



158/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 211^A OF 2011

HARRISON MAINGI KIMUNDU.....1ST APPELLANT

MICHAEL MATUKU2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court Criminal Case No. 388 of 2011 by Hon S. K. Mutai, RM on 14/11/2011)

JUDGMENT

1. **Harrison Maingi Kimundu** and **Michael Matuku** were **charged** with two (2) counts of breaking into a building and committing a felony contrary to **Section 306 (a)** of the **Penal Code**. Particulars of the offence on the **1st count** are that on the night of **27th/28th** day of **May, 2011** at unknown time at **Kyatune Market** in **Mutomo District** in **Kitui County**, jointly broke and entered into a building namely; a retail shop of **Lilian Mwaiki Mwangangi** and committed therein a felony namely stealing and did steal from therein sixty packets of sportsman, forty packets of safari king, thirty packets of safari menthol, twenty packets of roster, thirty packets of rocket cigarettes, sixty five packets of rally cigarettes, assorted safaricom, airtel airtime scratch cards, ten pieces of nice and lovely lotion, six pieces of 100mls Vaseline, one solar panel, one piece of cloth material(kitenge) and cash Kshs. 70,000/= all valued at Kshs. 107,340/= the property of the said **Lilian Mwaiki Mwangangi**.

In the **2nd count** particulars of the offence are that on the night of **27th /28th** day of **May, 2011** at unknown time at **Kyatune Market** in **Mutomo District** in **Kitui County** within **Eastern Province**, jointly broke and entered into a building namely; a retail shop of **shadrack Mutua Kilonzo** and committed therein a felony namely stealing and did steal from therein one mobile phone make sendo, three mobile phones batteries, six bottles of nice and lovely lotion, ten tri-cycle padlocks, safaricom and airtel airtime scratch cards, fifteen packets of sportsman, three packets of safari king, eighteen packets of rooster cigarettes and cash Kshs. 2,200/=(two thousand two hundred shillings) all valued at Kshs. **14,894/=** (fourteen thousand eight hundred and ninety five shillings) the property of the said **shadrack Mutua Kilonzo**

In the alternative, the **1st Appellant** was charged with the offence of handling suspected stolen property contrary to **Section 322(a)** of the **Penal Code**. Particulars of the offence being that on the **28th** day of **May, 2011** at about 9.00am at Kitui Police Station in Kitui County, otherwise than in the course of

stealing dishonestly received or retained one solar panel, 14 packets of sportsman, 2 packets of supermatch, 11 packets of safari king, 4 packets of rooster, 3 packets of rally cigarettes, 6 pieces of nice and lovely lotion, 1 piece of 100mls vaseline, one mobile phone make sendo, 3 mobile phone batteries, 7 tri-cycle padlocks, breaking implements one piece of Geisha soap, one piece of cloth material, assorted safaricom and airtel scratch cards and cash Ksh. 10,513.55 known or having reasons to believe them to be stolen goods.

2. The **2nd appellant** was found in possession of stolen goods contrary to **section 322(1) (2)** of the **Penal Code**. Particulars of the offence therefore being that on **28th day of May, 2011** at about **9.00am** at **Kitui Police Station in Kitui County**, otherwise than in the course of stealing dishonestly received or retained 20 packets of sportsman, 23 packets of safari king cigarettes, 10 packets of rockets cigarettes, 13 packets of rooster cigarettes, 1 piece of 100ml vaseline, 1 solar panel, 14 packets of sportsman, 2 packets of super-match, 11 packets of safari king, 4 packets of rooster, 3 packets of rally cigarettes, 6 pieces of nice and lovely lotion, 1 piece of 100mls vaseline, 7 tri-cycle padlocks and cash 13,409/= (thirteen thousand four hundred and nine shillings) knowing or having reasons to believe them to be stolen goods. An inventory of the items was made.
3. The appellants were tried, convicted on both the main counts and the alternative thereof. Each one of them was then sentenced to serve **five (5) years** imprisonment.
4. Being aggrieved by the conviction and sentence thereof the appellant appealed on the following grounds; that the learned trial magistrate erred in law and misdirected himself in fact by making a finding that the case had been proved beyond reasonable doubt; by basing his decision on extraneous matters; by finding that the identification was positive; by failing to consider mitigating factors and sentencing the appellants to **five (5) years** imprisonment, a sentence that was harsh and excessive.
5. At the hearing the 1st appellant denied having committed the offence convicted of and explained circumstances that transpired prior to his arrest. The **2nd appellant** on the other hand argues that he was not mentioned as the person who committed the act.
6. **Mr. Mwangi**, the learned State Counsel opposed the appeal. He reiterated evidence adduced in the Lower Court and urged the Court to confirm the conviction and sentence.
7. To establish its case the prosecution called witnesses. **PW1, Lilian Mwaiki Mwangangi**, the complainant in the first count closed down her shop on the **27th May, 2011** at 7.00pm. On **28th May, 2011** at **2.00am** intending to go to Nairobi. She passed by her shop only to find it open. She entered inside and found goods scattered on the floor. On checking she found Kshs. 70,000/= missing from the cash box. Also missing were 60 packets of cigarettes, soaps, airtel safaricom cards and nice and lovely lotion valued at Kshs. 107,340/=. **PW2, Shadrack Mutua Kilonzo** the neighbour's shop was also broken into on the material night. He found the padlock removed from the door which was left half open. Checking inside he found padlocks, phones, phone battery, calling cards, cigarettes, coins all valued at Kshs. 14, 895/= missing.

