



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

Criminal Appeal No 31 Of 2015

Alfred Muriki Kibui..... Appellant

Versus

Republic..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 84 of 2015 in the Senior Principal Magistrate's Court at Wundanyi by Hon G. M. Gitonga (RM) on 23rd July 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Alfred Muriki Kibui, was tried by Hon G. M. Gitonga Resident Magistrate for the offence of stealing contrary to Section 279(a) Cap 63 (Laws of Kenya). He had also been charged with an alternative offence of handling stolen property contrary to Section 322 (1) of the Penal Code Cap 63 (Laws of Kenya). He sentenced him to serve five (5) years imprisonment in respect of the alternative charge.

2. Notably, Hon K.I. Orange Ag SPM heard the entire Prosecution case. Hon G.M. Gitonga (hereinafter referred to as "the Learned Trial Magistrate") took over the matter at the defence stage having fully explained to the Appellant the provisions of Section 200 (3) of the Criminal Procedure Code Cap 75 (Laws of Kenya) and the Appellant having confirmed that the case could proceed from where it had reached.

3. The particulars of the main charge were as follows :-

"On the night of 15th and 16th February 2014 at FLYOVER Bar in Mwatate township within Taita Taveta County, stole one mobile phone Make Nokia 6700, one pair of sport (sic) shoes and cash Kshs 8,000 all valued at Kshs 37,500/= the property of SAMSON MWASHIGHADI MBEMBE from the person of the said SAMSON MWASHIGHADI MBEMBE."

ALTERNATIVE CHARGE

"On the night of 19th day of February 2014 at FLYOVER Bar in Mwatate township within Taita Taveta County, otherwise than in the course of stealing, dishonestly retained or received one pair of sports shoes knowing or having reason to believe them to be stolen or unlawfully obtained."

4. Being dissatisfied with the said judgment, on 8th June 2015, the Appellant filed a Notice of Motion

application seeking leave to file an appeal out of time. The said application was allowed and the Petition of Appeal deemed as having been duly filed and served. The Mitigation Grounds of Appeal he relied upon were as follows:-

1. **THAT he was a first offender and the sentence of 5 years awarded to him was harsh.**
2. **THAT being a young person aged 19 years and having a dream to join a learning institution, his future seemed incapacitated in a way for staying in prison for that long period(sic).**

5. This court directed both parties to file their respective Written Submission. However, on 17th November 2016, the Appellant filed what was titled “**Grounds of Appeal**” but which on closer examination, appeared to have been Written Submissions. The State’s Written Submissions were dated and filed on 20th December 2016. The Appellant responded to the State’s Written Submissions on 15th February 2017 wherein he reiterated his “**Grounds of Appeal.**”

6. When the matter came up on 15th February 2017, both the Appellant and counsel for the State asked this court to deliver its Judgment based on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

8. After perusing the pleadings and the Written Submissions by both the Appellant and State, this court concluded that the only issue that was before it for determination was whether or not the Prosecution had proved its case beyond reasonable doubt. This court nonetheless addressed its mind to the sentence that had been meted upon the Appellant as he had opined in his Grounds of Appeal that the said sentence was manifestly excessive in the circumstances of the case.

9. The said issues were therefore dealt with under the following heads.

I. PROOF OF THE PROSECUTION’S CASE

10. The Appellant submitted that the Complainant, Samson Mwashighadi Mbembe (hereinafter referred to as “PW 1”) never told the Trial Court that he had seen him (sic) or take beer with him. Presumably, he must have meant “**at the bar.**”

11. He contended that Shadrack Makau Matwo (hereinafter referred to as ‘PW 2’) contradicted PW 1’s statement on when PW 1 reported the matter at Mwatate Police Station. He averred that PW 2 testified that PW 1 informed him of the incident on 18th February 2014 and he advised him to report the incident to the Police Station. It was his contention that PW 1’s reporting of the incident to the Police on 19th February 2014 was an afterthought.

