



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 113 OF 2013

AMOS MURIU IRUNGU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against sentence and conviction in Kangema Senior Resident Magistrate's Court Criminal Case No. 186 of 2010 (Hon. D.Orimba) on 27th July, 2010)

JUDGMENT

The appellant was charged with the offence of shop breaking and stealing contrary to section 306 (a) of the Penal Code as read with section 279(b) of the Penal Code. On the night of 22nd and 23rd May, 2010 at Githinja trading centre within Murang'a district in central province, the appellants jointly with others not before court are said to have broken into and entered a building namely a shop and stolen five bales of maize flour, seven bales of wheat, rice sugar among other items all valued at Kshs. 35,000/- the property of Misheck Njuki Munanu.

In the alternative, the appellant was charged with the offence of handling stolen goods contrary to section 322 (2) of the Penal Code the particulars of which were that on the 30th day of May, 2010 at Gathinji village in central province, otherwise than in the course of stealing, the appellant dishonestly undertook the retention of four and a half packets of maize flour, half packet of wheat flour, 2kgs of rice, one kilogramme of sugar, 2 halves of bar soap, one sachet of cocoa knowing or having reason to believe them to be stolen.

In support of the charges and the particulars thereof the prosecution called two witnesses the first of whom was the complainant. The complainant told the court that on 23rd May, 2010 at around 7.30 am he found the rear door of his shop opened though he had closed it the previous day. Apart from the open door, the ceiling board had also been broken and some iron sheets removed from the roof. Some items in the shop had also been stolen. He found a panga, a hammer and a torch in the shop. He reported the matter to the police at Kirogo police post. A week after making the report, the complainant was called by the police to identify certain items which had been found in possession of a suspect, the appellant herein; he was said to hail from the same village as the complainant.

Corporal Walter Obengu who was then based at Kirogo police post confirmed that he was on duty on 23rd May, 2010 at around 9 am when he received a report from the complainant that his shop had been broken into and several items stolen. He went to the scene together with his colleagues. He noticed that the thieves had gained entry into the complainant's shop by cutting the iron sheets and the ceiling board. He established in the course of investigations that the thieves had stolen several

items including sugar, maize flour, rice and others.

On 30th May, 2010, this officer together with his colleagues conducted a search in several houses where the stolen items were suspected to have been hidden. They managed to recover rice, sugar, maize flour and soaps of different brands in the appellant's house. The appellant himself was found in the house and since those items were suspected to be the goods that had been stolen from the complainant's shop the appellant was arrested and taken to the police post. When the complainant was called, he identified the goods as his since they bore particular features which he could identify; for example he had labelled in a particular manner and they also still bore his price tags. The assorted goods were produced and admitted in evidence as prosecution exhibits.

In his defence the appellant opted to give a sworn statement. He told the court that on the midnight of 29th May, 2010, the police went to his house and found the assorted items that had been exhibited in court as stolen goods. They carried away the goods and arrested him. The appellant's explanation of the source of the goods was that they were given to him by his sister who was also a shopkeeper. His sister apparently gave him the same goods but of different brands. He said that though he called his sister when he was arrested, she failed to come to come and explain to the police that she had given the appellant these goods.

The appellant's sister testified on behalf of the appellant and said that she was a shopkeeper at Gatheru. She said that on 26th May, 2010 she gave the appellant maize flour, rice and some wheat flour. She later learned that the appellant had been arrested for having stolen the same items. On cross-examination, she said that the appellant lives with "a broker" and not alone. She said told the court that she had given the appellant an assortment of goods. Though she did not know where he got other goods which he was accused of having stolen.

After hearing both the prosecution and the defence cases the learned magistrate held that the prosecution had proved its case beyond reasonable doubt and convicted the appellant accordingly. The appellant was fined Kshs. 30,000/- under section 306(a) and in default thereof he was sentenced to serve three years imprisonment. Under section 279 (b) the learned magistrate fined the appellant Kshs. 50,000/- or six years imprisonment in default thereof.

The appellant appealed against both the conviction and sentences. In his grounds of appeal, the appellant faulted the learned magistrate for relying on exhibits produced in court without any documentary backing; the learned magistrate is also said to have erred in law and in fact by relying on contradictory prosecution evidence; the appellant also took issue with the fact that though the learned magistrate relied on the exhibits recovered from his house, there was nobody present when the items were recovered; finally the learned magistrate is said to have erred in law and in fact by ignoring the defence case and holding that the prosecution had proved its case beyond reasonable doubt.