They reported the matter to the police and in the meantime **PW3, Kithome Mulumba Munyati** who was travelling to Nairobi having information that the complainant's shops had been broken into boarded motor vehicle registration number KAW 843A Toyota Hiace. He was with his colleague **John Munyao**. He saw two (2) men enter the motor-vehicle carrying briefcases and paper-bags that contained shop items. Suspecting the two (2) gentlemen, they rang the 1st complainant and notified her. The motor-vehicle had an accident. Though injured he notified the driver of the 2nd motor-vehicle that arrived at the scene. They were taken to Kitui Police Station. The police on being informed conducted a search. The 1st appellant was found in possession of several shop items and cash money that included – 14 packets of sportsman, 2 packets of super-match, 11 packets of safari king, 4 packets of rooster, 3 packets of rally, lotion (nice and lovely) 6 pieces of vaseline, 3 mobile phone batteries, 1 piece of geisha soap, 7 padlocks, breaking implements, cash Kshs. 10,513/=, a piece of kitenge clothe, safaricom and airtel cards. His co-accused was found with 20 packets sportsman, 23 packets of rocket, 13 packets of rooster, 2 pieces of geisha, vaseline, 6 padlocks, cash Kshs. 13,409/=.

8. **PW4, No. 2008106949 APC Ann Mwende** (of *Kyatune AP Post*) received the report of breaking

- into a building from the 1st complainant. She visited the scene of the incident and confirmed the shops had been broken into and various shop goods were scattered. Later on she went to Kitui Police Station and found the appellants and another under arrest.
9. **PW5, No. 58803, Corporal Renos Nzungu** investigated the case. He took possession of the recovered items, visited the shops and confirmed they had been broken into and goods stolen. Consequently, he charged the appellants
 10. In his defence the 1st appellant said he was on his way to Kitui when the motor-vehicle he had boarded had an accident. It overturned. Another motor-vehicle took them to Kitui Police Station. One **Kithome** then alleged he had lost his money. The motor-vehicle was searched. Some luggage was removed. It was alleged it belonged to him. He denied having been in possession of the luggage in the paper-bag.
 11. The 2nd appellant stated that he boarded the motor vehicle. On the way it had an accident. He was injured. Another motor vehicle took them to Kitui Hospital, then the Police Station. A search was carried out. There were goods in paper bags which was not his. He was framed up.
 12. I have re-considered the evidence adduced in the lower court, re-evaluated it in order to come up with my own conclusions. This being the first appeal (see **Okeno versus Republic [1972] E.A. 32**).
 13. It is not in dispute that the persons who broke into the complainant's shops on the material night were not seen by any witness. Further, it is admitted by the appellants that they boarded the motor-vehicle in which PW3 was. PW3 saw them carrying brief-cases and paper-bags which contained goods that were positively identified by the complainants as what were stolen from their shops. They entered the motor-vehicle with the said items
 14. In the case of **Republic versus Loughlin 35 CR. APP. R69 1951** the Lord Chief Justice of England stated thus:

“if it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards a man is found in possession of the property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop-breaker”.

15. The doctrine of recent possession has also been re-stated in the case of **Chaama Hassan Hasa versus Republic [1976] KLR 10** where the court stated thus:-

“Where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, presumption arises that he was either the thief or a handler by way of receiving...”

16. It was proved in the case beyond doubt that the two (2) shops were broken into on the night of **27th/28th May, 2011**. The properties that were stolen from the shops on the material night were found shortly thereafter in possession of the accused persons. They rendered no explanation of how they came to be in possession of the said properties. Instead, they denied having had the same. The prosecution's evidence as correctly found by the learned trial magistrate was however overwhelming in as far as possession of the recently stolen goods was concerned. The only reasonable inference to be drawn was therefore, that the appellants were the persons who broke into the two (2) shops (*building*) and committed therein the felony.
17. From the foregoing, it is apparent that the trial court was correct in convicting the appellants on the main count. However, the learned trial magistrate misdirected himself when he also convicted them on the alternative count. Duplication of convictions is erroneous; he ought to have made no finding on the alternative counts. I therefore quash the un-procedural convictions, acquit the appellants on the alternative count and convict them on the main counts.
18. With regard to sentence, a **five (5) year** term of imprisonment was imposed. A person found guilty of the felony herein is liable to **seven (7) years** imprisonment. The appellant herein having been first offenders, the sentence of **five (5) years** imposed was harsh. In the circumstances the sentence is hereby set aside and substituted with three (3) years imprisonment.
19. It is so ordered.

DATED, DELIVERED and SIGNED this 30TH day of JANUARY, 2014.

L.N. MUTENDE

JUDGE