



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.128 OF 2014

BILLY WILLIAM OBURA ALIAS JOB.....1ST APPELLANT

WILLIAM ONGUSI OGOLLA ALIAS ELISHA2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

[APPEAL FROM ORIGINAL CONVICTION AND SENTENCE FROM NYANDO SPM'S COURT: B.M. KIMTAI – SRM

IN CRIMINAL CASE NO.116 OF 2014.]

J U D G M E N T

1. The two appellants are charged with the following offences.:

COUNT 1 – Burglary contrary to Section 304(2) and stealing contrary to section 279(b) of the Penal Code: (1)**BILLY WILLIAM OBURA** alias **JOB** (2) **WILLIAM ONGUSI OGOLLA** alias **ELISHA** : On the night of 21st January,2014 at Tura sub-location in Nyando District within Kisumu county jointly with others not before court broke and entered the dwelling house of PETER MWANGI MUIRURI with intent to steal therein and did steal from therein the following items – a Hass 6kg gas cylinder and a burner, a laptop make Toshiba, a wooden table, a complete tyre with a rim, a jack, 2 band bags, 3 sufurias, 2 plates, 2 spoons, 4 pairs of shoes, cooking stick, scientific calculator, kitchen knife, tea seiver, police not book, assorted clothes, a padlock, the property of the said PETER MWANGI MUIRURI valued at Kshs.100,000/=.

COUNT TWO – Having possession of suspected stolen property contrary to section 323 as read with section 36 of the Penal Code. **BILLY WILLIAM OBURA** Alias **JOB** On the 22nd day of January 2014 at Kolunga area in Nyando District within Kisumu county, having been detained by No.62453 SGT. MAURICE CEMASIS and No.68497 P.C. STEPHEN MUTAVA as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code had in his possession one television set, make JVC, one hoover with two detachable speakers make apex, a navy blue rain coat marked G4S and a remote control reasonably suspected to have been stolen or unlawfully obtained.

ALTERNATIVE CHARGES

ALTERNATIVE CHARGE 1 – HANDLING STOLEN GOODS CONTRARY TO SECTION 322(1) (2) OF THE PENAL CODE: (1) **BILLY WILLIAM OBURA** alias **JOB** (2) **WILLIAM ONGUSI** alias

ELISHA – On the 22nd day of January 2014 at Kolunga area in Nyando District within Kisumu county otherwise than in the cause of stealing jointly dishonestly received or retained 3 kaunda suits, one black pair of trouser, and red T-shirt the property of PETER MWANGI MUIRURI knowing or having reason to believe them to be stolen goods.

ALLTERNATIVE CHARGE 11 – HANDLING STOLEN GOODS CONTRARY TO SECTION 322(1)(2) OF THE PENAL CODE: BILLY WILLIAM OBURA alias **JOB** – on 22nd day of January 2014 at Kolunga area in Nyando District within Kisumu County otherwise than in the cause of stealing, dishonestly received or retained one wooden table, 2 pieces of shoes, 3 under wears, one safari bag, 3 sufurias, 2 spoons, kitchen knife, cooking stick, tea seeve, the property of PETER MWANGI MUIRURI knowing or have reason to believe them to be stolen goods.

2. After a full trial both were convicted and sentenced to 6 years imprisonment respectively and 1 year imprisonment for the 1st Appellant in Count 11. both were dissatisfied and have filed this appeal citing several grounds.

FACTS.

3. PW1 PETER MWANGI MUIRURI a police officer on 21.1.14 at 10 p.m. Was sleeping in his house heaving securely locked it. When he woke up the following morning he found the door opened and the items enumerated in the charge sheet missing.

4. He then reported to the station (Nyando Police) and the investigations commenced. Through an informer they went to some house at Ayweyo area where they recovered the said items. The 1st appellant was occupying the said house. Other items were recovered inside a toilet nearby.

5. They further traced the laptop with PW2 having been given to him by the 2nd appellant. The 2nd appellant was then arrested and charged. They also signed the inventory of the recovered goods.

6. **PW2 DAVID OMONDI BONYO** told the court that on 22.1.14 the 2nd appellant approached him with a view to selling a laptop computer and a gas cylinder. He accepted to buy the laptop only on condition that he would produce the receipt. He took the computer with an understanding that he would only pay for it upon the 2nd appellant producing the receipt.

7. He said that while at the 1st appellant's house he saw some assorted items including JVC TV, ampex hooper among others.

8. **PW3 SGT MAURICE CEMASIS** was the investigating officer. He narrated the incident just as explained by PW1. He produced the recovered items. He also produced the inventory signed by both appellants.

PW4 MAURICE AKUKU ABODHE is a member of community policing at Nyando Sub-County. He explained to the court how the 2 appellants have been under their radar for a while as they were suspecting their characters. He testified that they had changed houses severally and infact they had been earlier on suspected to have been involved in some thefts.

9. When put on their defence both appellants gave sworn evidence. The 1st appellant denied the charges and explained his movements on 21.1.14 as well as 22.1.14, He further said that he was arrested by some four people who wanted Kshs,1000/= from him. He had only Kshs.300, He was taken to Ahero Police station and forced to sign some documents.

10. The 2nd appellant equally narrated what he did on 21.1.14. He was arrested while on his way home and taken to the police station and tortured by having his fingers pricked He was forced to sign a document. He generally denied the offence.

ANALYSIS AND DETERMINATION

11.Both Petitions of Appeal by the appellants are generally touching on the credibility of the witnesses and the evidence adduced by the prosecution. They further argue that the court failed to consider their alibi when arriving at its decision.,

12.The state opposed the appeal arguing that the evidence against the appellants was watertight as they were found in possession of the stolen items.

13.This court is expected to re-evaluate the evidence afresh with a view of arriving at a fresh and independent finding. See **OKENO VRS REPUBLIC [1973] E.A.32.**

14. The evidence on record clearly indicates that the appellants were not arrested at the scene. However there is nothing to suggest that the items were not found in the house occupied by the appellants. All the witnesses clearly pointed out that the assorted items were recovered in the presence of the witnesses and infact the inventory attest to this.

15. Equally there is no evidence to suggest that the appellants were forced to sign the inventory.

16. It was the duty of the appellants to explain how they managed to come into possession of the recently stolen items. Infact this was hardly before the expiry of 24 hours.

17. PW2's evidence on how he came into possession of the laptop was not challenged at all.

18. Was the appellants evidence of alibi sufficient to oust the prosecution case? I do not think so. Their narratives does not explain whether their houses were searched that day and whether any items were recovered. Further they have not laid any basis for the allegation of being tortured.

19. In the premises I do not find any merit in the appeal. The stolen goods were recovered hardly 24 hours after the theft in the appellants custody. They ought to have at least explained how they came into possession of them. The sentence was lawful.

20. Consequently the appeals are hereby dismissed.

Dated, signed and delivered this 14th day of December, 2015.

H. K. CHEMITEI

J U D G E