REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 61 OF 2015

MUSYIMI MWENGA ..... APPELLANT

V E R S U S

REPUBLIC..... RESPONDENT

From original conviction and sentence in Criminal Case No. 388 of 2015 of the Principal Magistrate's Court at Kyuso – E. M. Mutunga –R.M)

JUDGMENT

The appellant was charged in the subordinate court at Kyuso with three counts of stealing and three alternative counts of handling stolen property.

Count 1 was for stealing contrary to Section 275 of the Penal Code. The particulars of the offence were that on 27th August 2014 at Mutanda sub location in Mumoni sub County within Kitui County stole a mobile phone make Asha 301 valued at Kshs 1,500/= the property of Mwendwa Mati. In the alternative, he was charged with handling stolen property Contrary to Section 322(1)(2) of the Penal Code. The particulars of the offence were that on the same day and place otherwise than in the course of stealing dishonestly received or retained a mobile phone make Asha 301 knowing or having reasons to believe it to be stolen property or unlawfully obtained.

Count 2 was also for stealing Contrary to Section 275 of the Penal Code. The particulars of the offence were that on 10th August 2014 at Kathumulani market Mutanda sublocation in Mumoni Subcounty within Kitui County stole a radio make Puhua valued at Kshs 1,500/= the property of Musyoki Nzulu. In the alternative he was charged with handling stolen property Contrary to Section 322(1)(2) of the Penal Code. The particulars of the offence were that on 27th of August 2014 at Mutanda sublocation in Mumoni Subcounty within Kitui County otherwise than in the course of stealing dishonestly received or retained a radio make Puhua knowing or having reasons to believe it to stolen property or unlawfully obtained.

Count 3 was also for stealing contrary to Section 275 of the Penal Code. The particulars of the offence were that on 19th August 2014 at Mutanda Sublocation in Mumoni Subcounty within Kitui County stole a frying pan valued at Kshs 500/= the property of Syombua Muthui. In the Alternative to this charge he was charged with handling stolen property contrary to Section 322(1)(2) of the Penal Code. The particulars of the offence were that on 27th August 2014 at Mutanda Sublocation in Mumoni Subcounty within Kitui County otherwise than in the course of stealing dishonestly received or retained a frying pan knowing or having reasons to believe it to be stolen property or unlawfully obtained.

He denied all the three counts and the alternative charges. After a full trial he was convicted of count one and the alternative to count two and count three. He was ordered to serve eight months imprisonment in

count 1 and 1 ½ years to both alternative charges to count two and three. The court did not indicate whether the sentences were to run consecutively or concurrently.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed his petition of appeal on 13th July 2015 on the following grounds that:-

1. The learned trial magistrate erred both in law and fact by convicting him without considering that prosecution witness evidence was contradictory.
2. The trial magistrate erred in convicting him without considering that the phone was recovered at the forest by a person who never testified to prove the fact of the exhibit.
3. The learned trial magistrate erred both in law and fact by convicting him without considering that the only witness was a relative of PWI who could plan with PWI to pass a heavy burden on him.
4. The learned trial magistrate erred both in law and fact by convicting him without considering that the charges had no reports at the police station which proved that this was a planned deal to take him to prison.
5. The learned trial magistrate erred both in law and facts by convicting him without considering that the recovery form was not signed by the appellant which could prove that the appellant was arrested with the items alleged.
6. The magistrate erred in law and fact by convicting him without considering that his defence was water tight and shook all the witness evidence.

During the hearing of the appeal, the appellant made oral submissions. He stated that on 28th of August 2013 he was arrested and framed with offences he did not know. Items such as mobile phones, clothes and a jerican and other goods were taken from his house.

He submitted that though PWI stated that at 3.00 Pm he was informed by PW2 that he saw the appellant enter the house of PWI, PW2 said that the time was 4.00 Pm. According to him this was a substantial contradiction on evidence. He stated that he was arrested by the Assistant Chief who had a grudge against him. The said Assistant Chief took his things to the Police Station and said they found the phone at the fence.

He also submitted that PW2 and PW1 contradicted each other when PW1 said that he was asleep and awoken by PW2.

He submitted that he was charged with stealing a radio which was lost on 10th August 2014 according to PW3 but the same witness said that he saw the radio on 27th August 2014 which was a later date. This meant that there was cheating. He submitted also that no photographs were taken to show how the radio was recovered.

On the frying pan, he submitted that PW4 said that it was found in his house while there was no evidence on record that the said witness had reported the loss of the frying pan. He claimed that the frying pan belonged to him.

