

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEALS NO. 200 AND 202 OF 2012

ISSAD IDDI ABUBAKAR 1ST APPELLANT

MARGARET AWINJA MUHANYO 2ND APPELLANT

(Appeals against conviction and sentence arising from the judgment of [C. KENDAGOR, R.M.] dated 16.8.2012 in the Chief Magistrate's Court Kakamega in Criminal Case No. 877 of 2012)

J U D G M E N T

The appellants were charged with the offence of breaking into a building committing a felony contrary to **section 306 (a)** of the **Penal Code**. The particulars of the offence are that the appellants *on the night of 23rd and 24th April 2012 at Kakamega Municipality, jointly with others not before court broke and entered into the shop of Milka Okonyo and stole from therein 9 Tecno mobile phones, 8 Nokia mobile phones, 3 Kabambe phones, 3 for-me phones, 2 China phones, 3 Mayonnaise hair treatment, 3 doogrow treatment, 2 infusion hair treatment, 54 hair weaves, 1 packet of bangles, all valued at KShs.117,605/= belonging to the said Milka Okonyo.*

The 2nd appellant was charged with the offence of handling stolen goods contrary to **section 322(1)** of the **Penal Code**. The particulars of the offence are that the 2nd appellant *on the 26.4.2012 was found in possession of one hair mayonnaise treatment, 1 doogrow hair treatment, 2 hair weaves, 1 Tecno 351 and 1 empty box of Kabambe mobile phone knowing or having reason to believe them to be stolen property.*

The 1st appellant was convicted and sentenced to serve 5 years imprisonment while the 2nd appellant was convicted of the alternative charge of handling stolen property and sentenced to serve 3 years imprisonment. The 1st appellant's grounds of appeal are that the prosecution evidence was not sufficient to sustain a conviction, he was taken to court after 3 days had lapsed, the exhibits that were produced were not found in his possession and that his sworn defence was ignored. The 1st appellant filed written submissions which expounds on the above grounds. He contends that the alleged informer did not testify, the items that were produced in court were recovered from his co-accused and the complainant did not prove ownership of the stolen items as no receipts were produced.

The 2nd appellant's grounds of appeal are that she pleaded not guilty to the charge, she is a single mother with 2 children, the sentence is harsh, she was a first offender and that she is remorseful. During the hearing of the appeal she urged the court to be lenient to her as he has 2 children. Mr. Okoth, State Counsel, opposed the appeal and relied on the evidence on record.

Before the trial court **MILKA OKONYO GICHULE** was **PW1** and the complainant. She operates a shop at Kenya Industrial Estates in Kakamega. She closed her shop on 23.4.2012 at 6.00 p.m. and on the following morning she found her shop had been broken into and the items indicated in the charge sheet had been stolen. She reported the matter to the police and on the 26.4.2012 she was called by **PW3**, the investigating officer that some of her items had been recovered. Her employee (**PW2**) went to the police station and identified some of the stolen items. **PW2 SARAH WANJIRU** is employed by **PW1** as a shop assistant. They closed their shop on the 23.4.2012 and when she arrived the following morning she found that the shop had been broken into. She informed **PW1** and the matter was reported to the police. On the 26.4.2012 the police called and informed that some items had been recovered. They went to the 1st appellant's house and recovered a mobile phone box which she identified as part of the stolen items.

The 1st appellant led them to the 2nd appellant's house and several other items were recovered.

PW3 PC BARNABAS MWARABU was based at the Kakamega police station and received the report on the 24.4.2012. On the 26.4.2012 he got information that a lady had been selling similar items that were reported to have been stolen. He went to Makaburini slums with PW2 up to the house of the 1st appellant. They recovered an empty box meant for a new mobile phone. PW2 identified it as part of the stolen items. PW3 asked the 1st appellant where the 2nd appellant was staying and the 1st appellant led them to Jua Kali estate. They reached the 2nd appellant's house and recovered some of the items including hair mayoness, Vaseline, hair weave and hair treatment among other. The 2nd appellant had a new Tecno mobile phone with no sim-card and could not give account on how she bought it. The appellants were arrested and later charged with the offence.

The appellants were put on their defence. The 1st appellant testified that he bought a mobile phone for his sister who had differed with her husband. His sister took the phone and went to Uganda but left the box in his house. The 2nd appellant was having her own house but at times stayed with him. He gave money to his wife who was selling chang'aa on the 26.2.2012 so that she could change her business. He was arrested at about 9.00 a.m. by the police who were with PW3 and PW2. The police recovered the box for the phone he had bought for his sister. They later boarded a vehicle and went to Jua kali area up to a house whose door was not locked. The police entered into the house and he saw PW3 leaving with a black bag. As they were leaving, the 2nd appellant appeared and she was told to board the vehicle. They were later charged with the offence.

The 2nd appellant testified that she normally sells chang'aa and was a friend to the 1st appellant. She had disagreed with the 1st appellant that morning and went to her own place. She went to a salon to do her hair but left her door unlocked. When she returned she saw police officers with the 1st appellant. She further testified that it is 1st appellant who had given the phone and hair weave and did not know that they had been stolen. She had been given those items two days before they were arrested.

The main issue for determination is whether the appellants committed the offence as charged. The prosecution evidence does establish that PW1's shop was broken into on the night of 23.4.2012 and some items stolen. PW3 investigated the matter and recovered some items from the appellants. Although the 1st appellant submitted that he had bought the phone for his sister he did not produce any receipt to counter the prosecution evidence. The evidence of the 2nd appellant is to the effect that the items were given to her by the 1st appellant. Both appellants confirmed that they used to live together. I do find that the prosecution was not controverted and the case was proved beyond reasonable doubt although the 1st appellant contends that he was taken to court after expiry of 3 days, that cannot be a ground for his acquittal. The prosecution evidence shows that receipts were produced by PW1 that proved ownership of the stolen items. The receipts were in names of PW1's husband and she was able to explain the ownership of the stolen items. The items were recovered 2 days after they were stolen. I do find that the trial court arrived at the correct decision. The prosecution case proved that the 1st appellant committed the offence of breaking into the shop and committing a felony as charged, while the 2nd appellant handled the stolen items.

The appellants contend that the sentence is harsh. Given the circumstances of the case I will reduce the sentence of the 1st appellant from 5 years to 3 years imprisonment from the date of conviction. The 3 years imprisonment sentence for the 2nd appellant is hereby set aside and replaced with the period already served. The 2nd appellant shall be set at liberty unless otherwise lawfully held. The appeals lack merit and they are disallowed. The sentences are hereby set aside and replaced as stated herein above.

Delivered, dated and signed at Kakamega this 17th day of February 2014

SAID J. CHITEMBWE

JUDGE