



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CRIMINAL APPEAL NO. 100 OF 2014

ERICK OTIENO AJIGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

1. **ERICK OTIENO AJIGO**, the Appellant herein was charged with the offences of house breaking and stealing and being in possession of ammunitions. In the alternative he faced the charge of handling stolen goods. That was on 15/07/2013 before the Senior Principal Magistrate's Court at Migori in Criminal Case No. 523 of 2013. He subsequently denied all the charges.
2. On 06/11/2013 the prosecution amended the charges by framing them more precisely and again the Appellant denied all of them. On request by the Appellant, the trial court directed that copies of all witnesses statements and the charge sheet be availed to the Appellant and from the record it appears that the same were availed since the issue was never raised again.
3. The Appellant then had upto 18/01/2014 to prepare for the hearing of the case. On the said day **PW1**, the complainant **RICHARD ONYANGO MILUO** testified and confirmed that his house at Kadem was entered into and property stolen. He identified several items in court with an estimated value of over Kshs. 10,000/=. He never knew the Appellant before the incident.
4. **PW2** was **GEORGE OTIENO SIPO** who was PW1'S neighbour and who was preparing ballast on 12/07/2013 at around 09:00a.m when he heard screams of a thief and answered to see what was happening. As he approached the screams he saw someone, the Appellant herein, running away while members of public were pursuing him calling him a thief. He joined in the chase and they managed to apprehend the Appellant. The police later on arrived and conducted a search on the Appellant and recovered five rounds of ammunitions and led the Appellant away. PW2 also identified the PW1's goods which had been recovered as he had previously seen them at his place.
5. **JAMES MILUO** testified as **PW3**. He was PW1's brother who lived around 100 yards from PW1's house. On 12/07/2013 at around 09:00 a.m. being aware that his brother was not around, heard a knock from his brother's house. He then decided to go and find out what it was all about. On reaching there he noticed that the front door of the house was closed but the back door was open. He then saw the appellant walking away from his brother's house with two bags which he readily recognized as those belonging to his brother PW1. He raised alarm and the appellant stated running away. He persued him and people joined in the chase and successfully apprehended the appellant. They never lost track of the appellant during the chase. He identified his brother's items which he knew quite well.

6. **PW4** was Corporal James Nzioka No. 79589 of Nyatike CID Office who rearrested the appellant at the Otho A.P. Post and was equally handed over the exhibits which had been recovered from the appellant which included the two bags which containing several items together with five rounds of ammunition. He escorted the appellant to Nyatike Police Station. He later on prepared a Police Exhibit Memo Form and took the ammunitions to the Firearms Expert for analysis. He was indeed the Investigating Officer in the case.
7. **APC DANIEL MACHIRA THORU (No. 2009017630)** of Nyatike A.P. Post confirmed rescuing the appellant from the wrath of the members of the public who had tied him around a tree and severely assaulted him. He searched him and recovered five rounds of ammunitions from one of his trouser pockets. He arrested him together with the items he was alleged to have stolen which were contained in two bags and led him to the said AP Post where he later on handed him over to his counterparts from the Nyatike CID Office.
8. **PW6** was the Firearms Examiner who testified and produced a report prepared by one of his junior officers who had left the police service for over a year and whom he had worked with for over ten years. He identified his signature which he knew quite well. He informed the court that his efforts to trace him to attend court were futile hence his attendance. He produced the report which confirmed that the five ammunitions were blank and that two of them had been tested. They were all confirmed to be ammunitions as per law.
9. The prosecution then closed its case and the court placed the appellant on his defence.
10. The Appellant gave sworn defence and called no witnesses. He denied committing the offences and stated that on the said day he was carrying his household goods on a motor cycle which suffered a tyre puncture on the way and as he waited for the rider who had gone to the nearest centre to repair it, a group of people emerged and claimed that he was a thief. He was beaten up and when the Area Assistant Chief came he explained to her where he was from and the said Chief told the people to leave him as he an innocent traveler. However the mob was reluctant and called the police. He contended that the exhibit were his household goods whose receipts got lost during the attack and arrest. He equally denied the issue of the ammunitions. He further contended that he was attacked and arrested at the main road.
11. By a Judgment delivered on 18/06/2014, the Court found him guilty on the offence of house breaking and stealing and that of being in possession of ammunitions and was accordingly convicted. He was sentenced to 3 years and 7 years imprisonment on counts 1 and 2 respectively with sentences to run concurrently. He appealed against the said convictions and sentences.
12. This court made an order on 30/03/2015 deeming the appeal which had been filed out of time without the leave of the court as being properly on record.
13. The Appellant mainly challenged the judgment of the trial court on the issue that the prosecution had failed to prove the charges as required in law. To that end he contended that there was no evidence of any break-in into the PW1's house neither was there evidence that the goods belonged to PW1. He equally denied that there was any evidence linking the ammunitions with him alleging that they were planted on him by the police since the same were not dusted for his finger prints. He prayed that his appeal be allowed and that he be granted his liberty unconditionally.
14. The prosecution opposed the appeal urging the court to be properly guided by the evidence which was sufficient to prove all the two counts.
15. As this is a first appeal the role of this appellate court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the