He further submitted that the court unfairly convicted him because it wanted him to produce a document to prove ownership of the items. He submitted that he was sentenced twice on count one, and in addition the court did not indicate whether the sentences would run concurrent or consecutively.

Mr. Orwa the Learned Prosecuting Counsel opposed the appeal. Counsel maintained that there were no contradictions in the evidence of the prosecution witnesses. Counsel also submitted that indeed the alleged stolen items were recovered from the appellant's house. With regard to ground 3 counsel argued that no law was violated by the fact that PWI was a relative of PW2.

Counsel submitted also that the prosecution did not rely on a recovery form at the trial and that such a document was actually not mentioned in the entire trial. Counsel submitted also that the defence of the appellant was considered by the trial magistrate in the judgment.

With regard to the allegation failure to take photographs, counsel submitted that such was not a legal requirement on the prosecution side.

On the sentence, counsel submitted that the magistrate wrongly sentenced the appellant twice on count two and urged this court to make a finding on the same. Counsel also submitted that the magistrate did not specifically say whether the sentences were to run concurrent or consecutively.

In response to the prosecuting counsel's submissions, the appellant submitted that PWI and PWI2 contradicted each other. He emphasized that no photographs were taken to prove that he had stolen from PW3. He further submitted that PW4 was not able to give any identifying mark to the items allegedly stolen. He stated also that in rural areas people had the habit of marking items in their homes, to prove ownership.

The summary of the evidence is as follows.

During the trial the prosecution called six witnesses. PWI was Mwendwa Matiti of Walua Secondary School. On 27th August 2014 at 3.00 Pm as he was inside his house having opened the door, the appellant Musyimi Mwende woke him up and then walked away. Later Mutindi a wife of the witnesse's brother came and asked him for his phone and he found that it was missing. The sister in law then informed him that Musyimi had carried the phone away and that she saw Musyimi pocket the phone while she was 50 metres away.

When he later asked Musyimi about the phone he denied taking it. He thus reported the incident to the Assistant Chief. Later the appellant was asked to give out the phone and he took them to where it was.

On finding the phone, people also demanded to check in the appellant's house whether there were other stolen items, and on doing so they found other stolen items. The witness described his mobile phone as Asha NBW 301 black and red in colour. He identified the phone in court.

In cross examination, he insisted that the appellant went to his home on 27th August 2014 and stole the phone. He said that the appellant hid the phone in the bush. He agreed that the appellant did not have a phone in the pocket during arrest. He stated that no photographs were taken. He maintained that the appellant was seen with a phone by his brother's wife.

PW2 was Felistas Mutindi. It was her evidence that on 27th August 2014 at 4.00 Pm he saw Musyimi near a door and ongoing to her brother in laws house the brother in law informed her that Musyimi had stolen his phone. The appellant was then followed to Kathumulani town and asked about the phone by the Chief and said he had kept the phone at the fence. She stated that she saw the appellant stand at the door of her brother in laws house and took the phone while she was 20 metres away. She stated that other people were present in the compound. She also stated that the appellant explained to the Chief where he had hidden the phone at the fence.

In cross examination she stated that she could not remember the number of the people who were with the appellant. She maintained that the appellant pointed out where he had hidden the phone. She stated that she did not go to the place where the appellant was arrested. She was also not aware if any photographs had been taken.

PW3 was Patrick Musyoki Ngugi from Kathumulani town. He was a boda boda operator. It was his evidence that on 27th April 2014 he found his radio which he had lost on 10th May 2014. He stated that it was a motorbike radio and that he had reported the loss to the Chief. He stated also that on 27th August 2014 because an allegation that the appellant had stolen a phone, they searched his house and recovered his lost radio. He stated the owner of the house where the radio was recovered was Musyimi Muange the appellant. He identified the radio with a mark MNZ in court. He stated that the appellant was present when the house was opened.

In cross examination, he stated that he lost a motorbike on 10th May 2014 and reported the matter to the

Assistant Chief. He maintained that the radio was found with the appellant. He denied carrying away the appellant's sofa set. He maintained that he identified the radio through a marking.

PW4 was Syombua Muthui. It was her evidence that on 27th August 2015, she found her lost frying pan in the appellant's house after a neighbour had lost a phone. It was her evidence that though many items were recovered, hers was the frying pan. She stated also that the recoveries were done in the presence of Mutua Kiilu the Assistant Chief. She stated that her frying pan worth Kshs 500/- was recovered after the appellant opened his house.

