



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 113 OF 2015

(CORAM: J. A. MAKAU – J.)

BENSON WAJEWA OJEE.....1ST APPELLANT

BRIAN OMONDI.....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 866 of 2014 in Siaya Law Court before Hon. J. N. Sani– (Ag. S.R.M.)

JUDGMENT

1. The Appellant Benson Wajewa Ojet and Another were charged with an offence of Burglary Contrary to **Section 304 (2) of the Penal Code**, the particulars of the offence are that on diverse dates between 1st week of November 2014 and 22nd December 2014 at Anyiko sub-location in Gem District within Siaya County jointly broke and entered the dwelling house of Elizabeth Onyango Oluoch. The Appellant faced count II, for an **Offence of Stealing in a Dwelling House contrary to section 279(b) of the Penal Code**. The particulars of the offence are that on diverse dates between 1st week of November 2014 and 22nd December 2014 at Anyiko sub- location in Gem District within Siaya County jointly broke and entered the dwelling house of Elizabeth Onyango Oluoch. The Appellant faced an alternative count of **Handling stolen goods contrary to Section 322(1) (2) of the Penal Code**. The particulars of the offence are that on the 24th day of December 2014, at Anyiko sub-location in Gem District within Siaya County, otherwise than in the course of stealing dishonestly received or retained eight stools, four chairs and one small round table, sewing machine and dining table knowing or having reason to believe them to be stolen goods.

2. That when the charges were read to the Appellant he replied it was “true” in respect both Count I and II and plea of guilty was entered accordingly.

3. The facts of the prosecution's case are that in the 1st week of November 2014, the complainant Securely locked her house and went to Kisumu. That on 22.12.2014 around 6.00 a.m. she received a call from a relative one Sarah Odongo who informed her, her house was on fire but they had managed to put off the fire. That at around 1.00 p.m. same day she travelled home and confirmed that the house had actually got burnt and she could only gather a few items, but she confirmed some items missing. The main door was also broken. She confirmed, that a wardrobe, two round tables, sewing machine, dining table, 14 chairs, a cupboard 5, small jikos, two big jikos and assorted utensils, all valued at Ksh.69,250,

were missing. The report was made to the police, scene of crime visited the scene and investigations began. That on 24.12.2014 the village elder one Moses Omenda got information that some items had been seen at the home of the accused persons. The items were positively identified by the complainant. The items, were produced as follows, 8 stools exhibit P2, 4 chairs exhibit P1, and 1 table P. 3.

4 The Appellant and another admitted the facts of the case and were each convicted on his own plea of guilty on both Count 1, and two (2) and each sentenced to serve three (3) years imprisonment on count I and two (2) years on count II and sentence to run consecutively.

5. The Appellant, who was the first accused being aggrieved by the conviction and sentence meted against him preferred this appeal setting out the following grounds of appeal.

1. The conviction of the accused/appellant herein was against the trite principles of conviction especially where an accused person is convicted on his own plea of guilt.

2. the plea as taken by the accused person was not equivocal as the same was taken in a language which the accused did not understand.

3. The learned trial magistrate erred in law and fact in convicting the appellant by relying on facts as given by the prosecution which were contrary to the particulars of the charge sheet.

4. The learned trial magistrate erred in law and fact in allowing the prosecution to produce exhibits by a witness who was not competent to produce them.

5. The learned trial magistrate erred in law by convicting and sentencing the accused person/appellant on ad totally defective charge sheet.

6. The sentence was excessively harsh and manifestly excessive in the circumstances.

7. That the sentence amounted to a misapplication of Judicial Discretion by the trial magistrate.

6. At the hearing of the appeal, learned Counsel Mr. Ogonda represented the appellant while state was represented by prosecution Counsel M/s. Maurine Odumba.

7. The Counsel for the appellant submitted that the appellant's appeal was against both conviction and sentence. He proposed to abandon grounds Numbers 2, 4 and 6 of the petition of the appeal and proceeded on to argue ground numbers 5, 3, 1 and 7 together.

8. On ground number 5 Mr. Ogonda learned Counsel urged that the charge was defective in his submissions. He urged the trial court was in error in convicting and sentencing the appellant on a charge that was totally defective. The Appellants was charged with an offence of **Burglary C/S 304 (2) of the Penal Code the said Section provides:-**

“If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.”

9. Mr. Ogonda, learned Counsel submitted that the facts did not support the charge of HouseBreaking as the intention was not disclosed. That the particulars of the offence of Burglary were lacking. As the offence was committed, at night. The learned State Counsel on her part though was opposed to the appeal she conceded on ground No. 5 in that the charge was defective. She stated the appellant was charged under the sentencing Section. That he was convicted on a sentencing section other than the Section stating the offence.

10. I have very carefully considered the charging Section and agree that the appellant ought to have been charged under **Section 304(1) (a) of the Penal Code, the said Section 304(1) (a) of the Penal Code** provides as follows:-

“If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.”

In the instant case the appellant was instead charged under sentencing Section. The particulars supporting the charge omitted essential ingredients of an offence of Burglary in that ***“with intent to commit a felony therein”*** and by failing to state that the offence was ***“committed in the night.”*** The court failed to note the charge was fatally defective and proceeded to convict the appellant and another on a fatally defective charge and sentenced them without any charge in support of the offence. I find merits in ground No. 5 of the appeal and I allow the same.

11. On ground No. 3 Mr. Ogonda learned Counsel submitted that the trial learned magistrate erred in law and fact in convicting the appellant by relying on facts as given by the prosecution which were contrary to the particulars of the charge. The charge sheet stated as follows:-

“stealing in a dwelling house contrary to Section 279 (b) of the Penal Code.”

12. The particulars as given if they disclosed any offence Mr. Ogonda submitted it was an offence of arson. He urged the appellants were not charged with the said offence. He urged there was variance between the charge and particulars given by the prosecution. The learned state Counsel M/s. Odumba conceded that the facts were in variance with **Section 279 (b) of the Penal Code which deals with Stealing from a Dwelling house. Section 279 (b) of the Penal Code** provides:-

“if the thin 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;”

13. The particulars given in the instant case relates to arson. The value of stolen goods exceeded KSh.100/= and there were not particulars that the offender immediately before or after the time of stealing used or threatened to use Violence to any person in the Dwelling house. I agree with both learned Counsels that there was variance between the charge sheet and the facts as given by the prosecution and find and hold the conviction based on a defective charge cannot be allowed to stand. That the trial court did not before taking the plea of satisfy themselves that the charges were proper and even after facts were given did not bother to find out whether the facts supported the purported charges. The failure resulted in unlawful and wrongful conviction. I therefore find that was why the conviction was against the trite principles of conviction. I therefore find merits in this ground of appeal.

14. The upshot is that the appeal is allowed, the conviction and is quashed and the sentence is set aside and the appellant is set at liberty forthwith unless lawfully held. That as I have found the charges to have been defective and though the 2nd accused at the lower Court. Brian Omondi did not appeal against both the conviction sentence, by virtue of Sections 382 of the Criminal Procedure Code and Article 159 (2) (a) (b) and (d) of the Constitution of Kenya 2010, the 2nd accused is entitled to benefit from this judgment. I accordingly quash the the conviction and sentence meted against 2nd accused by the lower Court. He is also set at liberty forthwith unless lawfully held.

DATED AT SIAYA THIS 24TH DAY OF MARCH, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

In the presence of:

Mr. Ogonda for Appellant

M/s. Odumba for State

Appellant in person.

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akide

J. A. MAKAU

JUDGE