



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 84 OF 2015

JOHN MUTEMBEI..... APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

J U D G M E N T

1. The appellant was charged and convicted by Embu Resident Magistrate of the offence of stealing from a dwelling house contrary to Section 279(b) of the Penal Code and was sentenced to serve 14 years imprisonment. He is appealing against the entire judgment.

2. The petition of appeal is based on the grounds that the case was not proved beyond any reasonable doubt. He filed written submissions in which he explains the grounds in the petition which may be briefly stated thus:-

- (i) That the evidence was inconsistent and uncorroborated.
- (ii) That the court relied on the evidence of one witness.
- (iii) That a vital witness during the recovery was not called to testify.
- (iv) That his defence was rejected on weak reasons.
- (v) That there was no eye witness to the alleged incident.
- (iv) That the sentence imposed was contrary to the law.

3. The appeal was opposed by the State on grounds that the prosecution adduced sufficient evidence which led to the conviction and that the sentence imposed was within the law.

4. Ms. Nandwa argued that the evidence was well corroborated and consistent and that no particulars of inconsistency were brought out in the submissions. Identification of the appellant was in broad day light and that the appellant was found wearing the stolen T-shirt who arrested him and took him to the police station where the exhibits were taken into police custody.

5. On the number of witnesses called by the prosecution, Ms. Nandwa argued that the prosecution had three witnesses who were sufficient and needed not call an additional one. It is incorrect to say that the prosecution relied on the evidence of a single witness.

6. The argument that the appellant's defence was rejected for weak reasons was baseless according to the state since the appellant forfeited his right to give defence.
7. The facts leading to this appeal is that the complainant PW1 left his house unlocked and went to Karingari shopping centre. While there, at around 10.00 a.m. he saw the appellant passing by wearing a T-shirt labelled on the front "Honourable Emilio" which he suspected to be his property. He said he was the captain of the local football team and had 11 T-shirts/jerseys which were part of the team's uniform in his house.
8. The complainant got hold of the appellant and after confirming the T-shirt belonged to him, took the appellant to his house. On checking on the jerseys, PW1 found three of them missing. He searched further on the appellant and found that the appellant was wearing three jerseys inside the T-shirt labelled "Hon Emilio" which PW1 identified as belonging to him. He took the appellant to the Chief's Camp at Kivue who in turn escorted him to Kivwe police post. The jerseys were removed by the police and kept as exhibit in the presence of PW1.
9. The appellant opted to keep quiet after his rights of defence were explained to him.
10. The incident occurred at around 10.00 a.m. when there was full day light. PW1 had confirmed the T-shirt labelled "Hon. Emilio" belonged to him. He dragged the appellant to his house where he noticed three uniform jerseys had been stolen and from there handed the appellant over to the relevant authorities.
11. PW2 the Assistant Chief of Gatunduri sub-location was at the chief's camp at Kivwe when the appellant was taken there by PW1 and other members of the public on allegations that he had stolen T-shirts. He then received him and handed him over to the police.
12. The appellant was received at the station by PW3 who removed all the 4 T-shirts he was wearing. The complainant handed over the other seven T-shirts to PW3 for comparison purposes. He identified all the stolen items as his property. He later preferred charges against the appellant.
13. The identification of the appellant and the exhibits was therefore not in question. The appellant did not offer any defence to counter that of the prosecution. He cannot be heard to say that his defence was rejected for weak reasons.
14. In the petition of appeal and in the submissions, the appellant only claimed that there were inconsistencies and lack of corroboration in the evidence but did not point out any of them for the consideration of this court. This renders the ground of appeal baseless.
15. Under Section 144 of the Criminal Procedure Code, the prosecution have the sole mandate of deciding the number of witnesses to call in support of their case.
16. There is no legal requirement that a criminal case may only be proved by calling an eye witness. It is trite law that a criminal case may be proved not only by direct evidence but also by circumstantial evidence.
17. The appellant did not challenge the evidence of the prosecution. There was evidence pointing the guilt at appellant and to no other other person. The prosecution adduced evidence that PW1 owned the four stolen items; that the appellant was found in possession of. The property was recovered soon after the theft and that the T-shirts were taken from PW1's house without his permission.
18. I find that the conviction was supported by cogent evidence and that it was safe.
19. Section 279(b) of the Penal Code provides for a maximum sentence of 14 years imprisonment.
20. The appellant had a previous conviction where he was sentenced to six months imprisonment for stealing. He was a second offender but it was too harsh for the trial magistrate to refer him as an

incorrigible criminal.

21. The value of the property stolen was of negligible value of Shs.5,000/=. This is a factor that ought to have been considered in passing sentence. The appellant did not deserve the maximum sentence in this case but a rather shorter term.

22. It is my finding that the sentence was based on wrong principles resulting on an excessive sentence.

23. The conviction was safe and is hereby upheld. The sentence of 14 years imprisonment is hereby quashed and substituted with seven (7) years imprisonment.

24. The appeal is partly successful.

25. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JANUARY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Nandwa for respondent

Appellant present