12. He pointed out that the Investigation Officer, No 88391 PC David Masinde (hereinafter referred to as “PW 3”) had already predetermined that the sports shoes belonged to PW 1 even before he received the report. He also stated that PW 3 had indicated that he had been arrested on another charge but nowhere was the said charge mentioned. He contended that this portrayed a substance of collaboration to fix him.

13. He further said that No 2005008095 APC Laban Bengo (hereinafter referred to as “PW 4”) testified that he arrested him from members of the public but did not charge him with any offence. It was his contention that this showed that PW 4 also collaborated with PW 1 to fix him in this case.

14. On its part, the State summarised the evidence that was adduced by the Prosecution witnesses in its Written Submissions. It said that PW 2 advised PW 1 to report the incident to the Police Station and after going there, PW 1 found the Appellant already arrested on another charge and wearing his shoes. It pointed out that PW 3 and PW 4 testified that the Appellant was arrested wearing PW 1’s shoes but the Appellant could not explain where he got the shoes from.

15. It submitted that although no one witnessed the Appellant steal PW 1’s shoes and PW 1 did not produce a receipt to prove ownership of his shoes, it was evident that the Appellant was guilty of the charge of handling stolen shoes belonging to PW 1. It was emphatic that the doctrine of recent possession was clearly established considering that the offence was committed on 15th February 2014 and the sports shoes were recovered on 19th February 2014.

16. It referred this court to the case of **Criminal Case No 272 of 2005 Isaac Ng’ang’a Kahiga alias Peter Ng’ang’a Kahiga vs Republic [2006] eKLR** where the Court of Appeal rendered itself as follows:-

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

17. The State submitted that the Appellant had failed to advance a credible defence and there was no reason for PW 1 or members of public to have implicated him to (sic) the offence herein. It added that the Learned Trial Magistrate acted correctly when he convicted the Appellant for the offence of handling stolen property as there were no witnesses who saw him steal PW 1’s sports shoes and sentenced him to five (5) as the Penal Code provided for a maximum of fourteen (14) years for the said offence.

18. This court carefully analysed the evidence that was adduced by the Prosecution witnesses and agreed with both the counsel for the State and the Learned Trial Magistrate that the charge for stealing could not have been sustained based on the said evidence that was adduced in the trial Court. It was therefore in order for the Learned Trial Magistrate to have considered the alternative charge of handling stolen property as no one witnessed the Appellant steal PW 1’s sports shoes.

19. Notably, according to PW 1, he went to report the loss of items that had been stolen from him while he was at Flyover Bar at Mwatate Police Station and found his shoes there. He identified his shoes in court. During his Examination-in-Chief and Cross-examination, he was categorical that the Appellant told him that he had bought the said sports shoes. In his Re-examination, he reiterated that the Appellant was found with his shoes.

20. PW 2 testified that PW 1 called him on 18th February 2014 while at the Police Station making a report about the theft of his property. His testimony was that the Appellant was found with PW 1’s sports shoes which he said he had bought but did not show who had sold him the said sports shoes, evidence he re-stated during his Cross-examination.

21. PW 3 told the Trial Court that PW 1 found him at Mwatate Police Station when he went to report about the theft of his items. He stated that the Appellant had been arrested in another case and was found wearing PW 1’s shoes but on being interrogated, he did not disclose the source of shoes. On his part, PW 4 averred that the Appellant was brought in for stealing.

22. After the Appellant adduced his sworn evidence on 7th November 2014, the Learned Trial Magistrate recalled PW 2 who testified that PW 1 told him that he found his shoes at the Police Station after the Appellant had been arrested on another offence. It was his testimony that another officer showed him the Appellant as having been the person who had been wearing PW 1's sports shoes.

