REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 41 OF 2015

ANG'OLE ZAKAYO KUKUT……..……... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 40of 2015 in the Senior Principal Magistrate's Court at Voidelivered by Hon E. M. Kadima (RM) on 13th July 2015)

JUDGMENT

INTRODUCTION

1. The Appellant, Ang'ole Zakayo Kukut, was tried and convicted by Hon E.M. Kadima Resident Magistrate for the offence of breaking and stealing contrary to Section 304 (1) and 279 (b) of the Penal Code Cap 63 (Laws of Kenya). He had also been charged with the alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code.

2. The particulars of the charge were as follows :-

> **"On the 17th day of January 2015 at Voi town within Taita Taveta County broke and entered MOLE Guest House with intent to steal therein and did steal one phone make samsung** (sic) **elaitel, one wallet, National ID Card, KCB ATM Card and cash 37,500/= the property of SIMON ABALANGIT LOKLWALE the said property being the value of Kshs 41,000/=."**

THE ALTERNATIVE CHARGE

> **"On the 19th day of January 2015 at Voi town in Taita Taveta County, otherwise than in the cause** (sic)**of stealing, dishonestly received or retained one wallet, National ID Card and KCB ATM Card knowing or having reason to believe them to be stolen property."**

3. Being dissatisfied with the said judgment, on 11th August 2015, the Appellant filed a Notice of Motion application seeking to be allowed to file an Appeal out of time. The said application was allowed on 17th September and the Petition Grounds of Appeal were deemed to have been duly filed and served. The Grounds of Appeal were generally as follows:-

> **1. THAT the Learned Trial Magistrate erred in law and fact by convicting him without considering the circumstantial evidence which the prosecution side never produced fully in the court of law**(sic)**.**

2. THAT the Learned Trial Magistrate erred both in law and fact by convicting him without considering that the prosecution case was not proved beyond reasonable doubt and hence the sentence of Kshs 6 years and a fine of Kshs 300,000/= in the two (2) counts that was imposed on him was harsh.

3. THAT the Learned Trial Magistrate erred in law and fact in not considering that he was a disabled person.

4. His Written Submissionswere filed on 11th July 2016. On 28th July, 2016, he filed his Response to the States' Written Submissions that were dated 20th July 2016 and filed on 21st July 2016.

5. When the matter came up in court on 28th July 2016, both the Appellant and counsel for the State asked this court to deliver its Judgment based on their respective Written Submissions. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

7. It appeared to this court that the only issue that was before this court was whether or not the Prosecution had proven its case beyond reasonable doubt. However, as the Appellant had also raised an issue regarding the sentence that was meted upon him, this court deemed it prudent to deal with the two (2) issues together as they were related. The ground that he was a person with disability was not considered in the Judgment herein as the same was ground for mitigation and ought to have been raised during his mitigation at the Trial Court.

8. The Appellantargued was that the Prosecution did not adduce any evidence to show that he was the one who indeed committed the offences he had been charged with. He was emphatic that there was no witness who could testify to the fact that he was seen anywhere near the ATM where money for Simon Abalangit Lokwale (hereinafter referred to as "PW 1") was withdrawn. Hepointed out that he was the one who in fact, who returned the wallet, KCB ATM Card, National Identity Card, Student Card of Kapsabet, Voter's Card and two (2) Safaricom Sim Cards (hereinafter referred to as the "items") to PW 1.

9. He also said that the Prosecution witnesses contradicted the facts in the Charge Sheet where it was stated that he had stolen a sum of Kshs 37,500. He stated that PW 1 testified in court that he lost a sum of Kshs 2,500/= which was in his wallet and a sum of Kshs 35,000/= that was withdrawn from his ATM making it difficult to establish the exact amount that PW 1 lost on that particular day.

10. Further, it was his contention that PW 1's evidence that the money was withdrawn from the ATM twice contradicted the evidence of Number 75862 PC Andrew Lokilima and Number 56177 Danson Mugo (hereinafter referred to as "PW 2" and PW 3 respectively) who had testified that the money from the ATM was withdrawn thrice.

