



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 1 OF 2017

ALEX NJUE KAIMATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgement, conviction and sentence of the

Senior Resident Magistrate Runyenjes in Criminal Case No.464 of 2015)

JUDGEMENT

The appellant was charged with the offence of having suspected stolen property contrary to section 323 of the Penal Code. The particulars of the offence were that the appellant on the 3rd of August 2015, at Ugweri market of Ugweri Sub –location within Embu County, was found having suspected properties namely one solar panel, one flat screen TV make Samsung, one singer sewing machine, one Olympia Camera, two music sub hoofers make AMPEX, five small speakers, one amplifier, one TV stand, one GO TV decoder, two weighing machines make HANSON, three hair shaving machines, one hair blow drier, Motor cycle spare parts (gear box), four remote controls for TV and one axe head all valued at Kshs.100,500/= reasonably suspected to have been stolen or unlawfully obtained.

The trial court convicted the appellant and sentenced him to serve one year imprisonment. The appeal is based on the following grounds:-

- 1. The Learned Senior Resident Magistrate erred both in law and fact by convicting the appellant on insufficient evidence.***
- 2. The Learned Senior Resident Magistrate erred and misdirected himself in law by shifting the burden of proof upon the appellant.***
- 3. The Learned Senior Resident Magistrate erred and misdirected himself both in law and in fact by regarding as unsatisfactory the explanation given by the appellant regarding his ownership of the exhibits subject of the charge.***
- 4. The Learned Senior Resident Magistrate erred and misdirected himself both in law and fact by disregarding the evidence of the appellant's defence witness whose evidence was not challenged in cross-examination.***
- 5. The Learned Senior Resident Magistrate erred and misdirected himself both in law and fact by conceding that the same required strict proof of ownership.***
- 6. The Learned Senior Resident Magistrate erred and misdirected himself in law by imposing a sentence that was harsh, oppressive and excessive in the circumstances considering that the appellant was a first and a remorseful offender.***

Mr. Ithiga appeared for the appellant. Counsel submit that the prosecution evidence did not implicate the appellant in any Criminal behavior. PW2 did not know where the items came from and the claim that they belonged to several people was not proved. The allegation that the property was suspected to have been stolen should be supported by evidence that the property was stolen. The appellant's defence was disregarded. Some of the items like GOTV decoder could have been subjected to investigations from the franchise holder but this was not done.

The appellant mentioned owning several items including a Motor cycle. The evidence did not support the charge. Counsel relies on the case of **MICHAEL ONYANGO –V- REPUBLIC Kisumu Criminal Appeal No 61 of 2013** where the court stated as follows **lastly count 5 dealt with the offence of having suspected stolen property. The reason for the charge was that the appellant did not produce receipts**

for the items which were found in his house. No one had reported the items as having been lost or stolen and no one showed up to claim them. The question that arises is whether in normal circumstances people keep receipts for all their items in the house. This court finds that no reasonable person would keep receipts for each item in their houses and such obligation would be too heavy to bear. Consequently there was no basis to suspect that all the goods in the appellant's house were stolen goods otherwise such suspicion would be unreasonable. The charge was not proved beyond reasonable doubt. The conviction on count 5 was not safe in the circumstances. It is not only draconian but also a bad precedent to allow every one without a receipt for the household goods to be jailed.

Miss Nandwa, Prosecution Counsel, opposed the appeal. Counsel submit that section 26(1)(c) of the Criminal Procedure code empowers a Police Officer to stop and search and detain any person suspected to be in possession or conveying anything stolen. Counsel relies on the case of **CHARO V REPUBLIC (1982) KLR 1** where **Muli J** (as he then was) stated as follows:

“The ingredients of a charge under Section 323 of the Penal Code are that a person must have been detained pursuant to Section 26 of the Criminal Procedure Code (Cap 75); the person must be charged with having in his possession or conveying anything reasonably suspected of having been stolen or unlawfully obtained; and the person must have failed to give an account to the satisfaction of the court of how he came by the thing so suspects.”

PW2 received information from a confidant that someone was at Ugweru Market with suspected stolen goods. Several items were found with the appellant. The appellant failed to offer any explanation as to how he got the items. The appellant's defence was considered but his explanation was not satisfactory.

Before the trial court **PW1 HENRY WASHINGTON** is a retired teacher. On 13/3/2015 at about 2:00pm someone by the name BEN called him from Runyenjes Police Station and asked him if he had a rental house at Ugweri town. He was also asked whether he knew the appellant. There were some items in one of the rooms. He went to Runyenjes Police Station on 15/8/2015 and was shown certain items that were collected from the room. He has two houses, two shops and two small rooms at the back. His caretaker Janet Muthoni was present. One room is used by the appellant and the other room is a store. The appellant used to pay rent on time. He had never entered his room.