23. Notably, there were several gaps and inconsistencies in the Prosecution's case. The evidence by the Prosecution witnesses was also very sketchy leaving out important details. For one, PW 1 did not say which date he went to report the incident to Mwatate Police Station. Though raised by the Appellant, the discrepancy in the date of 18th February 2014 when PW 2 said was the date when PW 1 called and informed him about the theft of his items while at Mwatate Police Station and PW 3's evidence that PW 1 reported the incident to him on 19th February 2014 was not an inconsistency that this court considered to have been material or fatal to the Prosecution's case because it was not disputed that PW 1 reported the theft of his items at Mwatate Police Station.

24. However, the scant details of how PW 1 found the Appellant with his shoes made his evidence incomprehensible. It was not clear from his evidence if he coincidentally found the Appellant wearing his shoes at Mwatate Police Station having been arrested on a different charge or if he was informed that the Appellant had been arrested after he was found wearing his sports shoes.

25. In this regard, if PW 1 had found the Appellant wearing the shoes at the Police Station when he went to report the theft of his items, then he ought to have explained the circumstances under which he met Appellant face to face wearing his sports shoes at Mwatate Police Station. Clearly by the time he went to report the incident, he had no idea who had stolen from him. There ought to have been a logical explanation of this coincidence.

26. There was also no evidence that was presented before the Trial Court to show that PW 1 had circulated information regarding his lost pair of sports shoes that put members of public on alert whereupon they started looking for the sports shoes, eventually finding the Appellant wearing the same and thus leading to his arrest.

27. In addition, PW 3's evidence that the Appellant was found wearing PW 1's shoes was vague. As was mentioned hereinabove, it was not clear if the Appellant was found wearing PW 1's sports shoes before his arrest or if PW 1 found the Appellant wearing the sports shoes at the Police Station after he had been brought to the Police Station on a different charge.

28. If on the one hand as PW 3 had stated the Appellant had been arrested on a different offence by the time PW 1 came to the Police Station, then he ought to have some details of the case to show veracity of his assertions and not merely gloss over this piece of evidence as it was critical in explaining how the Appellant found himself at Mwatate Police Station and thus make the Prosecution's case water tight.

29. In the absence of such evidence, this court formed the opinion that PW 3's evidence to the effect that the Appellant had been arrested on a different charge when PW 1 happened to come to the Police Station and found him wearing his sports shoes was intended to connect the Appellant to the said sports shoes.

30. If on the other hand as PW 4 had contended that the Appellant was brought in for stealing by members of public, then at least one member of the public who arrested him with PW 1's shoes and handed him over to him ought to have been called to testify as a witness with a view to linking the Appellant to PW 1's sports shoes.

31. Notably,⁹ As this court was not satisfied that the State had demonstrated that the doctrine of recent possession was applicable herein, this court found the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs Republic**(Supra) that it had relied upon was distinguishable from the facts of this case and concluded that the Learned Trial Magistrate had arrived at an erroneous conclusion when he convicted the Appellant herein for the offence of handling stolen goods.
40. A the variance between PW 3's and PW 4's evidence of how the Appellant found himself at the Police Station was irreconcilable. None of the Prosecution witnesses testified to the fact that the

Appellant was arrested and taken to the Police Station while wearing PW 1's sports shoes and no witnesses were called to confirm the said fact.

32. PW 2's evidence did not also impress this court as it added no value in this case. When he first testified in court on 26th March 2014, he had been categorical that the Appellant had been found with PW 1's shoes. However, when he was recalled on 13th January 2015, he stated that an officer showed him the Appellant as the person who had been wearing PW 1's shoes. This was a departure from his evidence. Clearly, his evidence was mere hearsay and had little or no probative evidentiary value.

33. This court noted the Appellant's sworn evidence in which he explained how he went to his shop on 19th February 2014 and five (5) people came and asked him what a particular shoe was doing there. He informed them that he did not know how the shoes reached there. These people then arrested him and took him to Mwatate Police Station.

34. Whilst it was difficult to comprehend how five (5) people could zero down on the Appellant at his shop unless they were on a mission to look for the sports shoes, this court also had difficulties in understanding whether PW 1 had circulated the description of his sports shoes so that some unknown people could look for the shoes and arrest the Appellant, an issue this court raised earlier on in this decision.

