



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 103 OF 2015
NGUMBAU MUTISYA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 305 of 2015 by M. W. Murage R M on 27/10/15)

J U D G M E N T

1. **Ngumbau Mutisya**, the Appellant, was charged with the offence of **Breaking into a Building and Committing a Felony** contrary to **Section 306(a)** of the **Penal Code**. Particulars of the offence were that on the night of 3rd and 4th day of **June, 2015** at **Mwingi Township, Mwingi Central District**, within **Kitui County** with others not before court, broke and entered a building namely **Highlight Electronic and M-pesa Shop** of **Juliet Mary Muli** and committed therein a felony namely stealing and stole electronic goods as per the attached list valued at **Kshs. 156,050/=**.
2. In the alternative, he was charged with the offence of **Handling Stolen Goods** contrary to **Section 322(1)(2)** of the **Penal Code**. Particulars of the offence were that on the 4th day of **June, 2015** at **Mwingi Township, Mwingi Central District**, within **Kitui County** otherwise than in the course of stealing dishonestly retained two mobile phones make **Itel S/No. 352441070791363** model **208**, a **Tecno** Mobile Phone battery and charger, knowing or having reason to believe them to be stolen goods.
3. He was tried, convicted and sentenced to **Seven (7) years imprisonment**.
4. Being dissatisfied with the conviction and sentence he appealed on grounds that:
 - The trial Court relied on evidence of police officers who were key witnesses without considering that they were the Appellant's enemies.
 - Evidence adduced was contradictory and could not sustain a conviction.
 - There was no proof that the stolen items were recovered from the Appellant's house.
 - The alibi defence put up was not considered.
5. Briefly, facts of the case were that PW1 **Juliet Mary Muli** closed down **Highlight Electronics and M-pesa Shop** on the 4th **June, 2015** to find it broken into. Part of the roof was damaged. Entry was gained by the iron sheet being cut. Electronics goods including Hoovers, Decoders, Mobile Phones, Amplifiers, Batteries, Rechargeable Lantern, Airtime and cash money were stolen. The estimated value was **Kshs. 156,050/=**. The matter was reported to the police.

6. Acting on information received the police amongst them PW3 No. 61506 Corporal Kenneth Barasa, PW4 No. 91081 P C Danny Wafula and PW5 No. 73692 P C Stephen Irungu arrested the Accused. They recovered two (2) mobile phones, a Tecno Mobile Phone Battery and a charger. Investigations were carried out which culminated into the Accused being charged.

7. When put on his defence the Appellant denied having committed the offence. He stated that P C Irungu, P C Wekesa and P C Tony requested him to be their informer but he declined. As a result they held a grudge against him. Consequently he was charged severally. On the date he was arrested P C Irungu and P C Wekesa went to his house. They found him with his wife. They took him to the police station where he was shown a photograph of some people. There was a jacket on the table. On the jacket was a phone. They took away from him Kshs. 1,600/=, an Identification Card and papers in the wallet.

8. The Appellant canvassed the Appeal by way of written submissions. In his submissions he contended that he was held in custody from 4th June, 2015 to 8th June, 2015. This was beyond the required 24 hours hence against his rights. He was not accorded a fair hearing because in sentencing him the Court took into consideration his previous convictions and the Probation Officer's report that was full of rumours and criticism from members of public. Crucial witnesses as his wife were not availed to adduce evidence. No recovery inventory was made as required by Section 19 of the Police Act. The alleged informer was not called as a witness.

9. In response, the State through Mr. Wanjala, State Counsel opposed the Appeal. He submitted that the shop was broken into and some of the stolen items that were stolen were found with the Appellant. That the Appellant failed to explain how he got the items. There were no contradictions as alleged and the issue of alibi defence did not hold any water. On sentence he argued that records of the Appellant were availed and he had been convicted of similar offences. He called upon the Court to uphold the conviction and sentence.

10. This being the first Appeal, I am under an obligation to re-evaluate, re-assess and re-analyze evidence adduced before the trial Court bearing in mind that I had no opportunity of seeing and hearing witnesses who testified at trial then come up with my own conclusions. (See Okeno vs. Republic (1972) EA 32; Pandya vs. Republic (1957) EA 336; and Shantilel M. Ruwal vs. Republic (1957) EA 570).

11. The Appellant was stated to have contravened Section 306(a) of the Penal Code that provides thus:

“Any person who—

(a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, 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; or”

12. Evidence adduced proved beyond reasonable doubt the break in. Entry was gained by the perpetrators of the offence cutting part of the iron sheets. The person(s) who gained entry into the shop and made away with various items as stated by the Complainant were not seen by any of the witnesses. Therefore the main issue for determination is whether the Appellant was one of them.

