



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 20 OF 2015

JOSEPH MURIUKI NJAU alias TAGAWA... ..APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (E. H. Keago) at Baricho, Criminal Case No. 284 of 2015 delivered on 4th June, 2015)

JUDGMENT

1. The appellant **Joseph Muriuki Njau** alias **Tagawa** was charged before Baricho Principal Magistrate's Court with the offence of shop breaking contrary to **Section 306 (a)** and stealing contrary to **Section 279 (b)** of the **Penal Code**. The particulars are that on the night of 19 and 20th December, 2013 at Kagio township in Kirinyaga West District within Kirinyaga County jointly with another before Court broke and entered a building namely a shop of Pauline Wanjiku with intent to steal and did steal therein 70 tins of assorted lubricant oils and assorted motor cycle spare parts all valued at Kshs.53,000/- the property of the said Pauline Wanjiku.

2. The Appellant was also charged with an alternative charge of handling stolen property contrary to **Section 22 (1) (2)** of the **Penal Code** for which he was acquitted. The Appellant denied the charge. After a full trial the Appellant was found guilty of the main charge of shop breaking and stealing. He was convicted and sentenced to serve four years imprisonment for each limb. The sentence was to run concurrently. On the charge of handling he was acquitted for lack of evidence.

The Appellant was dissatisfied with the conviction and sentence and filed this appeal. The Appellant raised five grounds namely:-

(i) That he pleaded not guilty to the charge and the contrary was not proven by the prosecution to the required standards by the law in that it must be proven beyond any reasonable doubts.

(ii) The trial magistrate failed in law and facts by failing to consider the fact that there was no prosecution witness who was able to clarify the ownership of the house from where the stolen items were recovered and there was no inventory signed by the accused that was produced by the investigation officer.

(iii) The trial magistrate failed to consider the fact that the prosecution case was marred by contradictions and inconsistencies between P.W.1, 2 and 3.

(iv) The trial magistrate failed in law and fact after he failed to consider his defence which was

not shaken by the prosecution in that the accused clearly narrated the reason for his arrest.

(v) The trial magistrate failed to consider his mitigation and the fact that he is a first offender.

The Appellant prayed that the conviction be quashed and the sentence imposed be set aside.

The Appellant filed written submissions. The State through the learned State Counsel Mr. Omayo opposed the appeal. He conceded to the appeal on sentence because the trial court sentenced the appellant on each limb. He urged the court to use its powers to rectify the sentence.

I have considered the grounds of appeal, the submissions filed by the appellant and the submissions by the State. The issues for determination are whether the prosecution proved the charge beyond any reasonable doubts.

3. This being the first appeal the court has a duty to re-evaluate the evidence and come up with its own independent finding while at the same time bearing in mind that it did not have the advantage to see the witnesses testifying and give room for that. This was so held in **Okeno -V- Republic (1972) E.A. 32.**

4. I have considered the evidence adduced. P.W.1 **Pauline Wanjiku Githinji** testified that she sells motor cycle spares, oils and lubricants. On 19th December, 2013 at 5.00 p.m. she locked her shop and went home. She came to open the shop the next day only to find a vent on the roof and spare parts all over the floor. She called the Police. The Police visited the scene. One Macharia reported that some people had gone to his garage and demanded for a hammer by force. He identified them by names. Later another mechanic told her there was a youth who had 70 pieces of oil to sell. Her husband Samuel Munene Maingi went and posed as a buyer. The youth by name Macharia brought 14 pieces of oil to calabash where they negotiated. Macharia was arrested. He disclosed that he was given the oils to sell. Macharia led Police to the house of the owner who was identified by an alias name as Tagawa and is the appellant herein. He escaped. Some exhibits were recovered. The goods stolen were valued at Ksh.50,000/- plus airtime worth Ksh.2000/-.

5. According to P.W.2 **Samwel Munene Mbingu** who is the husband of P.W.1, she was informed by his wife about the break-in. He went and joined the Police. On 21st February, 2014 he was told by a mechanic by name Njoroge that there was someone selling oil. Samwel Munene Mbingu met the person who agreed to deliver the oils. The Police were informed. They arrested that person and he led Police to a house where they found some spare parts including oils. P.W. 2 Samwel Mbingu was able to identify some oils which were stolen from his shop. They were 3 pieces. The owner of the house who was the Appellant in this case escaped. Later he was arrested by the Police. The one who was selling the oils whose name is Macharia was charged and convicted. Some oils were recovered from the house of the Appellant and were produced as exhibits 1 and 2.

6. P.W.3 was the Police officer **Sergeant Callen Obiri** of Kagio Police Station. She testified that she received the report on 20th December, 2013 and proceeded to the scene and saw the break-in whereby iron sheets were removed from the roof to gain entry. On 21st December, 2013 the husband of the complainant called her to say there was a youth who had oils to sell and he presented himself as a buyer. P.W.3 went there and met the youth by name Macharia Maxwell Kaburu who was arrested with 14 tins of oils. The youth disclosed that he was given the oils to sell by one Jose alias Tagawa. The youth led them to the house of Tagawa. They did conduct a search in the house and recovered 2 tins of oil and continued to look for the suspect Tagawa.

7. On 19th April, 2014 Tagawa and others were brought to the station by members of the public. She charged the suspect. She produced the two tins of oil which were found under the bed in the house of appellant as exhibits 1 and 2. P.W. 3 said she was not able to find the accused at his house but he was well known to her.

