



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 78 OF 2013

MULI MAITHYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the conviction and sentence in Mwingi SRM Criminal Case No. 467 of 2012 – V. A. Otieno Ag. SRM)

JUDGMENT

The appellant was charged in the subordinate court with house breaking contrary to section 304 (1) and stealing contrary to section 279 (b) of the Penal Code. The particulars of the offence were that on 14th August 2012 at Mwingi Township in Mwingi District within Kitui County jointly with others not before court broke and entered the dwelling house of Christopher Muoni and stole assorted household goods as per an attached sheet valued at Kshs. 71,200/= the property of the said Christopher Muoni. He pleaded not guilty to the charge. After a full trial he was convicted of handling stolen property and sentenced to serve 4 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant filed the present appeal and listed several grounds of appeal. His appeal is against both conviction and sentence. His grounds of appeal are in summary as follows:

1. The magistrate erred by convicting him on the evidence that he broke and stole from PW1's house without considering that nobody saw him breaking or moving from his house.
2. The magistrate erred by convicting him on the evidence of PW2 and PW3 without considering that PW2 was the one arrested with PW1's stolen property.
3. The learned magistrate erred by convicting him without considering that the stolen property was found at Mutwangombe and he was arrested at Mwingi a distance of about 20kms.
4. The learned magistrate erred by convicting him relying on the evidence of PW2 without considering that his testimony was false since there was no written document to prove that the property was left with him for a debt of 200/= while the property was worth 10,000/= or more.
5. The magistrate erred in rejecting his alibi defence which was strong enough to beat all evidence of witnesses.

The appellant also filed written submissions which I have perused. At the hearing of the appeal, the appellant stated that he was arrested by two men who were relatives. That at the police station he saw another suspect.

The Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that there was nothing wrong with a case being terminated against a co-accused who is then used as a witness. In

counsel's view such action can be taken after analysis of evidence by an investigating officer in order to establish a chain of evidence. Counsel submitted that the appellant was linked with the items stolen. When arrested he did not give a clear picture on how he came to possess the items. According to counsel, the evidence on record showed that he attempted to dispose of the items very fast which showed that he actually committed the offence. In addition the appellant was identified as the seller of the items by all prosecution witnesses. His defence did not touch on the weighty allegations against him. He was thus not able to shake the prosecution evidence. Counsel urged the court to dismiss the appeal.

At the trial the prosecution called 6 witnesses. PW1 was Christopher Muoni who testified that he conducted a wines and spirits business at Mwingi. That on 14th of August 2012 at about 10pm he arrived home only to find that his house had been broken into and plastics missing. His clothes were scattered all over and his bed room and kitchen door were broken. He noticed that a ladder had been placed outside his bedroom wall and that the burglars had used it to scale the wall to break the back door. He reported the incident to Mwingi Police Station who visited the scene and prepared the list of the missing items valued at approximately Kshs. 71,200/=. While in a pub the next day, he spotted the appellant carrying a bag which he identified as his. He stopped and asked him and reported the incident to the police who proceeded to the home of the appellant at Mutwangombe where he sold miraa. The police found a CD album and CDs. The appellant claimed that the items had been sold to him.

PW2 was Shadrack Kioko Ngungu. It was his evidence that on 15th August 2012 at 2pm he was found with a CD bag and arrested. He stated that the bag was left with him by the appellant.

PW3 was Mwangangi Muthui a resident of Kyomo. It was his evidence that on 15th of August 2012 the appellant approached him to buy miraa for 50/=. He was however not able to pay and instead left the CD bag as security.

PW4 was Esther Syokau. It was her evidence that on 19th of August 2012 she was informed by a client that Shadrack had sold a bag to his son which was suspected to be stolen property. The bag was later recovered.

PW5 was Nicholas Muasya a farmer. It was his evidence that on 20th August 2012 at 6.30am he was informed about the intended arrest of the appellant, and assisted in the arrest.

PW6 was PC Stephen Ndungu a police officer. It was his evidence that on 15th August 2012 at about 10pm while at Mwingi Police Station the complainant made a report of house breaking the previous night. They proceeded to the house and found household items in disarray and some were already stolen. In the evening he visited Mutwangombe and saw a suspect in possession of one of the stolen items which was a bag with CDs. On 19th August 2012 with PC Odinga they arrested the appellant. He produced a steel padlock, a bag and CDs as exhibits.

When put on his defence, the appellant gave sworn testimony. He stated that on 19th August 2012, he woke up as normal and went to work. At about 2pm his boss called him to go to Mwingi. Enroute, he met two men Mwema Musila and another who told him to accompany them to the police station. He stated that he wasn't found with any of the stolen items. In cross examination he stated that none of the stolen items were found on him.

This is a first appeal. As a first appellate court I am required to re-examine the evidence on record and come to my own conclusions and inferences. – See the case of **Okeno Vs. Republic [1972] EA 32**.

I have re-examined the evidence on record. I have also perused the judgment of the trial court. The appellant was acquitted of the offence charged but convicted of handling stolen property. He was not charged in the alternative with a count of handling stolen property.

A person who is brought to court on a criminal charge may be convicted on either the charge preferred against him, or a minor charge which has all its ingredients contained the main charge. He could also be convicted of an alternative charge, if an alternative charge was preferred against him or her. In the

present case, section 188 (a) of the Criminal Procedure Code is relevant. It states as follows:

188. When a person is charged with stealing anything and

(a.) the facts proved amount to an offence under section 322 or section 323 of the Penal Code, he may be convicted of that offence although he was not charged with it”.

In convicting the appellant for the charge of handling stolen property, the magistrate seems to have been taking it that handling stolen property is a minor charge to one of house breaking and theft. The learned magistrate must have been guided by the above provisions of the law though he did not specifically state so. Indeed the evidence on record is that the appellant was found in possession of the items that were recently stolen from the house of the complainant PW1. Though it would be preferable that the appellant be charged with an alternative count of handling stolen property, I

am of the view that he was not prejudiced in any way by the trial court finding him guilty of the offence of handling stolen property. If injustice was committed or prejudice noted, I would not hesitate to allow this appeal. However on the evidence on record, and since the appellant did not cross examine any of the prosecution witnesses, I find that he was not prejudiced in any way. The sentence is lawful. I will thus uphold both the conviction and the sentence.

To conclude, I find that the appeal lacks merits. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Dated and delivered at Garissa this 18th day of May, 2015

GEORGE DULU

JUDGE