In cross examination, she maintained that the frying pan was hers and that she had bought it in town. She admitted that on 25th December 2014 the appellant had worked on her land and she paid him. She denied making chapatis in the appellant's home.

PW5 was Alexander Mutua Musili the Assistant Chief of Mutanda sublocation. It was his evidence that on 27th August 2014 at around 4.00 Pm, one Mwendwa reported that his phone had been taken by Musyimi Mwendwa. Thereafter, at 6.00 Pm the reportee came back and they proceeded to Kathumulani market where they found the appellant having been held by other people. According to this witness, the appellant led him and members of the public to where he had hidden the mobile phone. The witness picked the phone from the hide out. They then proceeded to the appellant's home and the appellant opened his house. There in, a radio belonging to Musyoki Nzili was recovered together with many other items. Among these items was a chair, timber, a small chair, a jerican and a frying pan. On recovery of the items, the public wanted to kill the appellant.

In cross examination, he stated that he protected the appellant from the public. He maintained that the appellant showed them the stolen phone from where he had hidden it. He stated that initially the appellant sent his brother to pick the phone. He stated also that the frying pan found in the appellants house was identified by the owner. He admitted having been sold land by the family of the appellant but denied the existence of any dispute between them over land.

PW6 was Police Constable Simon Yegon of Kyuso Police Station. It was his evidence that on 28th August 2014 he was handed over this matter by the OCS to investigate, after the Administration Police Officers had arrested the appellant over theft. He investigated the matter and noted the contents of the report of items which were stolen by the appellant and which had been identified by owners. He thus charged the appellant with the offences.

In cross examination, he stated that the appellant led people to the recovery of the phone in the presence of the Assistant Chief. He stated that the appellant had hidden the phone in the bush. He stated also

that the phone in court was identified by the owner. He said he did not take photographs of stolen items. He also stated that the frying pan was found in the appellant's house and was also identified by the owner.

When put on his defence, the appellant tendered sworn testimony. He stated that he was a farmer and that on 27th August 2014 he woke up at 8.00 am fetched firewood with a pickup as a loader. At 1.00 Pm, he went to the employer and was paid and proceeded to take alcohol at the first complainant's home. At 2.00 Pm he went to Kathumulani town where he was asked whether he had a phone. At 4.00 Pm, a bar was opened and he got in and was later arrested by the Assistant Chief over a phone said to have been stolen at the place he had earlier taken alcohol. He stated that people went to his house and utensils such as Spoons, Plates, Timber, Jericans, Sufurias, and a Sony Radio were taken. He stated that there was an existing grudge between him and the Assistant Chief. He said that the radio produced in court wasn't the one collected from him.

In cross examination, he stated that Mutemi Kaloki worked as a loader and that they took alcohol in the first complainant's home. He stated that he knew the neighbours of the complainant in count 1 but not Felistus Muthini PW2. He said that he was not present when the door of the 1st complainant's house was broken. He said that the radio produced in court belonged to him. He stated that he frequented the beer den often.

This is a first appeal. As a first appellate court, I am required to reexamine the evidence on record and come to my own conclusion and inferences. See the case of ***Okeno -vs- Republic (1972) EA 32***.

I have evaluated all the evidence on record afresh. I have perused the judgment of the trial court. The appellant has raised several grounds on appeal.

His first complaint is that he was convicted on contradictory evidence, especially the evidence of PWI and PW2. Indeed the evidence of PWI was that the appellant went to his house door at 3.00 Pm. PW2 on the other hand stated that the appellant was there at 4.00 Pm. This was a difference on time of one hour. In my view though this is a contradiction on the exact time the appellant was in PWI's house, it is not a material one. None of the witnesses had any reason to keep exact time for the arrival and departure of the appellant. None was using a clock or watch to determine the time when the appellant was at that house. 3.00 Pm and 4.00 Pm are all hours within the same afternoon. In my view both were estimates and the witnesses were relying on their mental memory and as such that small difference in time cannot be said to be a material contradiction.

Besides the above, the appellant also in his defence said that after he was paid at 1.00 Pm for his days' work, he went to PWI's house to take alcohol. That was an admission that the same afternoon he went there for the purpose of taking alcohol. Whether or not he took alcohol was a different story. The fact is that the appellant admitted having gone there in the afternoon. The evidence both for the prosecution and the defence thus put the appellant at the house of PWI that afternoon of 27th August 2014.

The appellant has complained that the phone of PWI was recovered at the forest by a person who did not testify. That person who did not testify was not named by the appellant. The evidence on record was that the appellant led the Assistant Chief PW5 Alexander Mutua Musili and others to the place in the bush where the phone of PWI was recovered by the Assistant Chief. It cannot thus be said that the phone was recovered by somebody who did not testify. I dismiss that complaint.

The appellant has also complained that with regard to the phone, the witnesses who testified to the theft, ie PW1 and PW2, were relatives. Indeed the evidence on record was that PW2 was a sister in law of PW1. However there is no law which bars a relative or relatives from testifying in the same criminal case. There is no evidence on record that PWI and PW2 had any reason to collude and implicate the appellant for an offence he did not commit. I thus dismiss that ground.

The appellant has stated that the charges had no prior report to the police station. Indeed there is no evidence that, even for the items which were stolen earlier and found in the appellants house, the thefts or disappearances were reported to the police station. However the person who lost the motorbike with the radio stated that he reported the incident to the Chief. Such evidence was not disputed by the appellant.

Though there was no evidence that the loss of the frying pan was reported to the Assistant Chief or to the police, the evidence on record did not indicate any malice or an attempt to frame the appellant. None of the witnesses or complainants had a reason in my view, to unfairly implicate the appellant. Infact from the evidence in record, a number of other items were found in the appellant's house but no one came forward to say they belong to them. In my view therefore though the complainants in count 2 and count 3 did not make prior reports to the Police Station on the loss of the items, the evidence on record established that they were honest people who had no intention of unfairly implicating the appellant. I thus dismiss that ground of appeal.

The appellant has also complained that there was no items recovery form signed and produced in court. He also complained at the trial that no photographs were taken of the items that were allegedly stolen and recovered from him.

Taking photographs and production of the same in evidence is a discretion of the prosecution if they consider that in any particular case, they need to rely on photographic evidence. It is not mandatory that photographic evidence should be produced. A case may be proved beyond reasonable doubt even without the production of photographic evidence. In the present case photographic evidence was not necessary as

the complainants positively identified the actual items in court.

With regard to production of recovery form, again that in my view is not a legal or statutory requirement. In any event, it was not the police who recovered the alleged stolen items. Therefore the making and production of such recovery form which is a police document, in my view could not be appropriate in the present case.

The appellant was convicted on the alternative charges to count 2 and 3 because he could not give a reasonable explanation as to how he came into possession of the items. Though he claimed to be the owner of the radio, his contention was not believable, as he only talked about ownership in cross examination by the prosecutor.

The appellant has stated that his defence was not considered by the trial court. From the contents of the judgment that is not the position. The magistrate did consider the defence of the appellant in the judgment and expressed his own views about the same. In particular the magistrate in considering the defence, stated as follows:-

> ***"accused persons defence said on 27th August 2014 went (sic) to take alcohol at the complainants home then later at 4.00 Pm went to Kathumulani town where he got into a bar. He was later arrested and told he stole a phone and other goods identified by people. Upon cross examination he said that the radio belonged to him but had nothing to prove it".***

After making the above observations, the trial court went on to find that his defence was not corroborated and that the appellant was identified by PW2 when he pocketed PW1's phone, and that he later led to the recovery of the phone. The trial court went on to conclude that the prosecution had proved its case. In my view therefore, it cannot thus be said that the defence of the appellant was not considered by the trial court, even if the conclusions reached by the magistrate after considering the defence were shown to be wrong. I find no wrong conclusion reached by the trial court. I dismiss that ground.

With regard to sentence, the typed record shows that the appellant was sentenced to serve 8 months imprisonment for count one twice. The original record however shows that he was sentenced to serve 8 months imprisonment for count 1 only once. The apparent mistake on sentencing was therefore with regard to typing. It was not a mistake of the trial court.

The appellant was also ordered to serve 1½ years on each of alternative counts to count 2 and 3. The magistrate did not specifically state whether the sentence were to run consecutively or concurrently. Such a situation if left to stand would create an ambiguity since the offences were tried together. In my view the sentences herein should have been ordered to run concurrently. I will thus order that the sentences do run concurrently.

To conclude, I dismiss the appeal against conviction and uphold the convictions of the trial court. I order that the sentences on count 1 and the alternative to count 2 and 3 do run concurrently from the date on which the appellant was sentenced by the trial court. In effect the appellant will serve a total of 1 ½ years imprisonment from the date on which he was sentenced by the trial court.

Dated and delivered at Garissa this 22nd day of April 2016.

GEORGE DULU

JUDGE