record that there existed privity of contract between the appellant and complainant and as such no criminal liability arose from the complainant's complainant.
3. That learned trial magistrate erred in law in sentencing and conviction the appellant when the prosecution had failed to prove its case beyond reasonable doubt.
4. The learned trial magistrate erred in law by convicting and sentencing the appellant against the weight of evidence on record.
5. The learned trial magistrate erred in law by convicting and sentencing the appellant on strength of contradicting evidence from the prosecution.
6. The learned trial magistrate erred in law by failing to consider evidence adduced by the appellant.
7. The learned trial magistrate erred in law by meting an excessive sentence against the appellant.
8. The learned trial magistrate erred in law by shifting the burden of proof to the appellant.

3. The particulars of the offence against the appellant were that on the 2nd August, 2008 at Kakamega town within Western Province he stole one power saw machine make scavena valued at Kshs. 53,000/- the property of George Makhoha(herein referred to as the complainant).

The appeal was opposed by the state.

Prosecution Case

4. The case for the prosecution was that the complainant was working with Vihiga County Council and owned a power saw. That on the material day at 10 am he was at his house at Kiambala village in Mbale when the accused who was unknown to him went to him and requested for services of a power saw to cut his trees in Kakamega. They agreed on the charges. The complainant called a power saw machine operator PW2 . The three of them went to Mbale township and boarded a matatu for Kakamega. They were carrying the power saw. On getting to Kakamega they were dropped at Caltex Petrol Station. The appellant then went into the Petrol Station and approached a petrol station attendant PW4 while the others were standing a distance away. He requested her to keep the power saw for them. PW4 agreed. The appellant went back to the complainant and PW2 and told them that the petrol station did not have regular fuel that they required for use in the power saw. He convinced them that they leave the power saw at the petrol station as they went around to look for fuel. The complainant agreed. The complainant and the appellant went and kept the power saw in a room at the petrol station. They went to look for fuel.

5. The appellant offered to buy the complainant and his colleague drinks. They went to a bar. The complainant took a soda. PW2 took a beer. The appellant did not take anything. The appellant and PW2 then left the complainant at the bar and went to look for fuel. The appellant then gave PW2 money and told him to go and grind flour. The appellant went with a jerrican to look for fuel. The appellant then went back to the petrol station and took the power saw. The lady attendant PW4 was there when he took the power saw. PW2 went back to the bar with the flour. The appellant had not gone back to the bar. They became suspicious. They went to the petrol station. PW4 told them that the appellant had gone a few minutes earlier and taken the power saw. They made a report at Kakamega Police Station . The complainant went in search of the appellant. He boarded a matatu for mumias. On getting at Mumias – Butere junction, he was informed that somebody had alighted at that stage with a power saw. He boarded a matatu towards Butere . He managed to trace the home of the appellant. He found him with a different power saw. He went home.

6. On the 4/9/08 the complainant was at Vihiga District Hospital when he saw the appellant. He called an administration police officer PW3 who went and arrested the appellant. He was escorted to Kakamega Police Station and handed over to Pc Cherotich PW6. Pw6 organized an identification parade that was conducted by Chief Inspector Kinyua PW5. The appellant was identified by the petrol station lady attendant PW4. The power saw was not recovered. The appellant was then charged with the offence. The appellant denied the charge. During the hearing the purchase receipt for the power saw and the identification parade forms were produced as exhibits, Pexh 1 and 2 respectively.

Defence Case

7. When placed to his defence the appellant gave sworn evidence. He said that he was working as a personal assistant to Mr. Yusuf Chanzu in Vihiga. That on 2/8/08 he was on official duties in the office of Mr. Yusuf Chanzu. That he reported at his place of work at 8.am. He stayed there upto 11.30 am when he left for a funeral for the child of one Dr. Omboke . He went to the funeral with Mr. Yusuf Chanzu . At 12.30 pm they left for another funeral after which they went to the home of Mr. Chanzu where Mr. Chanzu was hosting a women group delegation. He stayed there upto 9.30 pm. He said that he did not know the complainant and PW2. He said that he never met them on the material day. He denied that he stole the power saw.