11. He pointed out that the Learned Trial Magistrate disregarded his defence because he gave an unsworn statement and did not call any witnesses to corroborate his evidence. He submitted that he did not know the difference between adducing sworn and unsworn evidence as it was his first time to be charged in court and that his witness Ms Dorine may not have come to testify because she was probably out of the country.

12. On its part, the State set out the evidence of the three (3) Prosecution witnesses to demonstrate that the Prosecution had proved its case against the Appellant herein beyond reasonable doubt. It relied on the principle of recent possession as the Appellant was found with the items that were stolen from PW 1's room and submitted that there was therefore strong inference that the Appellant entered PW 1's room and stole the said items.

13. It placed reliance on the case of **Reuben Nyakango Mose & Another vs Republic [2013] eKLR**where the Court of Appeal addressed its mind to the said doctrine of recent possession and held as follows:-

> **"…We have carefully considered the totality of the evidence as relates to recent possession and are satisfied that the two courts were entitled to reject the defences offered by the appellants. The stolen items were sufficiently described and identified by PW 1, PW 2 and PW 3 and were recovered so soon after the robbery that the trial court was entitled to draw an inference that the appellants stole the items."**

14. Notably, PW 1 did not adduce in evidence proof to demonstrate that he was a guest at Mole Guest House Voi on the material date and time. If he was a guest there, nothing would have been easier than for him to have produced receipts or called a witness from the hotel to show that he had indeed booked the room on that material date. Proof should also have been adduced to demonstrate that there had been actual break in in the dwelling house.

15. Failure to provide such proof led this court to question whether indeed PW 1 was a guest as he had alleged and consider the possibility of his items having been stolen elsewhere other at the said Guest House. In this regard, this court found that the evidence that was adduced before it was not sufficient for it to have concluded that the offence of housebreaking was actually proven.

16. Further, in the absence of proof of the exact time the offence the Appellant had been charged with occurred, this court was unable to conclude that the offence of burglary had been committed. Indeed, according to Section 304 (2) of the Penal Code, burglary can only occur at night.

17. The fact that the Appellant had PW 1's items was not proof of house breaking and burglary. This court found that the Prosecution had not proven the charge of housebreaking and burglary and in this regard, the Learned Trial Magistrate therefore erred in convicting the Appellant on the said charges. In fact, the said Learned Trial Magistrate erred in the nature of the sentence that he handed down to the Appellant herein, a fact that both the Appellant and the State picked up and which this court agreed with.

18. Although any sentence that is meted out to an accused person must be capable of being interpreted easily, a perusal of the decision of the said Learned Trial Magistrate showed that the same was ambiguous. He ordered the Appellant to pay a fine of Kshs 200,000/= or in default to serve three (3) years and an additional fine of Kshs 100,000/= or in default to serve three (3) years imprisonment. Both sentences were to run concurrently.

19. In view of the fact that the two (2) fines bore different figures, it behooved the Learned Trial Magistrate to specify which fine related to which Count.His failure to state which Count the second part of the sentence related to was a grievous and fundamental error on the part of the Trial Court.

20. Additionally, the rationalethat the said Learned Trial Magistrate adopted to give a sentence of three (3) years if there was a default of payment of a fine of Kshs 100,000/= and a similar number of years if there was a default of payment of the fine of Kshs 200,000/= was not clear to this court as the figures clearly varied.The way the sentence was set out rendered it to be illegal and irregular and cannot withstand the legal guidelines and policies on sentencing.

21. Having found that the Prosecution did not establish that the Appellant was guilty of housebreaking and burglary, it was the view of this court that the doctrine of recent possession was not applicable in the circumstances of the case herein. The doctrine presupposes that there is a particular chain of events from

the time of theft of property to the time the property is found on a person sufficient for any prudent man to make an inference that that is the person who actually stole the said property.

22. The Appellant was arrested two (2) days after the alleged theft with PW 1's items. The alternative charge of handling stolen property was therefore a reasonable charge which this court could consider. Indeed, as was rightly pointed out by the State, this court has power to re-evaluate the evidence and convict the Appellant on the alternative charge.

23. In considering this alternative charge, this court had due regard to the events of 19thJanuary 2015 when the Appellant was said to have been arrested with PW 1's items. Notably, the CID Officer who PW 2 said had tracked the phone the Appellant was using and a Safaricom Data Analyst to testify on the said signals were not called to testify.