PW2 PC JOSEPHAT KAARIA KIRINGA was stationed at the Runyenjes Police Station. They received a tip that at Ugweri Market there was someone with suspected stolen items. They went there and were shown the suspect. The appellant led them to his rented house where they recovered several assorted items. They arrested the suspect and charged him in court. The caretaker was present when they collected the items. The items belonged to several people. The appellant did not produce receipts for the items.

PW3 JANET MUTHONI is the caretaker of PW1's premises. On 2/8/2015 at about 7:00am Police went to the premises looking for the appellant. She lives in one room and the appellant lives in the other room. The appellant has been staying in the room for five years. She was present when the items were picked from the appellant's house. She had never heard any complaint against the appellant.

The appellant gave unsworn evidence. On 2/8/2015 at 2:00pm Police went to his place of work. They asked him to take them to his house. They searched the house. He told them that the T.V and other items were his. The Police took the items out of the house. The caretaker was called and she told the Police that no one had complained against him. He was detained for nine (9) days as investigations went on. No one came forth to claim the items. All the items are his. He did not have a gear box. He had an engine block for a Motor Cycle. He told the Police that the receipts for the items got burnt when his house went on fire.

DW2 MERCY WAHU is the assistant Chief in the area. Sometimes in mid - 2014 the appellant's premises at Ugweri Market got burnt. She visited the burnt premises. The appellant was running a business at the Market. He used to sell clothes in a Kiosk. She couldn't tell whether receipts were in the burnt premises. She had known the appellant since 2009.

The issue for determination is whether the prosecution proved that the recovered items were suspected to have been stolen.

The nature of the offence seems to put a heavy burden on the accused. All what the Prosecution have to do is to alledge that suspect the items were suspected to have been stolen. In such a situation no one comes forth to claim the goods. It is the mere suspicion by the Police which leads to the conviction. In its judgement, the trial court evaluated the nature of the recovered items and found that they were household goods for domestic use. The court noted that the washing machine and the shaving machines may not have been for domestic use.

The appellant was expected to explain how he came into possession of the items. It is quite difficult if the appellant was to exercise his right to remain silent under Article 50 (i) of the constitution. Should the suspicion be the basis of conviction. Mere suspicion has never been an ingredient for conviction. The court has to evaluate the circumstances of each case. In this particular case, it was not clear whether the items were new or used. Were the items taken to the premises in one day or they were in his premises for quite a long time. Who saw the appellant carrying the items to his premises? What does the accused do for a living. Is he someone who can own the suspected items.

All the above factors have to be considered before the court conclude that the items are suspected stolen goods. It is difficult for one to keep receipts for all the items in his possession. In the process of fighting crime, we should not be promoting poverty and conclude that people should be poor and should not own certain properties like a TV, a decoder, shaving machines, a sewing machine and a Camera. All the items were valued at Ksh.100,500. Couldn't the appellant afford such an amount. PW1 testified that the appellant paid his rent promptly. He had stayed in the premises for five years. It was equally possible that the appellant had accumulated the properties over the time. The manner in which the items were recovered was not explained. Were the items put in a gunny bag or were they properly arranged in the house. Couldn't the appellant afford to have a TV or a decoder. Was the T.V being used in the house or was it inside a box.

The nature of the offence requires adequate evaluation of the evidence otherwise there is the risk of shifting the burden of proof to the accused right before the prosecution adduces its evidence. The accused may give explanation on how he got the items. He may decide to remain silent. Lack of production of receipts showing ownership of a property cannot be the basis of conviction in a criminal case. PW2

testified that the items belonged to several people. Who are these people. Why didn't the several people claim their items and produce their ownership receipts which the appellant was expected to produce.

Given the evidence on record, I am satisfied that the prosecution did not prove its case beyond reasonable doubt. There was no allegation that the appellant was of bad character and associated himself with Criminals. The appellant was arrested from his place of work. The area assistant Chief knows that the appellant was selling clothes at his Kiosk. PW3, the caretaker of the residential premises had known the appellant for five years and no one had ever made a complaint against him.

I do find that the explanation by the appellant was satisfactory. The fact that the items ranged from shaving machine to a television does not matter. These are items one can buy from the market at any given time.

In the end, I do find that the appeal is merited and is hereby allowed. The conviction and sentence is hereby set aside. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and signed at Marsabit this.....day of June 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 28th Day of November, 2018

F. MUCHEMI

JUDGE