demeanor of the witnesses and hearing them give evidence and give allowance for that.

16. In discharging the said duty I will first revisit the evidence on the main count of house breaking and stealing. This count had two limbs; that of **house breaking** contrary to **Section 304(1)(b)** of the Penal Code and that of **stealing** contrary to **Section 279(b)** of the Penal Code.

17. I have carefully relooked at the entire evidence and do not see any evidence of house breaking. None of the witnesses tendered such evidence. PW3 who was an eye-witness had the following to say:-

“.....I noticed one door was opened and another locked ... I knew my brother was not present and I had heard a knock from his house. When I arrived there I saw you..”

18. The complainant, PW1, however clarified how the assailant found his way into his house in the following words:-

“.....entry was through the ventilation...”

19. Since there was no evidence of any break-in, the offence of housebreaking was not proved.

20. On the second limb of the main charge; there is need to satisfy ourselves if the offence of stealing was committed. PW1 testified that when he was called and informed that his house had been broken into, he went there only to confirm that indeed his household items were truly missing. They included two suite cases; hot pots, curtains, clothes sufurias and thermos. PW1 identified and confirmed the items as his at the police station where the appellant had been arrested and taken to. He conceded that he did not have receipts for the said goods.

21. PW3 was an eye-witness. On hearing a knock at the PW1's house whom he knew was not around, he went only to find that the front door locked but the rear door open. He then found the Appellant. He stated that:-

“... On 12/7/2013 around 9:00 a.m I found the accused person at my brother's house with 2 bags. I noticed one door was opened and another locked. He began walking away and I screamed. He then ran away.

People then showed up and began chasing him. He was apprehended. He is before court. These are the items he was found with. He was told to open the bags and all were removed.

I had seen the items in my brother's house. He claimed there were people who had given him the items.”

22. PW2 was one of the people who gave chase and eventually apprehended the Appellant. He heard screams of a thief and he pursued someone who was running away as people were referring to him as a thief. They never lost sight of him during the chase and eventually apprehended him. That person happened to be the Appellant herein. To PW2, the Appellant was carrying two bags when he saw him and he dropped them and began running away on raising alarm. He identified the bags in court and also confirmed that the Appellant opened the bags on being apprehended and he recognized the items therein as belonging to PW1 as he had seen both the bags and the items at the PW1's house being his neighbour.

23. PW1 confirmed that his house was entered into and his items taken away without his permission. He identified them around 11:00 a.m. which was about two hours later. Likewise PW2 and PW3 confirmed that the items belonged to PW1 as they used to see them at his house.

24. The items were also identified in court by PW4 and PW5. It was the Investigating Officer, PW4, who produced them in court and according to the list of exhibits the said items were produced as

exhibits 1 to 9 inclusive. To that end, PW4 stated that:-

“....He showed us the exhibits recovered from the accused persons which were 2 bags which contained some hot pots, sufurias, seat covers.....I wish to produce the exhibits as evidence...”

25.The Appellant however did not deny being in possession of the items in issue. He however contended that the same were his household items which he was moving from his house using a motor cycle which broke down on the way.

26.I have considered the prosecution evidence as well as the defence on the items. I am however unable to agree with the Appellant's defence given that the evidence of PW1, PW2 and PW3 remained more coherent and went to prove that indeed the goods belonged to PW1 instead. PW4 also visited PW1's house and noted that:-

“.... The house had everything scattered as the complainant was not present. James (PW3) also identified the place he had stopped the accused before he began running....”

27.There is evidence that PW1's items were found with the Appellant immediately after the theft despite the lack of receipts on ownership. The Court of Appeal at Kisumu in **Reuben Nyakango Mose & Another =vs= Republic (2013)eKLR** in dealing with a similar situation where the contention on lack of receipts had been raised settled the issue in the following manner:-

“..... The stolen items were sufficiently described and identified by PW1, PW2 and PW3 and were recovered so soon after the robbery that the trial court was entitled to draw an inference that the appellant stole the items....”