From the evidence on record there is no doubt that the complainant's shop was broken into in the night. The complainant's evidence and that of the investigating officer was consistent that the shop was broken into and some goods stolen. This piece of evidence was not displaced and there is nothing on record to doubt its credibility.

The complainant reported the theft to the police who, upon investigations, recovered commodities that they suspected were stolen from the complainant's shop. Again it is not in doubt that these commodities were recovered from the appellant's house. The crucial question here was whether these goods were those that had been stolen from complainant's shop. If they were, the appellant was bound to give a reasonable explanation of how he came into possession of these goods if he was to escape from liability for the offence of breaking and stealing or handling stolen goods. This explanation is tied to the doctrine of recent possession which was explained in the case of *Chaama Hassan Hasa versus Republic (1976) KLR* at page 10 where the High Court (Trevelyan and Hancox JJ) explained it as follows:

“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, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining).”

The appellant’s explanation of his possession of the goods was that they were given to him by his sister for his use. In particular he said that he was given 5 packets of maize flour, 1 packet of wheat flour, coca cola, and 1kilogramme of sugar. He said that his sister gave him different brands of the same goods. In examination in chief, his sister said that indeed she gave the appellant some maize flour, rice and some wheat flour. While being cross-examined she was more particular that what she gave him was 6 packets of maize flour, 3kilogrammes of rice packed in three packets, 1 packet of half kilogramme of wheat flour and bathing soaps. The total value of the goods she gave him was Kshs 6,000/=. It is apparent from the appellant’s sister’s evidence that what she alleged to have given the appellant was not only different in some respects from what the appellant testified that he received but they were also far more than he alleged he received. No explanation was offered as to why those items were uniquely tagged and labelled in the same way that the complainant tagged and labelled his merchandise. The explanation given on the ownership of the items in issue was contradictory and in my view, did not displace the complainant’s evidence that the goods were his. In the face of such contradiction and omissions, I would hesitate to fault the magistrate for rejecting the appellant’s explanation as untrue.

In the case of R versus Thomas Henry Curnok (1914), 10 Cr. Appeal Rep.207 cited in the judgment of the court in Zus versus Uganda (1967) E.A. 420, a prisoner was convicted of feloniously receiving stolen property which was a hosepipe. He was sentenced to fifteen months in prison. It was held that he was properly convicted because the burden of giving a reasonable explanation was on the prisoner. In that case when the prisoner was questioned by the police, he had said that he knew nothing about the hose pipe. The next day he said that he found it by the Feeder Bridge. At his trial before court he said he had picked it up at Brislington, which was a long way from Feeder Bridge. It was held that in view of the contradictory explanations, it could not be said that the prisoner had given any reasonable explanation as to how he had come to be in possession of the hose pipe.

From the evidence laid before the court, I have no doubt that the prosecution proved beyond doubt that the appellant could possibly have been the thief of the complainant’s goods or he knew or ought to have known that those goods had been stolen. In the circumstances of this case, the learned magistrate could convict the appellant on the principle count of breaking and stealing or the alternative count of handling. Such a conviction would be consistent with the decision of the Court of Appeal for East Africa in the case of Ratilal & Another versus Republic (1971) E.A at 577 where the court said:

“First the handling must be of stolen goods and done otherwise than in the course of stealing. We agree that this is a necessary element which must be proved by the prosecution. The prosecution must prove that the goods are stolen and must further satisfy the court that the handling of the goods was “otherwise in the course of stealing”. This altered element can, however, be proved by circumstances from which the court can infer and decide whether the offence was theft or handling of stolen goods. The prosecution should therefore always, except where the evidence positively establishes either that the act was theft or was one of handling stolen goods, lay alternative counts to cover both offences. This was done in this case.”

Considering that the goods were recovered almost a week later after the breaking in and stealing, and considering that the possibility that the appellant could have received the goods from a third party, it would be probable that the appellant was more culpable for handling than breaking and stealing. The most appropriate conviction in these circumstances would therefore have been of handling stolen goods contrary to section 322 (2) of the Penal Code. I would therefore quash the convictions for breaking and stealing and substitute them with the conviction of handling stolen property. In the same breath I would set aside the fine and sentences imposed on the appellant and substitute them with a sentence of five years imprisonment from the date of conviction. That is the order of this court.

Signed, dated and delivered in open court at Murang'a this 17th day of February, 2014.

Ngaah Jairus

JUDGE