REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 2 OF 2014

HENRY NAGANYA ANDATI.....….APPELLANT

VERSUS

REPUBLIC…… ……..RESPONDENT

(Being an appeal from the original conviction and sentence at Butere Senior Principal Magistrate's Court by M.I. Shimenga - RM on 29th April, 2014)

JUDGEMENT

The appellant has appealed against his conviction and sentence of three years imprisonment in respect of the offence of handling stolen property contrary to section 322 (1) and (2) of the Penal Code, which was imposed on him by the court of the Principal Magistrate at Butere on 29th April, 2014.

In support of his appeal, he has listed 9 grounds of appeal.

The respondent/republic has supported both the conviction and sentence.

This is the first appeal. As a first appeal court, according to ***Okeno v. R (1972) EA 32***, I am required to reassess the evidence upon which the appellant was convicted and sentenced. In doing so, I have to bear in mind that the trial court was in a better position of assessing the credibility of the witnesses which advantage, is not enjoyed by this court. Having done so, I have to make my own findings and conclusions. With this in mind, I will proceed to consider the evidence adduced at trial in relation to the grounds of appeal of the appellant.

Ground 1 is not contested as it is clear that he never pleaded guilty to the offences charged.

In ground 2 of his petition of appeal, the appellant has stated that the trial court erred both in law and fact by convicting him on a defective charge sheet. In ground 3, he has stated that the court erred in law and fact by failing to notice that he was tortured and forced to accept that he is the one who committed the offence.

In ground 4, he has stated that there was no one who saw him break into the building and commit this offence. Furthermore, in ground 5, he has asserted that the stolen bags of fertilizer were not recovered from him. In ground No. 6, he has stated that PW 1 who was his father framed up the evidence against him because they were not in good terms. Additionally, he states that there was no proof of communication brought before the court from the safaricom as a service provider to confirm that indeed his father telephoned him concerning this crime.

And finally, he states that the sentence imposed upon him was manifestly excessive and should be reduced. In order to respond to all these grounds, it is necessary to re-evaluate the whole evidence upon which the conviction and sentence are based.

The evidence of the complainant (PW 1) is that the appellant is his own son. According to him, he received a telephone call from Samuel Wesa (P 2) that his son was at his home trying to sell to him two bags of fertilizer. In response to that call, he went to his store and found that his two bags of fertilizer were missing from that store. Furthermore, the complainant stated that he did not know how the appellant gained access to that store. Finally, he stated that he had bought these bags of fertilizer from Mumias Sugar Company. In this regard, he produced two invoices which were produced as prosecution exhibits P EX 1(a) and (b).

Following a telephone call from the said Samuel Wesa (PW 2), the complainant went to the home of Samuel Wesa, which was about 100 meters from his home and found that the appellant has been arrested by members of public. He noticed that the appellant had been beaten by members of the public. Thereafter, the appellant took them to where he had hidden the two bags of fertilizer. One bag was hidden in the banana plantation and the other was hidden in a sugarcane plantation. Both of these places were 50 meters away from the home of Samuel Wesa (PW 2). These two bags of fertilizer were recovered and were produced in court as exhibits marked P EX 2 (a) and (b).

The evidence of the complainant is supported by that of Samuel Wesa (PW 2) and Joseph Musungo (PW 3). Samuel Wesa stated that he knows the appellant as his cousin. He supported the evidence of PW 1 in all material particulars. According to him, the appellant approached him on 2nd February, 2014 at 9.30 p.m. The appellant told him that he had two bags of fertilizer to sell to him. Furthermore, PW 2 stated that he knew that the appellant did not have any sugarcane. And for that reason, he rang the father of the appellant to check on his fertilizer. It is at that point in time that the complainant told Samuel Wesa that indeed his fertilizer was missing.

Subsequently, the appellant was arrested and taken to the police station. According to the police officer No. 53012 P.C Jackson Wanyama (PW 4), he knew the appellant before. He stated that the appellant was taken to the police station by the complainant and other witnesses on 3rd February, 2014 at Butere police station at about 1.40 p.m. He rearrested and charged him with the offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code being count 1. He also charged him with the offence of handling stolen property as an alternative count to count 1.

Upon being placed on his defence, the appellant made an unsworn statement. He stated that on 2nd February, 2014, he left his home for his parent's home. Thereafter, he passed by the house of Samuel Wesa to greet him. He states that he knocked at the door of Samuel Wesa and while there, two village elders started to beat him. According to him, these village elders were sent by his father. They then took him to Butere police station where he was re-arrested and charged with these offences. More importantly, he stated that his relationship with his father was not good.

I have reassessed the entire evidence of the prosecution and that of the defence that was produced before the trial court. I find from the perusal of the charge sheet that the offences were framed in accordance with the law. In the main count, the offence charged is that of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. The particulars of the offence indicate that the date of offence as being 2nd February, 2014. The village where the offence was committed is Emukangu village which is within Butere District of Kakamega County. It is further stated therein that the building broken into was a store of Jackson Andati Nalianya, from where it is alleged that two bags of fertilizer valued at Kshs 8,000/- being the property of the complainant were stolen.

Furthermore, in the 2nd count, the offence charged is that of handling stolen goods contrary to section 322 (1) and (2) of the Penal Code. It is alleged in count 2 which is an alternative charge to count 1 that the accused otherwise than in the course of stealing dishonestly retained the two bags of fertilizer which were the property of Jackson Andati Nalianya knowing or having reason to believe them to be stolen

goods.

It is clear that the charges as framed are in accordance to section 137 of the Criminal Procedure Code**.** I find that the offences as charged are not defective in any way as alleged by the appellant. This ground of appeal is therefore without merit. As regards the ground that he was tortured and forced to accept that it was him who committed the offence, I find that this is not true. The reason being that the appellant was found to be in constructive possession of the two bags of fertilizer. It is him who led the complainant and the prosecution witnesses to where he had hidden the two bags of fertilizer. It is true that he was beaten by members of public. There is no evidence that he was beaten to admit having committed the offence. This ground of appeal also fails.

In respect of ground 5, I find that the appellant was found constructive two bags of fertilizer. This is clear from the evidence of the prosecution witnesses. This ground is therefore without merit and it is hereby dismissed. I also find that it was not necessary to call the safaricom service provider to confirm that his father (PW 1) made telephone calls concerning this crime in view of the evidence that was produced and accepted by the trial court which I find overwhelmingly proved the two offences that were brought against him.

I do need to consider whether the sentence was manifestly excessive as to warrant reduction in view of what I will state in the next paragraphs.

It is clear from the evidence that the offence was committed on 2nd February, 2014 at about 9.30 p.m. In this regard, the evidence of the complainant and that of Samuel Wesa is very clear that indeed the offence was committed as stated in the charge. In the circumstances, I find that the offence proved was that of stealing two bags of fertilizer being the property of the complainant. It seems from the evidence of these witnesses that the appellant was arrested within hours of stealing the two bags of fertilizer. This evidence supports the offence charged in count 1 being the main charge. The evidence does not support the offence charged in the alternative count namely that of handling stolen property.

In the light of that evidence, I find that the offence proved was the one charged in count 1 not the one charged in count 2, being the alternative charge. The trial court acquitted the appellant of stealing the two bags of fertilizer. The prosecution has not appealed against the acquittal of the appellant in respect of this charge. They had a right of appeal against the acquittal of the appellant in respect of this charge in terms of ***section 348A of the Criminal Procedure Code***, which gives the public prosecutor a right of appeal to the High Court in respect of that law and facts.

Furthermore, according to ***R.V Seymour (1954) I All ER 1006***, a trial court is in law not allowed to acquit an accused in the main charge and simultaneously convict the same accused on the alternative charge, as was the position in this instant case. Instead, the trial court should not have made any finding in respect of count one, bing the main charge. If the trial court had followed this procedure, it was open to the High Court to substitute a conviction of breaking into a building and stealing the two bags of fertilizer.

It is not open to this court to substitute a conviction in place of the acquittal in the absence of an appeal by the prosecutor. If it was desired by the prosecutor, they should have appealed against this acquittal as a cross appeal since there was in place an appeal by the appellant. This procedure was approved in case of ***Azolozo v. R (1986) KLR 585*** in the dissenting judgement of ***Hancox, JA at pages 589 to 593***.

It therefore follows that the appellant was wrongly convicted on a charge of handling stolen property. I therefore find that there is no evidence to support a conviction and sentence entered by the trial court, which I hereby quash and set aside the sentence imposed.

The appellant is hereby set free unless otherwise held on other lawful warrants.

JUDGEMENT DATED, SIGNED and **DELIVERED** at **KAKAMEGA** this **22nd** day of **JULY., 2015**

J.M. BWONWONGA

JUDGE

22.07.15