



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 217 of 2012

(An appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Mumias in Criminal

Case No. 642 of 2011 [H. WANDERE, PM])

JAMES OMONDI WERE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged jointly with another (STEPHEN ODINGA MUMALI) with theft from the person contrary to **Section 279 (a)** of the Penal Code. The particulars of the charge were that on the 27th September 2011 at about 9.00 a.m. at Magambisia village, Matungu Sub-location in Matungu District within Kakamega County jointly stole one handbag containing cash Kshs.15,000/=, one mobile phone make Nokia 2700 and Airtel cards valued at Kshs.65,000/= all property to the total value of Kshs.83,500/= the property of Rajab Kulundu Juma from the person Rajab Kulundu Juma.

In the alternative, the appellant was charged alone with handling stolen goods contrary to **Section 322 (2)** of the Penal Code. The particulars of offence were that on the same day at 11.00 a.m. at the same place other than in the course of stealing dishonestly retained one handbag knowing or having reason to believe it to be stolen property.

Both denied the charges. The other accused however disappeared before the trial commenced. The case therefore proceeded only against the appellant.

After a full trial, the appellant was found guilty on the main count, and was convicted and sentenced to serve eighteen (18) months imprisonment. He has now appealed to this court on several grounds, challenging both conviction and sentence.

At the hearing of the appeal, the appellant submitted that PW1 did not establish through evidence that he was a seller of airtime cards. In addition, since he said that the bag was pulled abruptly, he could not claim to have identified the person who took the bag. The appellant also submitted that the motor-cycle which was said to have been recovered during the incident, was not produced in court. Further, he challenged the evidence of PW2 who claimed to have arrested him, and at the same time stated that the public arrested him. In the appellant's view, this was a serious contradiction. On sentence, the appellant submitted that the Probation Officer did not give a genuine report on his conduct.

The learned prosecuting counsel Ms Opiyo, opposed the appeal and supported both the conviction

and sentence. In counsel's view, PW1 positively identified the appellant when he snatched his bag. In addition, PW2 witnessed the incident which occurred in broad daylight. On the sentence, counsel stated that she would leave it to the discretion of the court, though the Probation report and mitigation of the appellant were considered by the trial court.

This is a case where the appellant was said to have been arrested in broad daylight. PW1 and PW2 stated that they saw the appellant run into a sugarcane plantation, after the appellant had snatched a big bag from PW1. The appellant had by then been intercepted when he boarded a motor vehicle driven by the co-accused who has disappeared. The appellant was followed by members of the public and arrested lying down in the sugarcane plantation. The bag was not immediately found with him. The appellant was arrested and taken to the Administration Police Camp at Matungu. The big bag was said to have been recovered later.

Though PW1 stated that his bag contained a number of items, including a large amount of cash and airtime cards, none was found in the bag. It was empty, except for some two receipts.

In my view, the circumstances of recovery of the bag and the arrest of the appellant are not conclusive that he was the thief. The description given regarding the circumstances of the arrest of the appellant and the recovery of the bag, are such that there was a possibility that the wrong person was arrested, due to the fact that the co-accused who was said to be the rider of the motor-cycle, which was not produced in court, has disappeared and has not been traced to-date. It is possible, in my view, that this is a case of mistaken identity. In my view, the benefit of the doubt should have been given to the appellant.

The other issue of concern for this court is that very crucial witnesses were not called to testify at the trial. The appellant was said to have firstly been taken to Matungu Administration Police Post. None of the Administration Police officers who received the appellant from the members of the public, were called to testify. More importantly, the Investigating Officer of the case, who would have tied the loose ends in this evidence, was not called to testify. This was a mistake on the part of the prosecution.

The failure to call crucial witnesses fatally weakened the prosecution case. Where important prosecution witnesses are not called to testify, the court is in law entitled to draw an inference that the evidence of those important witnesses would have been adverse to the prosecution case. See the case of **Bukenya & Others -vs- Uganda [1972] EA 549.**

In the present case, the failure of the prosecution to call the independent Administration Police Officers and the Investigating Officer creates a wide gap in the prosecution case. As a result, the court is not sure about the circumstances and reasons for the arrest of the appellant and the recovery of the exhibits (handbag) produced in this case. The failure of the prosecution to call the above important prosecution witnesses naturally leads to the inference that their evidence would be adverse or contradict the prosecution evidence on record.

Having re-evaluated the evidence on record afresh, I come to the conclusion that the conviction of the appellant is not safe.

Consequently, this appeal is allowed. I quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated at Kakamega this 29th day of January, 2014

George Dulu

JUDGE