



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 32 OF 2015
SAMUEL LETODO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in 1911/14 at Embu Chief Magistrate's Court by Hon. V.O. Nyakundi on 15th April, 2015)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 10 years imprisonment imposed upon him by the court of the Resident Magistrate at Embu on 15th April 2015 in respect of the alternative charge of handling stolen goods namely cable wires contrary to section 322 (1) as read with section 322 (2) both of the Penal Code (Cap) 63 Laws of Kenya.
2. The state through Ms Mbae supported both his conviction and sentence.
3. The appellant was convicted on the evidence of Lawrence Kinyua (PW 2) and that of Patrick Mugambi Muriithi (PW 1). The evidence of PW 2 is that he was employed as a security officer with Race Brink Security Ltd. On the night of 7th December 2014, he went to the Telkom house to return his uniform. There he found his colleague by the name Neebe. Neebe told him that he had found somebody sleeping near Kanjuru and that person was in possession of Telkom cable wires. They went to the scene and found the appellant asleep holding firmly the cable wires in his hand. They awoke him up. They then decided to call a technician from Telkom Kenya Ltd to verify the ownership of the cables wires.
4. As a result, PW 1 responded and arrived at the scene. He inspected the cable wires and confirmed that the cables were the property of the Telkom Kenya Ltd. They awoke up the appellant and escorted him to the police station. He was then charged with this offence. After conducting investigations, No. 93439 PC John Kwambai charged the appellant with the main offence of stealing contrary to section 275 as read with 268 and the alternative charge of handling stolen goods contrary to section 322 (1) as read with section 322 (2) all of the Penal Code.
5. Upon being placed on his defence, the appellant made an unsworn statement and called no witnesses. He testified that he comes from Isiolo and had come to Embu to look for employment. When he arrived in Embu, he started to look for somebody to give him directions to the KWS quarters. He then met a young man who greeted him. The young man responded in a language he did not understand. It is at that point in time that he saw a motor vehicle pull up with three people who disembarked with the young boy whom he had met earlier on. They then said that the appellant was a thief as a result of which he was arrested and taken to the police station.

6. It was his further testimony that when they arrived at the police station, he saw them holding the cable wires which they alleged that he had stolen. He denied knowing where they had gotten those cable wires from. Thereafter, he was charged with these offences.

7. The appellant has raised seven grounds of appeal in his petition. In ground 1 he has stated the unchallengeable fact that he did not plead guilty. In ground 2 he has faulted the trial court for relying on the evidence of members of the same company who framed him up. In this regard the evidence against the appellant was that he was found in possession of property which was positively identified as that of the complainant (PW 1). His defence evidence was that the case against him was a frame up. In the light of this evidence, the trial court found that the evidence against him was credible and that the appellant was not framed up.

8. The court went further and found that proof of a fact in issue may be proved by one witness or witnesses, as long as these witnesses are found to be credible in terms of **section 143 of the Evidence Act (Cap 80) Laws of Kenya**. The trial court rightly cited with approval the case of **Peter Irungu v. R. (2011) eKLR**, in which it was stated as follows: **“As to why members of the public were not called to testify, section 143 of the Evidence Act states as follows: “143, no particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact.”** It is not the number of witnesses or particular class of witnesses that are required to prove any fact in issue. What matters is the credibility of those witnesses who are called to testify in court. Having considered their evidence, I find that PW 1 and PW 2 were rightly found to be credible. Ground 2 of appeal therefore fails and is hereby dismissed.

9. In ground 3, the appellant has faulted the trial court for failing to stipulate the section of the law in respect of which he was convicted and sentenced. **In this regard, the trial court clearly found the appellant guilty and convicted him of handling stolen property** contrary to section 322 (2) of the Penal Code and sentenced him to 10 years imprisonment. I have re-examined the evidence in this regard and I find that the offence proved is stealing and not handling stolen property. This clear from the evidence of Lawrence Kinyua (PW 2), who was a security officer with Race Brink Security Ltd. PW 2 testified that: *“.....There is a time cables were about to be stolen. An alarm was triggered I and PW 1 visited the area which is at provincial general hospital Embu. When I and PW 1 arrived there we found that you had cut some cables. When he saw us he escaped towards the housing department buildings. You disappeared near a fence and escaped. We went to guard our area until morning...”*