24. However, this court did not find the same to have been fatal to the Prosecution's case as the Appellant did not deny that he tried to get in touch with PW 1 to give him his items. In fact, in his Written Submissions, he testified that he was the one who looked for PW 1 after collecting his documents. PW 1's and PW 2's evidence that the Appellant's phone signals were picked at a place called Mwakingali were therefore inconsequential.

25. This court, however, noted that no video footage was provided to demonstrate that it was indeed the Appellant who withdrew the money from PW 1's account by ATM. This was a critical piece of evidence that the Investigating Officer could have easily obtained from Kenya Commercial Bank as it related to theft of its customer's funds. The Prosecution did not proffer any reason to explain why this was not done. This dealt a fatal blow to the Prosecution's case.

26. In addition, the failure by the Prosecution to adduce an online statement marked PEX 11 to demonstrate withdrawal of funds from PW 1's bank account in line with the provisions of Section 106B of the Evidence Act Cap 80 (Laws of Kenya) renderedthe said document inadmissible as evidence before the Trial Court.

27. Section 106B of the evidence Act provides as follows:-

> **1. Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible….**
>
> **2. ….**
>
> **3. ….**
>
> **4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—**
>
> > **a. identifying the electronic record containing the statement and describing the manner in which it was produced;**
> >
> > **b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;**
> >
> > **c. dealing with any matters to which conditions mentioned in subsection (2) relate; and**

d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

28. The Bank Statement which was generated from the computer as a print-out from the computer marked **"KCB. ACCTS.STMT.ONLINE Page 1 of 1"**did not also meet the threshold of the requirements of adducing electronic evidence in accordance with the aforesaid Section and consequently, the Learned Trial Magistrate ought not to have relied on the same to link the Appellant to the withdrawal of the monies from PW 1's bank account.

29. The State may have ably advanced arguments about principle of recent possession. However, the fact that the Appellant was found with the items belonging to PW 1 was not synonymous to him having stolen due to the gaps that were identified hereinabove. This was irrespective of the fact that the Appellant adduced unsworn evidence which had little or no probative value at all. The burden of proof lay on the Prosecution to demonstrate that the Appellant knew that he was handling stolen goods at the material time.

30. Indeed, the State did not persuade this court to infer that there were no co-existing circumstances that would have led the Appellant to have picked PW 1's wallet as a good Samaritan, called PW 1 and took his items without knowing that money had been withdrawn from PW 1's account.

31. This court was persuaded by the Appellant's submissions that it was not practical for him to have withdrawn the monies from PW 1's account and then agreed to meet him to return the very ATM that was said to have been stolen.It was indeed improbable that a person who had broken into a dwelling house at night, stolen an ATM Card amongst other items could have agreed to meet the owner of the items in broad day light at 3.00 pm and in an open place between KCB and Barclays Banks in Voi Town without fearing his arrest more so because as PW 2 testified was an extortion exercise. PW 2's evidence that the Appellant called him on a different number was neither here nor there as the Appellant called him and agreed to meet him.

32. Having considered the evidence that was adduced by the Prosecution, its Written Submissions and those of the Appellant herein, this court came to the firm conclusion that the investigations that were conducted herein were extremely shoddy. The Prosecution presented a case that left a lot to be desired and was in fact not proven to the required standard being proof beyond reasonable doubt.

33. Indeed, this courtwas not persuaded by the State's submissions that it should re-evaluate the evidence and convict the Appellant on the alternative count of handling stolen property as the Prosecution had failed to link the Appellant to the either the offence of stealing and burglary and/or handling of stolen property.

DISPOSITION

34. The upshot of this court's decision was the Appellant's Petition of Appeal that was lodged on 11th August 2015 was successful. Accordingly, this court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

35. It is so ordered.

DATED and **DELIVERED** at **VOI** this **27th** day of **September** 2016

J. KAMAU

JUDGE

In the presence of:-

Ang’ole Zakayo Kukut……..….. Appellant

Miss Anyumba…… State

Ruth Kituva– Court Clerk