8. The appellant called 4 witnesses. Ronald Oyieko DW2 stated that he is a clerk at Vihiga constituency office where the appellant was the manager. That on 2/8/08 he reported for work at 8 am. The appellant reported at the same time and stayed upto 11.30 am when he, the appellant, left with their messenger Herbert Adegto to attend a funeral.

9. Herbert Adegto DW3 stated that he works at Vihiga Constituency Office. That on that day he reported for work at 8 am and found the appellant having already reported. They stayed in the office upto 11.30 am when he and the appellant proceeded for a funeral in Chambiti sub-location . That Mr. Yusuf Chanzu found them at the funeral. Later the appellant and Mr. Chanzu left for another funeral.

10. Ronald Mbangwa DW4 stated that he is a location representative with Vihiga Constituency Bursary Fund. That the appellant was the manager of Vihiga Constituency office. That on 2/8/08 he made a visit to the said office at 9.30 am and signed the visitors book. The appellant was at the office. He left the office at 10 am. Later in the day at 1.30 pm he met the appellant in a funeral in the company of Mr. Yusuf Chanzu.

11. Kigalo Muholo DW5 testified that he is a bursary representative with Vihiga Constituency Bursary Fund. That the appellant was the office manager of Vihiga Constituency office. That on 2/8/08 he went to the rural home of Mr. Yusuf Chanzu. At 11 am he left with Mr. Chanzu to attend a funeral at Chambiti village where they found the appellant already there in the company of Herbert Adego. They stayed at the funeral upto 1 pm when he, the appellant and Mr. Chanzu left for another funeral. Later they went to the home of Mr. Chanzu where Mr. Chanzu met members of a women group. They parted ways at 9 pm.

Findings by the trial court

12. In his judgment the learned trial magistrate found that the appellant was positively identified by three-people the complainant, the power saw machine operator PW2 and the petrol station lady attendant PW4. He found that the three of them had travelled together to Kakamega from Mbale and therefore that the witnesses had ample time to identify him. He found that the identification parade was properly conducted. He dismissed the appellant's alibi defence on the basis that the evidence given by the defence witnesses was contradictory.

Submissions:

13. The advocates for the appellant, **D.C. Chitwa & Co. Advocates**, submitted that the complainant stated that he did not know where the appellant resides. The advocates questioned the identity of the person whom the complainant said that he found at Butere.

14. The advocates submitted that the evidence of the complainant was contradictory in that he said that it is the appellant who was carrying the power saw to the petrol station while other witnesses said that it is the complainant who did so.

15. That the appellant was said to have a deformity on one of his fingers but the complainant and PW2 contradicted each other on which finger had a deformity.

16. That PW4 said that there were 20 members in the parade while PW5 said that the parade comprised of 8 members.

18. It was also submitted that the trial court shifted the burden of proof to the accused and erred in rejecting his alibi defence. It was also submitted that the sentence meted out was excessive.

19. The state did not make any submissions but instead relied on the record of the lower court.

Duty of a first appellate court

20. . It is the duty of a first appellate court to subject the evidence adduced in the lower court to a fresh and exhaustive examination and draw its own conclusions while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses testify – see **Okeno Vs Republic(1972) E.A. 32.**

Analysis and Determination

21. The evidence against the appellant was that he went to the home of the complainant and requested for services of a power saw. The complainant and a power saw machine operator PW2 accompanied the appellant to Kakamega town where the appellant convinced them that they leave the power saw at Caltex Petrol Station as they sought for fuel. A lady attendant at the petrol station identified the appellant as the

person who asked her whether they could keep the power saw for them. She identified the appellant as the person who soon after went back and collected the power saw in the absence of the other two. She picked him in an identification parade at the Police Station.