10. In view of this evidence, it is clear that the appellant had stolen the cable wires which he had cut. In the circumstances, I find the offence proved is stealing and not handling stolen property as found by the trial court, as the appellant could not be convicted of handling stolen property, when it is clear that he had stolen that same property. In the circumstances, this ground of appeal succeeds and I hereby set aside the conviction for handling stolen property and in its place I substitute a conviction for stealing the cable wires. In the light of the foregoing, the appellant stands convicted on a charge of stealing contrary to section 275 of the Penal Code. The conviction of the appellant on a charge of stealing is sound in principle, since the trial court did not make a finding in respect of stealing. According to the Court of Appeal in **Kantilal Jivraj v R (1961) EA 6** it is open to High Court to convict and sentence an appellant in respect of a charge in which the trial court did not make any finding. The trial court will only convict an appellant either on the main charge or the alternative charge depending on the evidence adduced at trial. The High Court can convict and sentence either on its own motion or upon the application of the prosecutor. This is not possible where the trial court has acquitted the accused person. In such a case the High Court can only convict if the prosecutor has filed a successful cross appeal. The filing of a cross appeal by the prosecution is permitted according to the Court of Appeal in **Azolozo v R (1986) KLR 585**. In that case the cross appeal by the prosecutor was dismissed for lack of statutory jurisdiction to appeal against the acquittal of the appellant on certain charges. In the light of the above evidence, the appellant stands convicted on a charge of stealing contrary to section 275 of the Penal Code.

11. In ground 4 the appellant has faulted the trial court for failing to find that his fundamental rights were violated at the trial because he did not understand the English language on account of being illiterate. He has further stated in this regard that he was not assisted with an interpreter. The record of the proceedings

shows that both English and Swahili were used during the proceedings. The record further shows that the appellant extensively cross-examined all the three prosecution witnesses in the Swahili language. The interpreter of that court is indicated to be one Kariuki. It is therefore clear that his right to an interpreter as required by **Article 50 (2) (m) of the 2010 Constitution** was not violated. This ground of appeal is without merit and is hereby dismissed.

12. In ground 5 the appellant has faulted the trial court for failing to find that the case of the prosecution was not proved beyond reasonable doubt. In view of what I have found in respect of ground 3 above I find that this ground is without merit and is hereby dismissed

13. In ground 6 the appellant has faulted the trial court for rejecting his evidence in violation of **section 169 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya**. In this regard, I find that the trial court found the prosecution witnesses to be truthful and reliable and also found that the appellant was not truthful. In doing so, the trial court complied with section 169 (1) of the Criminal Procedure Code. In the light of this finding, this ground of appeal is without merit and is hereby dismissed.

14. It is important to point out that there was a potential witness by the name Neebe who was not called to testify. The trial court in respect of that witness stated that: *“One of the witnesses known as Neebe however didn't testify. The court was not told why he failed to testify. That notwithstanding however, two witnesses PW 1 and PW 2 found the accused in possession of the cable belonging to Telekom Kenya.”* In view of this finding, the trial court ought to have called this witness on its own motion pursuant to **section 150 of the Criminal Procedure Code (Cap 75) Laws of Kenya**. **Section 150 of the Criminal Procedure Code provides that: “A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:**

provided, that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

15. The trial court should have invoked its inquisitorial powers under **section 150 of the Criminal Procedure Code** to call Neebe on its own motion as a court witness in view of the evidence of Lawrence Kinyua (PW 2). PW 2 in respect of Neebe testified that he went to Telekom house to return the uniform and upon arrival he found Neebe there. He further testified that Neebe told him that he had found somebody asleep near Kanjuru having Telekom cables. This witness and Neebe decided to visit the scene. In the circumstances, I find that Neebe was an essential witness who ought to have been called by the court on its own motion to testify in court. In doing so, the court would be descending into the arena of conflict, because our system is essentially adversarial in both structure and operation, but it is authorized by statute. In doing so, the court in principle will be exercising inquisitorial powers in calling the witness. This inquisitorial approach is mitigated by the requirement that the advocate for the accused person is given a right to cross examine the person called by the court.

16. As a result of these requirements the resultant system is a hybrid of both the inquisitorial and the adversarial systems. This procedure was judicially approved by *the Court of Appeal in the Kulukana Otim v R (1963) EA 253, in which it was held that the first part of section 148 of the Criminal Procedure Code of Uganda conferred a discretion upon the court, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, the judge has a mandatory duty to call the person himself, if the witness has not been called. That court went further to hold that the duty remained even if the evidence to be called supports the case for the prosecution and not that of the defence. The provisions of the Criminal Procedure Code of Uganda are similar to those of Kenya. Notwithstanding the failure of the court to exercise its discretion to call Neebe, there was ample evidence of PW 1 and PW 2 that the appellant had stolen the cable wires of the complainant.*

17. As regards sentence, the appellant was sentenced to 10 years imprisonment following his conviction and sentence on a charge of handling stolen property. I have already found that the appellant should have been convicted of stealing contrary to **section 268 as read with section 275 of the Penal Code (Cap 63) Laws of Kenya.**

18. In the circumstances, I set aside the conviction and sentence entered in respect of the alternative charge of handling stolen property and I substitute in its place a conviction for stealing contrary to section 275 of the Penal Code. The maximum sentence provided for under section 275 is 3 years imprisonment and that is the sentence that I hereby impose on the appellant. The appellant's appeal only succeeds to that extent.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **21th** day **SEPTEMBER 2016**

In the presence of both the appellant and Ms Mbae for the respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

21.09.16