8. This was the evidence which was tendered against the Appellant. On considering this evidence I find

that it was insufficient to base a conviction. Firstly, the witnesses relied on hearsay evidence by witnesses who were never called to testify. For example P.W.1 testified that Macharia reported that some people had gone to his garage and demanded for a hammer by force. The said Macharia identified them by names. This Macharia was a crucial witness who was not called. P.W. 1 further testified that later another mechanic told her there was a youth who had 70 pieces of oil to sell. The said mechanic was not called. P.W.1 also talked of one Simon who went and asked her whether she reported her to the Police. Simon threatened her with death. According to P.W.1 this Simon was arrested by Police but he injured the police and escaped. This evidence was not corroborated by the Police officer P.W. 3 and it remains a mystery who this Simon was.

9. Secondly according to P.W.1 and P.W.2, a youth led Police to the house of the Appellant. That the person who was in the house escaped. According to P.W. 3 when they were led to the house, they conducted a search. According to P.W.3 the Appellant was not at the scene. There is material contradiction in the evidence of P.W. 1 and P.W. 2 with the evidence of P.W. 3. Due to the material contradiction there is no proof that the Appellant was in the house and escaped.

10. There is no proof that the house belonged to the Appellant. It is noted that it is the youth by name Macharia and who was selling the oils who implicated the Appellant and alleged that the house belonged to the Appellant. He was an accomplice. His evidence requires corroboration. Other than what witnesses were told by Macharia, there was no independent witness called to prove that the house belonged to the Appellant. Going by the testimony of P.W. 3, the appellant was not at the scene when she was led there by Macharia. This house could have as well belonged to the said Macharia in the absence of evidence to prove that it belonged to the Appellant. The Police could have called neighbours or if the house was rent, call the landlord who could have identified who was the tenant. There was a lacuna in the prosecution evidence which raises doubts as to whether the house belonged to the Appellant. Being a criminal case doubts must be resolved in favour of the Appellant.

11. Thirdly there are contradictions as to what was recovered from the house. Though P.W. 1 identified 2 pieces of Delo oil, MF1 – 1 and 2 it was not clear from her evidence where they were recovered. P.W. 2 identified three pieces of oil which he said he was able to identify. On her part P.W. 3 testified that they recovered two tins of oil. There is conflicting evidence as to what was recovered from the said house. In any case, the oils exhibits 1 and 2 were ordinary oils which can be bought anywhere even from petrol stations. The P.W. 1 and P.W. 2 did not positively identify the oils as the ones which were stolen from their shop. There was no attempt to positively identify the oils. Failure to positively identify the oils coupled with the contradiction on how many pieces of oil were recovered raised doubts in the prosecution case.

12. It is noted that the Appellant was not arrested in connection with this case. P.W. 3 testified that the Appellant was taken to the Police station by members of the public and no complaint was made against him. The evidence to connect him to the offence is lacking as he was not arrested with the stolen properties. Implication by a person who is an accomplice is insufficient and unreliable in the absence of corroboration.

13. I agree with the appellant that the prosecution did not prove the case to the required standards. There was no proof beyond any reasonable doubts that the house where the Police were led by the other suspect belonged to the Appellant. The evidence was riddled with hearsay and contradictions. It was not safe to rely on such evidence to convict the Appellant.

14. The Appellant gave his defence on oath and said he was arrested by members of the public after which Police interrogated him to give information on thieves at Kagio and drug peddlers. He denied that he committed the offence. In view of the reasons I have stated, the defence was plausible and the trial court ought to have considered it. The Appellant said the oils were not recovered from his house. The trial court held that the Appellant did not disclose the location of his house. I find that the Appellant had no burden to prove which was his house. The burden in a criminal case is always on the prosecution. This burden never shifts.

15. I must also address the issue of the charge. The charge as drawn was defective. The Appellant was charged with shop breaking contrary to **Section 306 (a)** and stealing contrary to **Section 279 (b)** of the Penal Code. The charge was duplex and offended **Section 134** of the **Criminal Procedure Code**. **Section 306 (a)** of the **Penal Code** provides:

“Any person who-

Breaks and enters a school house, a shop, warehouse, store, office, counting house, a garage pavilion, club, factory or workshop, or any building belonging to a public body or any building or part of a building licensed for the sale of intoxicating liquor or a building which is adjacent to a dwelling house and occupied with it but is not part of it or any building used as a place of worship and commits a felony therein:

Is guilty of a felony and is liable to imprisonment for seven years.”

On the other hand **Section 279 (b)** of the **Penal Code** provides:

“If the theft is committed under any of the circumstances following, that is to say –

If the thing is stolen in a dwelling house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling house, the offender is liable to imprisonment for fourteen years.”

These are two distinct offences which are well defined and with the penalty prescribed. They cannot be combined in one charge. The charge as drawn was defective and offends **Section 134 of the Criminal Procedure Code** which requires that the offence must be specified in the charge or information with necessary particulars. The charge was a non-starter and ought to have been rejected. It occasioned a miscarriage of justice as the Appellant was sentenced on two limbs when the evidence adduced was for only the offence under **Section 306 (a)** of the **Penal Code**. The trial Magistrate ought to have rejected the charge under **Section 89 (5)** of the **Criminal Procedure Code** or in the alternative order an amendment under **Section 214** of the **Criminal Procedure Code**. This did not happen and led to the accused being tried on defective charge. For these reasons I find that the charge against the Appellant was not proved beyond any reasonable doubts. The conviction and sentence cannot be upheld. I allow the appeal and order that the conviction and sentence of the Appellant are set aside. The Appellant is set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Kerugoya this 28th day of April, 2017.

L. W. GITARI

JUDGE

Judgment delivered in open court, Appellant present, M/S Kiarie for the State, Naomi Court Assistant this 28th day of April, 2017.

L. W. GITARI

JUDGE

28.4.2017