



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 13 OF 2016

YUSUF KIOGORA GITONGAAPPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 467 of 2015 by Hon. W J Gichimu Magistrate on 23rd October 2015)

JUDGMENT

1. On the **first Count** YUSUF KIOGORA (Kiogora) was charged with the offence of burglary Contrary to Section 304 (1) (a) as read with Section 304 (2) of the Penal Code Cape 63 and on the **second limb** he was charged with the offence of stealing Contrary to Section 279 (b) of Cap 63. In the **alternative count** he was charged with the offence of handling stolen property Contrary to Section 322 (1) (2) of Cap 63. He was convicted, although the trial court failed to state on which offence the trial court convicted Kiogora on. Kiogora was sentenced to imprisonment of 2½ years. Kiogora was aggrieved by his conviction and sentence and has filed this appeal against both.

2. The duty of the 1st appellant court was explained by the Court of Appeal in the case in the case of **KARIUKI KARANJA VRS REPUBLIC [1986] KLR 190** that:

“On first appeal from a conviction by a Judge or Magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the Judge or Magistrate with such materials as it may have decided to admit.”

3. Bon Tadiche (Tadiche) operated a hotel and a shop in Timau area. On 20th May 2015 at 10 pm while in the company of Collins Oduor (Collins) they escorted Tadiche's cousin to the stage to get transport to Isiolo. Both Tadiche and Collins stated that the transport took too long. After escorting that cousin they went back. According to Tadiche they were both going to his place of business cum his abode. As they approached those premises Collins saw a person near Tadiche's place carrying away a TV and 2 plastic chairs. This person ran away. There was another person who was inside Tadiche's shop. Tadiche met this person at his door way. Tadiche ran after that person and arrested him. Tadiche also screamed and neighbour came to his rescue. That person he arrested and he did identified him as the accused Kiogora. Kiogora had a sack when he was arrested by Tadiche and in that sack was recovered pair of pliers, bunch of keys, rice, knife and a DVD. Tadiche on scrutinising his business premises found that his TV, 3 plastic chairs and money were missing. Tadiche stated that the thieves gained access by damaging his padlock and by cutting the latch of the door.

4. P W 3 James Ndurathi a neighbour of Tadiche answered to Tadiche's call for help when he was arresting Kiogora. On arrival at Tadiche's shop he found Kiogora being beaten by members of the public.

P W 3 saw some spilled rice, DVD and keys. Later on the arrival of P W 4 Daniel Kajori, the village elder, Kiogora was taken to police station. P W 4 also confirmed that he saw at the scene a sack which had a knife, rice and D V D player. He, just like P W 3 confirmed that the accused before court, Kiogora, was the person arrested on the subject night.

5. The investigating officer stated that on 20th May, 2015 at about 5am a group of people arrived at the police station compound with the accused before court. Because Kiogora was seriously injured he was first taken to Nanyuki hospital. The officer confirmed that Kiogora was brought with a knife, pair of pliers a bunch of keys and D V D player. The office confirmed she visited the scene and saw that the thieves had broken the Tadiche's hotel door.

6. The court, on finding that the prosecution had proved a prima facie case against Kiogora, called upon Kiogora to give his defence. Kiogora gave his defence under oath. In his defence Kiogora stated that he spent the night of 19th May, 2015 at a lady's home. The name of the lady was Mwamuna. As Kiogora and the lady walked out of the lady's house a man shone a torch to him and then he cut Kiogora on his head. Kiogora ran but the man followed him and continued to attack him and informed the people who had gathered that Kiogora was a thief. That it was later that the village elder was called by Tadiche and that village elder took Kiogora to the police station.

7. There are six grounds of appeal raised by Kiogora, but essentially those grounds are interrelated. Kiogora by his grounds has stated that Tadiche, Collins and the investigating officer gave inconsistent testimony regarding the breakage of Tadiche's premises, secondly he argued that the prosecution's witnesses confirmed that there was a lady inside the premises of Tadiche which confirmed the defence he raised; and finally that Tadiche mentioned more items that were stolen from his premises than had been reported to the police.

8. The court of appeal has in two separate cases considered how a court should deal with inconsistencies in evidence. In the case **JOSEPH MAINA MWANGI – VRS – REPUBLIC CRIM. APPEAL NO. 73 OF 1993** the learned Judges of appeal held:

In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."

9. In the case **PHILIP NZAKA WATU V REPUBLIC [2016] EKLR** the court of Appeal stated:

"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In **DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR. APP NO. 92 OF 2007** the court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of

the matter.”