35. It is important to point out that the Appellant was under no obligation to assist the Prosecution prove its case. The burden of proof to prove its case beyond reasonable doubt lay with the Prosecution at all material times. It was therefore the view of this court that although PW 1 positively identified the sports shoes as having belonged to him, which fact the Appellant did not dispute when the said shoes were adduced in court as evidence, and further testified that the said shoes had recently stolen from him, this court was not satisfied that the Prosecution had demonstrated beyond reasonable doubt that the Appellant was found in possession of his sports shoes as it had contended in its case.

36. This court had due regard to the provision of Section 143 of the Evidence Act Cap 80 (Laws of Kenya) that stipulates **"that no particular number of witnesses shall in the absence of any provision to the contrary be required to prove any fact."**

37. However, the Prosecution's failure to call a witness who could testify as to how the Appellant was arrested and taken to the Police Station weakened its case greatly and in fact dealt it a fatal blow. In this regard, this court had due regard to the holding in the case of *Bukenya vs Uganda [1972] EA 549*, where the Court of Appeal held that a failure to call crucial witnesses by the prosecution entitles the court to make an adverse conclusion against the prosecution case, and acquit the accused person.

38. This court also placed reliance on the case of *Julius Kalewa Mutunga v Republic [2006] eKLR* where the Court of Appeal rendered itself as follows:-

"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive".

39. As this court was not satisfied that the State had demonstrated that the doctrine of recent possession was applicable herein, this court found the case of *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs Republic* (Supra) that it had relied upon was distinguishable from the facts of this case and concluded that the Learned Trial Magistrate had arrived at an erroneous conclusion when he convicted the Appellant herein for the offence of handling stolen goods.

40. Accordingly, having considered the evidence that was adduced in the Trial Court, the Written Submissions by the Appellant and the State and the case law it relied upon, this court came to the firm conclusion that the Prosecution had failed to prove its case of handling stolen property against the Appellant, the standard being, proof beyond reasonable doubt.

II. SENTENCING

41. Section 322 (2) of the Penal Code provides as follows:-

“A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.”

42. However, as this court had found that the Prosecution had failed to prove its case beyond reasonable doubt, it did not find it necessary to spend much time on analysing the sentence that was meted upon the Appellant herein. Suffice it to state that in the event it would have upheld the Appellant’s convictions, it would definitely have disturbed the Learned Trial Magistrate’s finding.

43. Indeed, a sentence of five (5) years imprisonment for being found in possession of a pair of sports shoes and where the Appellant was a first offender was clearly disproportionate. This court thus agreed with the Appellant that a sentence of five (5) years imprisonment was manifestly excessive, harsh and severe in the circumstances of the case herein.

44. In the circumstances, the Appellant’s Mitigation Ground of Appeal No (1) had merit.

DISPOSITION

45. Notably, the Appellant’s Mitigation Grounds of Appeal fell below the threshold of what would have persuaded an appellate court to quash his conviction and set aside his sentence. However, he raised pertinent issues in his Written Submissions that satisfied this court that the Prosecution did not prove its case beyond reasonable doubt.

46. Bearing in mind the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to technicalities, this court deemed it fair and in the interests of justice to allow the Petition as drawn.

47. Indeed, doubt that was created in the mind of this court on how exactly the Appellant was connected to the sports shoes making this court hesitant to affirm the conviction and sentence that was meted upon him. In the premises foregoing, this court hereby quashes the conviction and sets aside the sentence that was meted upon him by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless he be held or detained for any other lawful reason.

48. The upshot of this court’s decision therefore was the Appellant’s Petition of Appeal that was lodged on 8th June 2015 is hereby allowed.

49. It is so ordered.

DATED and DELIVERED at VOI this 28th day March of 2017

J. KAMAU

JUDGE

In the presence of:-

Alfred Muriki Kibui..... Appellant

Miss Anyumba.....for State

Josephat Mavu– Court Clerk