22. The complainant stated in his evidence that he observed that the appellant had a nail missing on his right thumb. Pw2 stated that the appellant had a broken nail on the third finger of the left hand which was confirmed by the trial court during the hearing. When cross examined in court the appellant said that he had a deformity on his middle finger nail of the right hand. He said he had no deformity on the left thumb nail.

23. There is no doubt that the complainant's power saw was stolen on the material day by a certain person at Caltex Petrol Station as testified by PW1, 2, and 4. The three witnesses did not know the appellant before. The question was whether the witnesses identified the appellant as the person who stole the power saw.

24. Our courts have always required for evidence of identification to be treated with great caution so as to avoid convicting an accused person on evidence of mistaken identity. In **Wamunga Vs Republic (1984) KLR 424** the Court of Appeal held that:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J., in the well known case of R. vs Turnbull (1976) 3 All E.R. 549 at page 552 where he said:-

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

The court in the said case also held that identification of an accused person in court by a complainant is almost worthless without an earlier identification parade.

25. Pw2 stated that he only saw the appellant on the material day and the second time he saw him was when he was testifying in court. There was no identification parade conducted to test whether the witness could identify the appellant. No explanation was given why the police failed to do this. In the premises the witness was only identifying the appellant in court without a prior identification having been conducted. The identification from the witness box was worthless. The evidence of PW2 should therefore have been disregarded.

26. The complainant stated that he on the material day traced the thief upto his home at Butere. He did not explain how he learnt that the person hailed from Butere. He at the same time stated that when he found the person, he did not take any action on him. He did not report to the police. Was the appellant then the same person that the complainant traced to Butere? What had changed from the time when the appellant saw the person at Butere to the time he saw him at Mbale when he had him arrested?

27. The Investigating Officer did not follow up the matter to find out whether the appellant hails from Butere. He did not find out whether there was another person at Butere whom the complainant could be mistaking for the appellant. It is then not clear whether the appellant is the same person that the complainant traced to Butere. If the two people are different, it would mean that the complainant is mistaking the appellant for another person. The prosecution did not thereby adduce evidence ruling out the possibility of mistaken identify.

28. The complainant stated that he observed that the person had a deformity of his nail on the right

thumb. PW2 on the other hand stated that the deformity was on the third left finger nail. The complainant said that the deformity was on the middle finger of the right hand. If the witnesses had observed the appellant properly why would they differ on where the deformity was ? It is then possible that the witnesses were making up this evidence because they learnt the appellant had a deformity on one of his fingers. Their evidence on the issue was not credible.

29. The petrol station attendant PW4 saw the person more than a month later. As a person working in a public place, she meets very many people on a daily basis. She did not give any special features that enabled her to identify the person as the appellant while she dealt with him for a very short time. Given that the evidence of PW1 and 2 was doubtful that the appellant was the thief, I do not think that the evidence of PW4 was by itself sufficient to be the basis of a conviction against the appellant.

The appellant raised an alibi defence. The onus of proving falsity of an accused's defence of alibi lies on the prosecution.

In **Kiarie Vs Republic (1984) KLR**, the court of Appeal held that :

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable – Said vs Republic(1963) EA6.”

30. The fact that the complainant failed to take any action on the appellant when he traced him to Butere should have created doubt in the mind of the trial court as to whether the complainant actually identified the appellant as the person who had stolen his power saw. There was no explanation as to why the complainant decided to take action on the appellant when he saw him a second time in Mbale when he had failed to take any action when he saw him the first time after the theft. The complainant might have mistaken the appellant for the thief. The defence offered by the appellant which explains his itinerary for the day raises reasonable doubt that he was the thief.

31. In the foregoing, the evidence adduced against the appellant was not sufficient to be the basis of a conviction against him. The trial court did not consider that there was a possibility of mistaken identity. The conviction was unsafe. The same is thereby quashed and the sentence set aside. An order is made for the fine paid by the appellant to be refunded to him.

Delivered, dated and signed at Kakamega this 28th day of September,2018.

J.NJAGI

JUDGE

In the presence of :

Chitwa.....for appellant

Ng'etich.....for state

George.....court assistant

14 day Right of appeal.