10. In this case there are no major discrepancies in the prosecution’s evidence. Tadiche stated that the thieves had broken the door and damaged the padlock. He went further to state that the latch to the hotel door was cut on the night in question.

11. Collins was cross examined by Kiogora about Tadiche’s wife and he stated that she was inside their house at the material time. It is in relation to that questioning that Collins stated “*the door had been locked from inside.*” It follows that Collin’s evidence did not contradict that of Tadiche.

12. The investigating officer in evidence stated: “the thieves broke hotel door.” That evidence was consistent with Tadiche’s evidence. There is no inconsistencies as alleged by Kiogora.

13. Kiogora in his submission stated that the prosecution’s witnesses confirmed that Tadiche’s wife was inside the house which supported his defence. Firstly it is important to note that Kiogora in his defence stated that the lady he spent the night with was called Mwamuna. At no time, while cross examining the prosecution’s witnesses, and in particular Tadiche and Collins did Kiogora pose a question that the woman’s name and by extension Tadiche’s wife name was known as Mwamuna. Mwamuna was a name Kiogora mentioned for the very first time when he gave his defence. It follows that the attempt to connect the alleged lady called Mwamuna and the wife of Tadiche is an afterthought and leads me to find that it was fabricated defence in that respect.

14. The last issue raised by Kiogora was that Tadiche failed to report the loss of his TV. It needs to be understood that Tadiche was essentially giving evidence about the items recovered from Kiogora when he was arrested. Tadiche did however in his evidence in chief state that he lost a TV and plastic chairs that they were not recovered. It is also instructive to note that the particulars of the offence of burglary and theft itemised T V as one of properties stolen from Tadiche. The investigating officer in her evidence in chief stated that the items of property stolen from Tadiche were TV, 2 plastic chairs, rice and D V D player. That evidence is in tandem with Collins evidence where he stated.

“Near the complainant’s (Tadiche’s) shop, I saw one person outside carrying a T V set and 2 plastic chairs.”

15. It is clear from the above that the grounds raised by Kiogora are for rejection because they are not supported by the evidence tendered at the trial court.

16. Kiogora raised a defence of alibi. Kiogora does not assume any burden to prove his alibi defence. This was stated in the case of **KIARIE VS REPUBLIC [1984] KLR** where the Court of Appeal held:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate’s finding on the alibi because the finding was not supported by any reasons”.

17. The alibi defence raised was not raised by Kiogora with sufficient clarity when prosecution’s witnesses were testifying. Kiogora failed to ask Tadiche whether indeed his wife was known as Mwamuna. On the whole when that alibi defence is considered in the light of the prosecution’s case it becomes clear that the said defence is for rejection. Weighing that defence with the prosecution’s evidence it is clear that Kiogora’s guilt was sufficiently proved by prosecution’s evidence. I am in agreement with the finding of the Learned trial Magistrate that the prosecution’s evidence proved that Tadiche and Collins found two people in Tadiche’s shop. One ran away while Kiogora was arrested on the scene in possession of items of property belonging to Tadiche. Learned trial Magistrate stated in his judgment:

“The accused person (Kiogora) was found red handed as he left the complaint’s (Tadiche’s)

shop carrying the stolen items”.

18. The Learned trial Magistrate proceed also to state in his judgement:

“I find that the prosecution has proved its case against the accused person beyond reasonable doubt. He is found guilty and convicted under Section 215 of the criminal procedure code”.

19. The Learned trial Magistrate in making that pronouncement however failed to state on which count he had convicted Kiogora. That notwithstanding however, this court has power to make a finding that the prosecution proved beyond reasonable doubt a case against Kiogora on the first count of burglary and stealing.

20. The Trial court failed to state whether the sentence of 2 ½ years imprisonment related to one limb or both limbs of count No. 1. It is for that reason that the trial court’s sentence shall be set aside.

21. In the end YUSUF KIOGORA GITONGA is convicted on the main count of burglary and stealing. **The trial court’s sentence of 2 ½ years is hereby set aside and YUSUF KIOGORA GITONGA is sentenced to serve 1 ½ years imprisonment on the first limb of count No. 1 and 1 year imprisonment on the second limb of count No. 1. Both of those sentences shall run concurrently.**

Both of those sentences shall run from the date he was convicted by the trial court.

22. It is so ordered.

Dated and Delivered at Nanyuki this 31st day of May 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/ Maria Stella

Appellant: Yusuf Kiogora Gitonga

For the State:

Language

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE