REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 6 OF 2015

(From original conviction and sentence in Criminal Case No. 72 of 2014 of the Principal Magistrate's Court at Kyuso E.M Mutunga – R.M).

WILSON MWANGANGI ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was charged with two main counts and one alternative count. In count one he was charged with breaking into a building and committing a felony contrary to section 306(a) of the Penal Code. The particulars of the offence were that on the night of 25th – 26th February 2014 at Kamusiliu in Kyuso District within Kitui County broke and entered a building a shop of Mbwese Musili and Committed therein a felony namely stealing of a sack of green grams weighing about 40 Kgs valued at Kshs 2,800/= property of Mbwese Musili.

In count two he was charged with stealing a Motor Cycle contrary to section 278(A) of the Penal Code. The particulars of the offence werethat on the night of 25th – 26th February 2014 at Kamusiliu in Kyuso District within Kitui County stole a motor bike registration No. KMCC 850C make Suzuki special Blue/Black in colour valued at Kshs 90,000/= and a helmet red in colour valued at Kshs 2,000/= the property of John Mbwese Musili. In the alternative he was charged with handling stolen goods contrary to Section 322(1)(2) of the Penal Code. The particulars of the offence were that on 26th February 2014 at Kamusiliu in Kyuso District within Kitui County otherwise than in the course of stealing dishonesty received or retained one motor bike registration KMCC 850C make Suzuki special Blue/Black in colour a helmet red in colour and a sack containing green grams all valued at Kshs 94,800/= property of one John Mbwese Musili, knowing or having reasons to believe them to be stolen goods.

He denied all the charges. After a full trial he was convicted of count 1 and count 2. He was sentenced to serve 2 years imprisonment on each of the two counts, sentences to run consecutively.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal on the following grounds:-

1. That the learned trial magistrate erred both in law and fact when he admitted prosecution evidence which was totally uncorroborated thus violating the provisions of section 163(c) of the Evidence Act Cap 80 Laws of Kenya.
2. The learned trial magistrate erred both in law and fact by failing to consider that the appellant was not found with any exhibit during his arrest.
3. The learned trial magistrate erred both in law and fact when convicting and sentencing him

without considering that the prosecution relied on witnesses from one family, ie the complainant and his son.

4. The learned trial magistrate erred both in law and fact by failing to note that this case originated from an existing grudge between him and the complainant.
5. The learned trial magistrate erred both in law and fact when he convicted and sentenced him very severely without considering that the Judges rule No. 4 was broken which says that it was wrong for a police officer to appear before the court as the arrester as well as the investigator when adducing his or her testimony.

6. The learned trial magistrate erred both in law and fact by failing to note that there were more essential witnesses who were mentioned during the case and never turned back to clear the doubts.
7. The learned trial magistrate further erred both in law and fact when convicting and sentencing him very severely without considering that he was a first offender.
8. The learned trial magistrate erred in law and fact when concluding this matter without considering his defence.

At the hearing of the appeal the appellant elected to make oral submissions. He submitted that some witnesses who mentioned his name did not come to court to testify. He further submitted that he was called on the phone and went to Kyuso town only to be arrested by the police and told that he would be given the reason for arrest at the police station. After waiting for the complainant he was charged with a complaint which he did not know.

He submitted further that he was surprised that he had been imprisoned for two years by the court but told at the prison that the sentence was four years. He complained that he stayed in the police cells for two weeks before charge. He also said that his names were Wilson Mwangangi but one of the witnesses called him Jackson Mwangangi.

He stated that the complainant said that he was told about him but did not see him commit the offence.

In response, the Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that there were no contradictions in the evidence of the prosecution witnesses as alleged in paragraph 1 of the grounds of appeal. In any event, the issue of contradictions was not raised in the trial court. With regard to ground 2, counsel argued that the evidence was clear that the appellant was found with the motor cycle and bag of the green grams. On ground 3, counsel argued that PW2 was hired as a watchman. At no point did PW2 state that he was related to PW1. Counsel stated that PW2 was thus an independent witness.

With regard to ground 4 counsel submitted that the appellant did not cross examine any witness on the issue of an existing grudge. He merely brought out the issue in his defence which was an afterthought.

On ground 5, counsel argued that no law was violated when the appellant was arrested, and with regard to ground 6 counsel argued that failure to call additional witnesses did not weaken the prosecution case.

Counsel also submitted that the sentence was neither harsh nor excessive.

With regard to ground 7 and 8, counsel argued that both the prosecution and defence evidence was considered by the trial magistrate who listed 5 important issues for determination. Counsel emphasized that the stolen goods were recovered just a few hours after the theft and the appellant did not lay any claim of ownership on the same.

In responses, the appellant stated that he had nothing more to say to the prosecuting counsel's submissions.

During the trial; the prosecution called three witnesses. PW1 was John Mbweze Musili the complainant. He testified that he was a teacher at Mbaathi Primary School and that on the 25th February 2014 at 4.00 Pm he went to his home and noted that somebody had been in the house compound the previous day. He then called his wife who told him that she was not aware of such a visitor. He observed footprints in the

bathroom and outside the compound. On checking the kitchen he noted that it was broken into.

He then followed the footprints to Mulewa Kaseri's homestead and asked Kanini Muli about the footprints. According to him, Kanini Muli told him that the footprints belonged to Boi that is Jackson Mwangangi who was the complainant's worker. They looked for Jackson Mwangangi and saw him on the path but he ran to the bush.

At around 3.30 am, he went to the toilet and checked in his son's house where he had kept his motor bike and found it missing and the door broken. He saw the footprints of the shoe which the appellant wore on 25th February 2014. He thus went to Kilonzi's homestead and told him that Boi had taken his motor bike.

With Kilonzi they searched for the appellant using another motorbike from a neighbour towards Ndatani area. At his plot at Ndatani, he found that his shop at Kamusiliu market had been broken into and 40Kg green grams missing. They proceeded to Kyuso township at around 6.00 am on 26th February 2014, where he saw his motor bike parked at Makuti Hotel with the green grams but the accused was not present.

Shortly thereafter, the appellant came to where the motorbike was and was arrested. According to this witness, the appellant said that he was in possession of the motor bike and the green grams. They thus took the appellant, the motorbike and the green grams to Kyuso Police Station. The motorbike in question was a Suzuki Special Blue in colour registration KMCC 850 C. According to him, the appellant tried to sell the green grams to the Makuti hotel owner who failed to buy it. He identified the motor bike and the 40 kg polythene bag of green grams and also a receipt for purchase of the motor bike in in name in court.

In cross examination, he stated that he knew the footprints of the appellant. He stated that he saw the footprints in his homestead and that he was told at the home of the appellant that he had stolen the shoe from his grandfather. He stated that the appellant was arrested in Kyuso market. He maintained that the appellant broke into his shop and that they found him with the green grams which were stolen from the shop. He maintained that the motor bike and green grams were found with the appellant and that the appellant had been seen by the proprietor of the hotel selling the green grams.

After this witness testified, the Investigating Officer was called to produce the exhibits though he was not recorded to be a witness. He was acting Inspector Simon Kiyayi of Kyuso Police station that he recovered one motor bike belonging to one John Mbwese and a sack of green grams and a panga. He produced the motor bike, 40Kgs green grams bag, and a receipt for the purchase of the motor bike as exhibit 1-3. The accused did not lay claim on any of the items, and they were released to the complainant PWI.

PW2 was Kitheka Kilonzi a watchman in Kitengela. It was his evidence that on 25th/26th February 2014 during that night, he was woken up by Musili who informed him that his motor bike had been stolen. He went to his house and found that the motor bike had been stolen. They followed the footsteps of the appellant who was a former servant of Musili to Kithumbi and noted that the motor bike was headed to Kyso Town. They thus got a motor bike from a friend and rode to Kamusiliu to the shop of Musili Mbwese and found that his shop had been broken into.

It was his evidence that Musili Mbweze called his wife and, on checking, found that a bag of green grams was missing. They then proceed to Kyuso town and went to Makuti hotel where they found the motor bike. They started looking for the person who had stolen the bike and the appellant appeared. They called the members of public who managed to arrest the appellant. They then took the appellant to Kyuso police station. According to him they suspected the appellant because of his footprints and the shoe marks which were known by the complainant. He stated also that the green grams weighed about 40 Kgs. He knew the appellant before the incident.

In cross examination, he stated that footprints were seen at Mbweze's home and that the complainant

Mbweze, knew the subject shoe worn by the appellant. He stated that he arrested the appellant with the motor bike with the green grams.

PW3 was Acting Inspector Simon Kiai of Kyuso Police Station. He stated that on 26th February 2014, he received a report at the police station that somebody had been arrested having stolen after breaking a house. He had stolen a motor bike and broken a shop and stolen ndengu. He was informed that the appellant was spotted by the complainant at Kyuso with the stolen items. He stated that the appellant was initially arrested by members of the public. He described the motor bike and the bag of ndengu/green grams which he had already produced as exhibit.

In cross examination he maintained that the appellant had broken into the house, though he was not at the scene of commission of the offence. He stated that he visited the scene of crime and saw the broken house. He stated that some witnesses were fearing for their lives in this matter.