13. The Prosecution adduced evidence to prove that some items that were stolen from the shop were found in possession of the Appellant less than approximately twelve hours after the break in. Therefore to secure a conviction the Prosecution required to prove ownership of the alluded to items and that they were indeed recovered from the Appellant.

14. In the case of Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic – Criminal Appeal No. 272 of 2005 the Court of Appeal held:

“.....It is trite that before the court of law can rely on the doctrine of recent possession as a

basis for 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 the 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 again, will depend on the easiness with which the stolen property can move from one person to another.

15. It is argued by the Appellant that he was not found in possession of the exhibits. He does not deny that the exhibits belonged to the Complainant. In her testimony PW1 identified the exhibits recovered as what was stolen from her shop. She gave a list of items that were stolen from the shop which included exhibits that were recovered namely two (2) mobile phones make ITEL, a phone charger, a remote control unit, Techno battery, Safaricom and Airtel Airtime cards. The defence did not dispute the fact of ownership of the items by the Complainant prior to being stolen.

16. The fact of the items having been stolen recently from the Complainant is also not in dispute.

17. The issue to be determined is whether indeed the stolen items were found in possession of the Appellant. It is not denied that police officers who were investigating the matter went to the house of the Appellant and found him with a lady that he states was his wife. The evidence of PW2 that they found him wearing a black pair of trousers and a jacket from which they recovered two (2) mobile phones make ITEL, one battery make Techno, a charger and remote control unit and cash money **Kshs. 1,000/=** is corroborated by the evidence of PW5. In his defence the Appellant stated that the jacket was on a table at the police station when he was taken there after his arrest. However this issue did not come up in cross examination to give the witness the opportunity to respond to the allegation.

18. The Appellant has submitted that his relationship with the police officers was not cordial because they wanted him to work for them but he declined. This was an allegation that could not be established.

19. Further the Appellant argued that the police should have prepared an inventory of recovery to prove that indeed they recovered the jacket from his house. In the case of **Leonard Odhiambo Ouma & Another vs. Republic CA NKU Criminal Appeal No. 176 of 2009 (UR)** the Court of Appeal held that:

“Failure to compile an inventory as contended in ground 5 is in our view a procedural step which in the circumstances did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial.”

20. The Prosecution has been faulted for not calling the informer on whose information the police acted and moved to arrest the Appellant. In the case of **Kigecha Njuga vs. Republic (1965) EA 773** the Court stated that:

“Informants play a useful part no doubt in the detection and prevention of crime and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desires the courts to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”

21. Informers work with the police for purposes of detecting crimes. Such like people are protected hence may not testify in court. As stated in the authority cited if details of the information they give is to be adduced in evidence then they must be called to testify. But where as in this case he gave information which the police acted upon and went to the house of the Appellant where they found him in possession of items that turned out to have been stolen, such an informer cannot be called to testify.

22. It is argued further that the Prosecution failed to call the wife of the Appellant as a witness to testify. In the case of **Keter vs. Republic (2007) 1 EA 135** the Court held that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses that are

sufficient to establish the charge beyond any reasonable doubt.”

23. The lady who was found in the house who is acknowledged as the wife of the Appellant being a spouse was almost a single entity with the Appellant. She may have been a competent witness to testify but was not compellable. Therefore the Prosecution having chosen not to call her as a witness was not fatal to their case.

24. With regard to the issue of alibi defence, as correctly submitted by the learned State Counsel, no such a defence was raised.

25. From the foregoing I find the trial Court having reached a proper conclusion in the matter in respect to conviction of the Appellant which I will not interfere with. The Appeal on conviction lacks merit and is dismissed.

26. With regard to sentence the offence the Appellant committed attracts a sentence of upto **Seven (7) years imprisonment** which the Appellant was sentenced to.

27. In sentencing the Appellant the learned trial Magistrate remarked that she considered the report and the Appellant had several previous criminal records of a similar nature. According to the report filed by the Investigation Officer on the **22nd August, 2011** the Appellant was placed under probation supervision for a period of **Six (6) months**. On the **30th December, 2011** he was sentenced to **four (4) years imprisonment** for the offence of Salon Breaking and Committing a Felony. But he was not given an opportunity of reacting to the report. This court has the power to alter the sentence pursuant to the provisions of **Section 354** of the **Penal Code**. In the premises, I do appreciate that sentencing is a matter of discretion of the trial Court and must be based on facts and circumstances of each case. **(See James vs. Republic (1950) 18 EA CA 147)**. Having considered the facts of the case I do alter the sentence imposed by quashing it and substituting it with **4½ years imprisonment** to run from the date of conviction.

28. It is so ordered.

Dated, Signed and Delivered at Kitui this 27th day of April, 2017.

L. N. MUTENDE