28.I need not to say any more as the above perfectly fits this case; but suffice to say that I equally do not find the Appellant's defence plausible. It was an afterthought having hoped to escape on the aspect of the receipts.

29.From that evidence it is clear that PW1 lost his items in circumstances which are described in **Section 268** of the Penal Code, Chapter 63 of the Laws of Kenya as stealing. The offence of stealing was hence sufficiently proved as against the Appellant and the trial court rightly found him guilty and convicted him.

30.On the charge of being in possession of ammunitions, the evidence on record clearly indicates how the same were recovered from the Appellant. That was so done by PW5 who conducted a search on the Appellant upon rescuing him from the mob. He found the ammunitions in one of the Appellant's trouser pockets. That was also in the presence of PW2 and PW3.

31.The ammunitions were subjected to an expert examination and found to have been live ammunitions capable of causing injury and that the two which were tested produced a deafening sound. According to the report of the examining officer which was produced as exhibit 11, the examiner confirmed that:-

“... I formed the opinion that exhibits (A1 to A5) were all live and were ammunitions as per the Firearms Act, Chapter 114 of the Laws of Kenya...”

32.The contention by the Appellant that the ammunitions were blank hence not capable of being used as such is taken care by **Section 2 of the Firearms Act, Chapter 114 of the Laws of Kenya** which defines an “ammunition” to mean:-

“..... any cartridge, whether a blank, tracer, explosive, incendiary, gas-diffusing, signaling or any other cartridge of any other kind capable of being discharged from or used with a firearm and includes-

- a) *any grenade, bomb or other missile whether explosive or not and whether or not capable of or intended for use with a firearm;*
- b) *any mine whether for use on land or at sea, depth – charged or other explosive charge;*
- c) *any other container or thing design or adapted for use in or as weapon for the discharge of any noxious liquid, gas or other substance;*
- d) *any projectile, powder or other charge, primer, fuse or bursting charge forming part of any cartridge or any component part thereof; and*
- e) *any ammunition or pellets for use in an airgun, air rifle or air.”* (emphasis added).

33. This court therefore does not agree with the Appellant that the ammunitions were planted on him. I am satisfied on the evidence on record that indeed the same were recovered from the Appellant. The conviction on that charge was hence proper.
34. On the sentences, **Section 279** of the Penal Code Chapter 63 of the Laws of Kenya provides a maximum sentence of 14 years on conviction under sub-section (b). The Appellant was so convicted on stealing under Section 279(b) sentenced to a 3-year imprisonment term.
35. **Section 4(3)(a) of the Firearms Act** defines the sentence on conviction to be a term of imprisonment of not less than 7 years and not more than 15 years. The Appellant was therefore sentenced to the minimal sentence of 7 years.
36. Although the Appellant has contended that the sentences were excessive, the holding in the case of **Wanjema vs Republic (1971) EA 493** remains good law. The Court noted that an appellate court should be slow to interfere with the sentencing discretion of a trial court unless it can be demonstrated that the discretion was exercised capriciously and not judicially. This court may also exercise its jurisdiction if further satisfied that the trial court in sentencing did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence was harsh and excessive.
37. I hence find that the sentences are indeed in order and it has not been demonstrated how this court can reasonably interfere with the sentencing discretion of the trial court. The trial court was also right in finding that the sentences do run concurrently.
38. Before I come to the end of this appeal, I wish to point out some issues on the part of the trial court which it needs to take into account in future. First, the Appellant was charged with the main charge of house breaking and stealing. This offence has two limbs and the court ought to have clearly recorded how the Appellant pleaded to each limb. The court ought to equally make specific findings in its judgment on each limb since each limb defines a specific offence and an accused person may be convicted on all or either of the two limbs. The trial court therefore erred in treating the main charge as a single offence both at the plea taking as well as in the judgment.
39. I have however cured that error in this judgment in my foregone analysis being the duty of an appellate court of the first instance. I therefore find that the said error did not cause any miscarriage of justice to the Appellant as it is readily cured under **Section 382** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.
40. The upshot is therefore that the Appellant is hereby acquitted of the offence of housebreaking contrary to Section 304(2)(b) of the Penal Code but the convictions and sentences on stealing contrary to Section 279(b) of the Penal Code as well as the offence of being in possession of ammunitions are hereby upheld.
41. Consequently the appeal is hereby dismissed.

DATED, SIGNED and DELIVERED at MIGORI this 12th day of November, 2015

A. C. MRIMA

JUDGE