When put on his defence, the appellant gave sworn testimony. He stated that he was a mason from Masungwa in Kathiani Sub location. He stated that on 24th February 2014 at 8.00 Pm, he was called by John Mbweze who asked him to meet him at Kyuso market. When he came to Kyuso he met Kitheka Kilonzi who testified in this case. He told him to go to the police station where he was locked up in the cells for a reason he did not know and brought to court on 25th Febuary 2014.

In cross examination, he stated that he was called by Kitheka whom he thought was going to give him his money for motor bike repair. He denied knowing the motor bike in court. He denied knowing the footprints and the shoe that he was alleged to have been wearing which was not brought to court. He denied knowing the green grams and motor bike. He stated that he knew Mbweze and Kilonzo and that there was an existing grudge between him and Kitheka over a girlfriend.

Arising from the above evidence the learned magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. The magistrate thus convicted the appellant on the two main counts.

This being a first appeal, I am required to evaluate all the evidence on record and come to my own conclusions and inferences ***see the case of Okeno -vs- Republic (1972) EA 32.***

I have reevaluated the evidence on record. The appellant has raised several grounds of appeal. The learned prosecuting counsel has strongly opposed the appeal.

No one saw the appellant breaking into the shop and stealing the bag of green grams and also taking away the motorbike. The evidence of commission of the offence is thus based on circumstantial evidence. The appellant is said to have been traced through footprints and marks of the shoe that he wore by PWI and PW2. He is also said to have been found in possession of the motor cycle and the bag of green grams at Kyuso. It was the evidence of the prosecution that the appellant attempted to sell the bag of green grams to the owner of Makuti Hotel who did not buy the same. The appellant was also arrested by members of the public and taken to the police.

In a case depending on circumstantial evidence the prosecution is required to establish through evidence a case in which there can be no other reasonable hypothesis than that the accused did infact commit the offence.

In this present case, it was said that the appellant was traced through footprints and a shoe that he wore. There was however no description by any of the witness PW1 and 2, as on how they identified footprints to be those of the appellant. The evidence on the shoe alleged to have been worn by the appellant was also scanty. There was no specific description of how that shoe looked like and how the prints of that shoe would connect the appellant with the offence. The appellant was said to have stolen the shoe from his grandfather. However nobody from his grandfather's homestead was called by the prosecution to come and confirm that contention by the prosecution. I find that the evidence regarding the footprints and shoe print of the appellant is scanty and hazy and cannot connect him to the commission of the offence.

The other evidence that the prosecution relied upon was that he tried to sell a 40 Kg bag of green grams to the owner of Makuti hotel at Kyuso. It was also said that when the motor cycle and bag of green grams was initially found by PW1 and PW2, the appellant was not present but shortly thereafter he came to where the stolen items were, and was thus arrested by the public and taken to the police station.

The owner of Makuti hotel who would have tendered evidence to connect the appellant with the attempt to sell the 40 Kgs bag of green grams was not called by the prosecution to tender evidence. No reason was given for the failure of the prosecution to call him as a witness. None of the members of public who were said to have arrested the appellant and taken him to the police station was called to testify in order to establish the circumstances and the reason for the arrest.

These in my view, were crucial witnesses who would connect the appellant with being in possession of items which were recently stolen. The witnesses were not called to testify. No reason was given to the failure to testify. It is trite that in a case where the prosecution fails to call crucial witnesses to testify and no reason is given and the case of the prosecution is weak, the court is entitled under the general rules of the evidence to infer that such evidence if tendered would have been adverse to the prosecution case or evidence – ***see the case of Bukenya -vs- Uganda (1972) EA 549.***

The failure of the prosecution to called the owner of the Makuti hotel to whom the 40 Kg bag of Green grams was offered for sale by the appellant, and the failure of the prosecution to call any of the people who arrested the appellant, gives credence his version that he was called on the phone to come to Kyuso and when he arrived there he was arrested and taken to Kyuso Police Station. Indeed it was the evidence of both the prosecution and the defence that the appellant had previously worked for the complainant PW1. Therefore in my view it was quiet probable that he was called by the complainant to go to Kyuso. One has to take into the account that the burden is always on the prosecution to prove a criminal case against an accused person beyond reasonable doubt. The accused does not have a burden to prove his innocence. I find that the crucial witnesses, if called would have contradicted the prosecution version.

The prosecution failed to tender evidence to prove beyond reasonable doubt that indeed the appellant committed the two offences. The convictions cannot thus be sustained. It follows that the sentences imposed also will have to be set aside.

Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 18th November 2015.

GEORGE DULU

JUDGE