



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO. 2 OF 2015

JOHN NJOGU WERU.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 491 of 2009 by Hon. E. N. Gichangi - Resident Magistrate on 22nd July, 2011.)

JUDGMENT

1. **JOHN NJOGU WERU** the appellant has filed this appeal against his conviction and sentence of the **offence of shop breaking and committing a felony contrary to section 306(a) of the Penal Code**. On conviction the trial court sentence the appellant to a prison sentence of 20 months.

2. The prosecution's evidence before the trial court was that John Kimani Kuria, PW 1, had his electronic shop broken into on 25th February 2009. PW 1 attending to his shop on 26th February 2009 confirmed that padlock had been broken and all the doors had also been broken and that he had lost some telephones which he valued at Kshs.200,000. PW 1 enlisted the help of a tracking dog and its handler and later got information that some people had been arrested.

3. PW 2 Paul Ndegwa was a dog handler. He produced before court letters which confirmed that he had been trained as a dog handler by his employer Oljogi. PW 2 stated that on being instructed by his manager to attend to the tracking of those involved in the breaking of PW 1 shop, he left Oljogi with two dogs and another dog handler and reported to the police station. Together with the police they went to PW 1's shop and took scent from the area in the shop where the thieves had touched. He testified that the dog trailed the scent and led them to Majengo Estate at Nanyuki town. They ended up with the dog leading them to a house in that Estate. This is what he then stated that the dog did:-

“Before it (the dog) entered the house, it made signal that the person was within the premises. When it nears the target, it starts being over active. It led us to a certain house Inside we found another lady and two men. The two men are the accused. The dog identified the accused by jumping on them. That's the training of the dog.”

4. PW 3 P.C. Joseph Mwathi accompanied PW 2 with the dog. He stated in evidence;-

“The dog led us to a certain house inside and we found the two accused in the house. The dog could not leave where the two accused were. The dog handler told us that it was the two accused. We arrested them and led them to their house and conducted a search but did not recover anything.”

5. The appellant in his defence stated that on the day he was arrested after being found by the Oljogi dog he was at a place taking busaa. That at that place the police arrested 4 people but only the appellant and his co-accused were charged.

6. The trial court by its judgment had this to say on the prosecution's evidence:-

“After looking at the entire evidence, I have established that the evidence of the prosecution witnesses is very consistent and not even shaken by the cross examination of the accused. I also found the prosecution witnesses to be very truthful and honest witnesses. None of the prosecution witnesses had earlier known the accused and there is no evidence to indicate that there existed a grudge hence a frame up. It's very clear that the dogs passed a woman who was at the door and chose the two accused who were among other women. Following the experience and qualifications of PW 2 and the dogs, I want to believe (sic) the prosecution witnesses. Dogs picked the scent at the shop and identified the accused to own it.”

7. On my own evaluation of the prosecution's evidence I find that, other than that the dog tracked the appellant to a house in Majengo estate, there was no other evidence that connected the appellant to the breaking in of PW 1's shop. What is clear is that the evidence of the dog handler is circumstantial evidence. It is not direct evidence of the committal of the offence by the appellant. The Court of Appeal in the case **SAWE V REPUBLIC (2003) KLR 364** held:-

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.”

Were there any facts which were incompatible with appellant's innocence? This can only be determined by delving into the evidence surrounding the identification of the appellant by the dog.

8. The evidence of PW 2, the dog handler clearly showed that PW 2 had been trained at Oljogi in the training and handling of tracking dogs. There was no doubt in the capability of PW 2 in handling and training of tracking dog. What however was lacking in the prosecution's evidence was the evidence of how long PW 2 had handled or worked with the dog that tracked the appellant. There was no evidence of the type of training the dog in question undertook. There was no evidence of how the dog had been trained to identify a person who it was trailing. The prosecution should also have adduced evidence of the previous cases of tracking, if any, the dog in question and undertaken the result of such tracking. It was not enough in my view for PW 2 to state that that the dog gave a signal that the persons it was tracking were within the house in Majengo estate; or that it became active when it neared the appellant; or that the dog jumped on the appellant. All those activities that the dog did, to the uneducated in matters of dog handling means nothing. Prosecution was under a duty to clearly spell out in evidence what the dog's training entailed and how it communicated with its handler. This was what was held by the court of appeal in the case **DAVID NJERU KIBUTHU & OTHERS V REPUBLIC (2005) KLR** where the only evidence against the appellant was that of being tracked by a dog called Omas. The court stated:-

“However, we are concerned at the lack of evidence as to both the experience of Omas as a tracker dog and as to the ability of tracker dogs to distinguish between the scents of a number persons at a scene of a robbery such as this. It is probably the case that a competent experienced dog can do so but there should be evidence adduced from a tracker dog expert as to these sort of issues. The learned Principal Magistrate did describe Omas in his judgment as being “well trained in tracking” and yet there was no evidence tendered by any witness to this effect. His handler, PW 5 did not claim this

We consider that it would be unsafe to rely solely on the fact that the dog Omas led the police to the places where they were found that night. The fact that the dog was able to pick up and follow the scent of two different people starting at the same place where the dog selected the scent of Kibuthu seems unlikely in the absence of any evidence as to what a tracker dog can or

cannot do.”

In the case **Rex v Trupedo (1920) App Div 58 (S Africa)**, where it was held:-

“We have no scientific or accurate knowledge as to the faculty by which dogs of certain breeds are said to be able to follow the scent of one human being, rejecting the scent of all others

..... there is too much uncertainty as to the constancy of his behaviour and as to the extent of the factor of error involved to justify us in drawing legal inference therefrom.”

In yet another case **Regina v Das Matthew Theodore Pieteron (1994) EWCA crim 5 U.K.** the court stated:-

“In our judgment, if a dog handler can establish that a dog has been properly trained and that over a period of time the dog’s reactions indicate that it is a reliable pointer to the existence of a scent from a particular individual, then that evidence should properly be admitted.

However, it is important to emphasise two safeguards. First, the proper foundation must be laid by detailed evidence establishing the reliability of the dog in question. Secondly, the learned judge must, in giving his directions to the jury, alert them to the care that they need to take and to look with circumspection at the evidence of tracker dogs, having regard to the fact that the dog may not always be reliable and cannot be cross-examined.”

The court in **Regina v Das Matthew** (supra) further stated that the training of the dog should have been given, or evidence of the reliability of the dog on any tests that had been carried out in controlled condition to see whether the training of the dog had produced reliable response should have been adduced by the prosecution.

9. It is clear from the above analysis that the prosecution failed to prove the case against the appellant beyond reasonable doubt. This court in view of what is stated above entertains doubt whether the dog identified the correct person who broke into the shop of PW 1. It is because of that finding that the appellant’s appeal against conviction and sentence succeeds. The appellant’s conviction is hereby quashed and his sentence is hereby set aside.

DATED AND DELIVERED THIS 19TH DAY OF DECEMBER 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant

Appellant: John Njogu Weru

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE