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REPUBLIC OF KENYA

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 18 OF 2015

(An appeal from the Judgment of the Ag. Principal Magistrate, Runyenjes in CMCR. Case No. 73 of 2015 dated 4/3/2015)

MOSES KINYUA NJIRU............................ APPELLANT

VERSUS

PROSECUTION.....................................RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Runyenjes Principal Magistrate where the appellant was convicted of the offence of shop breaking and committing a felony contrary to Section 306(a) of the Penal Code and sentenced to three years imprisonment.

In his petition of appeal the appellant relies on the following grounds:-

1. *That the trial magistrate erred in convicting him on the evidence of a single witness.*
2. *That the trial magistrate failed to take into account that the inventory records used in court were barely a month old and that there was no investigation diary.*
3. *That the trial magistrate failed to consider that the exhibits were personal properties which the complainant obtained by purchasing receipts.*
4. *That the complainant gave conflicting evidence on the identification of the electronics recovered.*

5. *That the sentence imposed on him was too harsh for he was a first offender.*

The appellant filed written submissions in which he explained his grounds. He added further grounds as follows:-

1. *That the case was framed against him.*
2. *That he was arrested for a different offence.*
3. *That important witnesses were not called to testify.*

The appeal was opposed by the State. It was argued by the state counsel Ms. Matere that an accused person maybe convicted on the evidence of a single witness provided it is credible. However, the conviction by the trial court was based on recent possession. The stole goods were recovered from the house of the appellant and he failed to give a reasonable explanation on how he came into possession of the goods.

The prosecution proved beyond reasonable doubt that the house in which the goods were recovered belonged to the appellant. The complainant identified the goods as his stolen property and proved ownership by producing official receipts. It was also shown that the goods were recently stolen from the complainant.

The appellant's claim that the inventory was barely a month old and that there was no investigation diary had no basis. This is due to the fact that the prosecution never produced any inventory save for a list of exhibits all of which were produced in court. PW3 Chief Inspector

Wangombe and PW2 PC Kithaka testified that the inventory was prepared at the police station but the appellant refused to sign it. At no time did the appellant request for the investigation diary and for that reason the prosecution did not find it necessary to produce it.

In the case of ***STEPHEN KIMANI ROBE & 2 OTHERS VS REPUBLIC Nairobi Criminal Appeal No. 236 of 2012 [2013] eKLR*** it was held that:-

"*The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence."*

The failure to produce the inventory did not override the overwhelming evidence of the prosecution on the recovery and identification of the exhibits.

The appellant claimed that the recovered exhibits were his personal properties. However, he did not tender any defence to include his claim or even produce documentary evidence in support. The trial magistrate relied on the prosecution's evidence which was the only material placed before him. I find no basis in this ground.

It was also submitted that there was no contradiction in the evidence relating to the identification of the exhibits. The complainant availed the necessary receipts which were produced in evidence to confirm that the items belonged to him. It is the appellant who assisted the police

officers to recover the stolen items. He led them to his house where all the items were recovered.

Regarding the sentence, Ms. Matere submitted that it was within the law and should not be interfered with.

The State further submitted that the allegation raised in the appellant's submissions that the case was framed against him has no basis. The evidence of the prosecution dislodged the defence of the appellant.

The appellant claimed that some witnesses were not called. The only person who was mentioned was the son of the complainant who locked the bar on the material evening. The prosecution made a decision not to call him because he was not a material witness.

Finally, the respondent submitted that the prosecution proved the case beyond any reasonable doubt and the conviction and sentence should be upheld.

The evidence of the prosecution can be briefly stated. The complainant testified that he carries on business of a bar at Nduuri market and that on the material day he closed at 10.00 p.m. He went home and slept until the following morning at 7.00 a.m. when his son informed him that the bar had been broken into. He went to the scene and confirmed the premises had been broken into. He checked inside and found several items missing including a television set size 21", a DVD player, make LG, 2 chloride batteries, an apex woofer speaker, amplifier and several crates of beer. He reported the matter to the police at Runyenjes. The

following day he was called to the police station and identified some of the stolen properties. He produced receipts for the following items namely TV, amplifier, DVD, speakers, two chloride batteries, apex sub-woofer.

PW2 testified that he was instructed by PW3 to escort the appellant to his house at KCC area. The appellant was remanded in the cells as a suspect. PW2 was accompanied by 2 other officers as the appellant led them to his house. Upon conducting search the officers recovered a TV set make JTV, 1 DVD make LG, 2 chloride batteries, 1 apex woofer, 1 amplifier make Kinter and 1 motor bike Registration No. KMCA 1341. The items were taken to the police station.

The complainant who had made a report of bar breaking and stealing was summoned to the police station. He identified all the stolen items apart from the motor cycle as his stolen property. He later produced purchase receipts for the items.

The case was investigated by PW3 who reiterated the evidence of PW2 on how the stolen items were recovered. He was one of the officers who made the recovery. He testified that he asked the appellant to produce proof of ownership of the items but he failed to do so. The complainant produced receipts confirming that the items belonged to her. He had earlier given a breakdown of the property stolen from the bar which matched the items recovered.

The appellant opted to remain silent and did not present any defence to

exonerate himself. The trial magistrate relied on the evidence of the three prosecution witnesses which included that of the officers who made the recovery and identification of the stolen property to convict the appellant.

The law applicable is Section 306(a) of the Penal Code which provides:-

Any person who –

(a) *Breaks and enters a schoolhouse, shop, warehouse, store, office counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor …… is guilty of a felony and liable to imprisonment for seven years".*

The evidence of the complainant that his bar was broken into and properties stolen was not challenged since the appellant did not offer any evidence to the contrary. This testimony was corroborated by the investigations carried out by the police. Most of the stolen items were recovered from the house of the appellant about 11 days after the theft. The bar was broken into in the night of the 22/23rd January 2015 while the recovery was made on 4th of February 2015. The police would not have known that the stolen property was in the house of the appellant if he had not volunteered to take them there. The appellant is the one who opened his house for the officers to conduct the search. This demonstrates that the house was occupied by no other person but the appellant at th material time.

The fact that the appellant was arrested for a different offence from the

one charged does not affect strength of the prosecution case. The police in the course of investigations into an offence may come across evidence relating to another offence. In such a scenario, the investigators may charge the suspect with either or both offences. A motor cycle was recovered in the house of the appellant and it was explained by PW3 that it related to another offence. This could be the offence for which the appellant had been arrested.

The conviction was based on the evidence of three prosecution witnesses and not a single witness as claimed by the appellant. In addition to the evidence of PW1, there was the evidence of PW2 and PW3 who recovered the items. However, there is nothing wrong with the court convicting on the evidence of a single witness provided that it suffices to support the offence.

Section 143 of the Evidence Act that:-

"*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact".*

In the case of ***DAVID MUTUNE NZONGO VS REPUBLIC [2014] eKLR*** the court held that under Section 143 of the Evidence Act, there was no minimum number of witness required to prove a case.

The prosecution produced the exhibits in evidence together with purchase receipts. The magistrate in his judgment observed that the receipts matched the exhibits. This was a confirmation that the property recovered belonged to the complainant who had produced the

receipts. The items were recently stolen from the complainant and were positively identified. There was evidence that the items were recovered from the appellant. He had an opportunity to give an explanation as to the possession of the items which he failed to do.

It was held in the case of ***ANTONY KARIUKI KARERI VS REPUBLIC [2004] eKLR*** held that the presumption is that a person in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession.

The appellant in his submissions alleged that the case was framed up against him. Neither the complainant nor the police officers knew the appellant before the incident. There was no possibility of any of them framing up the case against him. This was an afterthought since the issue was not raised during the trial.

The witness whom the appellant alleges was not called to testify was not material to the case. This was the son of the complainant who only locked the bar on the material evening and informed his father the following morning that the bar had been broken into. There is no evidence that he witnessed the incident.

The fact that the appellant was found in possession of the stolen items a few days after the theft is sufficient to connect him with the offence. The magistrate in convicting the appellant relied on the overwhelming evidence of the prosecution which was not challenged.

It was held in the case of ***FRANK MUIA MUTA VS REPUBLIC [2014] eKLR*** that:-

'*The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors".*

Section 306(a) provides for seven years imprisonment. The appellant was sentenced to three years imprisonment. It has not been demonstrated that the trial magistrate acted on the wrong principles or overlooked some material factors in passing sentence. The sentence is not manifestly excessive and it is within the law.

I find that the appeal has no merit and it is hereby dismissed.

The conviction and sentence are hereby upheld.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Matere for State

The appellant