



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 11 OF 2018

ABDI BARRE MUHAMUD.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Mandera Senior Principal Magistrate Criminal Case No. 542 of 2017 by Hon. Mugeidi Nyaga (RM))

JUDGEMENT

1. The appellant was charged with another in the Magistrate's Court at Wajir with two counts. Count 1 was breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. The particulars of the offence were that on 22nd November 2017 at Wajir township Location, Wajir East Sub-County within Wajir County, Jointly broke and entered the store of Hassan Noor Abdille and committed therein a felony namely theft of 30 cartons of Altunza power milk valued at Kshs. 231,000/= property of the said Hassan Noor Abdille.

2. In the alternative he was charged with handling stolen goods contrary to section 322 (1) (2) of the Penal Code. The particulars of the offence were that on the same day and place, otherwise than in the course of stealing dishonestly retained 7 cartons of Altunza powder milk having reason to believe them to be stolen goods.

3. He denied both counts. After a full trial his co-accused Sammy Muthui Kilo was acquitted on both counts. The appellant was however found guilty and convicted on the main count of breaking into a building and committing a felony. He was sentenced to serve five (5) years in jail.

4. The appellant has now come to this court on appeal. He filed his appeal in February 2018. Before his appeal was heard however, he filed amended grounds of appeal and written submissions which he relied upon. His amended grounds of appeal are as follows-

(1) The learned trial magistrate erred in law and fact to convict him without considering the fact that he was not caught at the scene of the crime.

(2) The learned trial magistrate failed to consider that he was incriminated by the 2nd accused due to the fact that he was trying to escape from the trap.

(3) The learned trial magistrate erred in law in convicting him without putting into consideration that the prosecution case was not proved beyond reasonable doubt.

(4) The prosecutor who conducted the prosecution case was not fit as his rank was below that required by the law.

5. At the appeal, the appellant relied on his written submissions. He added orally that initially there were three suspects and a woman. Two were released at the police station while the one who was found with the items was released in court.

6. Mr. Okemwa the learned Principal Prosecuting Counsel stated in submissions that the appellant was tried with another and was found guilty of the main count. He stated that the appellant was placed at the scene of the crime. He stated also that the offence was prevalent at Wajir and that the magistrate gave a sentence which was meant to send a message to other would be criminals. Counsel pointed out however that the appellant appeared to have reformed while in prison.

7. In response, the appellant maintained that he was not found in possession of anything.

8. This is a first appeal and as a first appellate court, I am required to re-evaluate all the evidence on record and come to my own independent conclusions and inferences. See the case of **Okeno vs Republic [1972] EA 32**.

9. I have re-evaluated the evidence on record. I have perused the judgment, and I have also perused and considered the submissions of the appellant both written and oral, as well as the submissions of counsel for the prosecution.
10. The prosecution called five witnesses in support of their case. The appellant and his co-accused tendered sworn testimony and each was cross-examined at length.
11. No witness saw the breaking of the shop and stealing of the milk cartons. PW2 Mohamed Khalif Ahmed was an employee of Hussein Noor PW1. At 4 am while PW2 was going for prayers in the mosque he found that the store was broken and milk cartons stolen, and after calling the police, they got information that some cartons of milk had been offloaded in another house that early morning. With the police, they proceeded there and met a woman PW3 Josephine Kalonzo who told them about the person who talked to her husband PW4 Justus Kilonzo the previous night and brought the items there. That person was Sammy the accused who was acquitted.
12. According to PW3 Sammy brought the cartons of milk in the company of a Somali man by the name Mati. When the police arrived, it was the same Sammy who was called on phone by PW3 and came to the house and started throwing the cartons of milk over a fence before he was locked into the house by PW3 and arrested by the police.
13. At no point did Sammy give the whole story about how he was given those items and why was he throwing them out if it was true that he was merely given the cartons by somebody who wanted the items to be hidden because of a debt with Equity Bank. In my view, if he was honest he would have called the owner to come and take his goods, rather than throw the cartons over a fence.
14. In my view, Sammy (2nd accused) should have been the first person to be convicted before the conviction of the appellant as the connection between the appellant and the cartons was by Sammy a co-suspect, and in this particular case an accomplice.
15. In my view, once Sammy was left out of the hook and acquitted by the trial court, the appellant should also have let off the hook, as the evidence that implicates the appellant is far weaker than that against Sammy. Convicting the appellant and acquitting Sammy was an injustice which this court cannot allow to be upheld. The evidence of the accomplice Sammy appears to be an attempt to deflect attention from himself and put it on another person, and was prejudicial to the co-accused unless there was other supporting evidence and, in this particular case, there was none as even if the two went together to the house of PW3, that was not sufficient to support the story of Sammy.
16. I thus find that the prosecution did not prove their case against the appellant beyond reasonable doubt. In addition, though the magistrate based his conviction on the doctrine of recent possession and relied on the case of **Robert Obara Lango vs Republic [2015] EKLR** and the case of **Isaack Nganga Kahiga vs Republic - Nyeri Court of Appeal Criminal Appeal No. 272 of 2005**, the appellant was actually not found in possession of those items. All the evidence is that the co-accused Sammy who was acquitted was the person who was in possession of the items in those late hours of the night and took them to a place to hide them, and in the morning the same Sammy attempted to throw the cartons across a fence which showed guilty mind. In effect it was actually Sammy and not the appellant who was in possession of the items and thus was also duty bound to explain how he came into possession of the same and not the appellant.
17. Consequently, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Garissa this 30th day of October, 2018.

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George Dulu

JUDGE