



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 174 OF 2012**

**ALEX MUGENDI NDWIGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**From original conviction and sentence in Cr. Case No. 632 of 2012 at the Resident Magistrate's Court  
at Runyenjes by HON. J.P. NANDI – Ag. SRM on 22<sup>ND</sup> NOVEMBER 2012**

**J U D G M E N T**

**ALEX MUGENDI NDWIGA** the Appellant and others were jointly charged of the offence of shop breaking and stealing contrary to section 306 (A) of the Penal Code. The particulars as stated in the charge sheet were as follows;

**“On the 26<sup>th</sup> day of June 2012 at Runyenjes Township Runyenjes East Location in Embu County jointly with others not before Court, broke and entered the shop of JOHN NJIRU with intent to steal therein and did steal therein four mobile phones make G-TIDE G90 S/No. 38070004491653/ 358070044491661 and NOKIA a-01 S/NO 351937051474151**

**/351937051474151 and cash all valued at kshs.84,000/= the property of the said JOHN NJIRU”**

1. After full hearing the Appellant was convicted and sentenced to three (3) years imprisonment while his two co-accused were acquitted under section 215 Criminal Procedure Code. And being dissatisfied with the Judgment he filed this appeal against the conviction and sentence.
2. He raised the following grounds of appeal;
  1. ***That the learned trial Magistrate erred in law and when he failed to consider the fact that the Appellant's constitutional rights were violated when he was held in the police custody for more than 24 hours before he was taken before a Court of Law for pleas as it is stipulated by the constitution.***
  2. ***The learned trial Magistrate erred in law and facts when he convicted the Appellant relying on the prosecution evidence which was inconsistent and uncorroborated.***
  3. ***Your honour, the learned trial Magistrate erred in law and facts when he convicted the Appellant relying on evidence which was purported to come from the members of public who were not called as witnesses and ignored the fact that he was severely and taken to Court so as to deny him a chance to seek justice.***
  4. ***The learned trial Magistrate erred in law and facts when he misled himself by relying on the evidence of PW2 without any support of documents of agreement when PW2 alleged that the***

***Appellant sold the phone to him.***

5. ***The learned trial Magistrate erred in law and facts when he failed to consider that no exhibit was recovered from the Appellant.***
6. ***The learned trial Magistrate erred in law and facts when he proceeded in trial for 3 different files of the Appellant within the same period of time and it is against the law.***
3. The case of the Prosecution was that PW1 (John Njiru) who runs an electronic shop in Runyenjes town closed his business on 26/6/2012 at 7pm. The next morning he received a call from his brother and he went and opened the shop. He found several phones missing. He reported the matter to the police.
4. PW3 (Julius Kariuki) who works with PW1 confirmed the evidence of PW1. He also stated that when they entered the shop he saw a hole in the roof. That's when he called PW1.
5. PW2 (Linus Mwangi Samuel) testified that he is a taxi driver and the Appellant used to be his customer. On 5/7/2012 the Appellant asked him for shs.500/= and he gave him a Nokia phone as security. He gave him the money. He identified the phone as EXB1. He was arrested near Kubukubu as he was on his way to the Police Station to see the Appellant who had been arrested. He was arrested in respect of this phone (EXB1) which the Appellant had given him.
6. PW4 (P.C. NICHOLA M'MBARIO OF CID EMBU) and P.C. Njomo were assigned to trace stolen phones. They involved safaricom services. They arrested a Christine Wawira who named the Appellant.
7. They also arrested Ann Nyambura with a G-TIDE IMEL phone serial No.3587004491653 (EXB2). They learnt that she was the Appellant's wife. These two phones EXB1 & 2 were identified by PW1 as some of his missing phones. He produced receipts of purchase EXB1a and 2a.
8. In his unsworn defence the Appellant denied the charge. He stated that on 10/7/2012 he was called from Nairobi and travelled back home. On 11/7/2012 he was at his employer's place working. At 5pm he went to Embu town and while there he was arrested by two police officers who booked him for the offence of Robbery with Violence. He met PW2 in the cells when he was brought by two others.
9. He further stated that PW2 used to carry him in his taxi and had framed him for his unpaid charges. And PW2 did not produce any written document to show that he had sold him the phone. He also confirmed that he had been arrested for Robbery with Violence.
10. When this appeal came for hearing the Appellant presented the Court with written submissions. In them he has expounded on all his grounds of appeal.
11. The State through M/s Ing'ahizu opposed the appeal on the grounds that;
  - There was evidence of shop breaking
  - Two phones linked to the Appellant were recovered (EXB1 & 2). One was found with PW2 and another from the Appellant's wife.
  - The Appellant did not explain the possession.
  - His Constitutional rights were never violated.
  - NO prejudice was occasioned to the Appellant even if his other two criminal cases had been heard by the same learned trial Magistrate.
12. This is a 1<sup>st</sup> appeal Court and I am enjoined to reevaluate the evidence as a whole and come to my own conclusion. All the time I should remember that I did not have the opportunity of seeing or hearing the witnesses. The Court of Appeal in the case of ***MWANGI –V- REPUBLIC [2004]2 KLR 28*** stated the following on the duty of a first appeal Court.
  1. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate Court's own decision on the evidence.***
  2. ***The first appellate Court must itself weigh the conflicting evidence and draw its own conclusions.***
  3. ***It is not the function of the first appellate Court merely to scrutinize the evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own***

**conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.**

13. Having been guided by the above case and others, I have considered the submissions by both the Appellant and the State with the grounds of appeal. I have equally considered the evidence on record.
14. From the evidence on record the Appellant was arrested on 12/7/2012 in respect of this case and he was arraigned in Court on 13/7/2012. There is no evidence that he was in police cells for over 24 hours in respect of this case. Ground **1** therefore fails.
15. Ground **3** also fails as it is not supported by any material on record. Same goes for ground **6**. There is no record showing that the Appellant raised any issue over his three different files before the same Court. In any event even if the Court handled three of his files there is no evidence that he suffered any prejudice as a result.
16. I will merge the **2<sup>nd</sup>**, **4<sup>th</sup>** and **5<sup>th</sup>** grounds of appeal and deal with them together.
17. There was no eye witness to the shop breaking. PW1 and PW3 woke up and found the shop having been broken into and several phones missing. The evidence linking the Appellant to this offence is that of the recovery of the two phones (EXB1 & 2).
18. There are two persons who are said to have been found with the two phones.
  - The 1<sup>st</sup> one who had the phone EXB2 is said to be the Appellant's wife. That is the evidence of PW4. There is no other evidence to confirm that Ann Nyambura is the Appellant's wife and that indeed she had this phone and said it is the Appellant who gave her the phone. This kind of evidence needed corroboration as the Appellant's wife cannot be compelled to testify against him.
  - The other person who is said to have had the phone is PW2 (Linus Mwangi Samuel). The said PW2 was found in actual possession of this phone and was among the four accused persons who appeared for plea on 13/7/2012. However on 20/7/2012 the Prosecution withdrew the charge against him as they wanted to use him as a witness for the Prosecution. PW2 therefore became an accomplice witness.
19. PW2's evidence was that the Appellant gave him the phone as security for his shs.500/= which he had given to him. On the other hand the Appellant said PW2 had framed him because of money he owed him in form of taxi charges. It therefore remained the Appellant's word against that of PW2.
20. That aside when it came to PW2 being an accomplice witness, the rule of practice requires that accomplice evidence must be corroborated. In the case of **KINYUA –V- REPUBLIC [2002] KLR 256** the Court of Appeal stated the following on accomplice evidence;
  1. ***The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the aid of assessors, on the dangers of doing so.***
  2. ***Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.***
  3. ***If the Court decides that the accomplice witness' evidence, though credible, requires corroboration, the court must look for, find and identify the corroborative evidence.***
  4. ***The trial judge did not explicitly direct himself and the assessors on the nature of accomplice evidence and the weight to be given to it as required by law. However this omission would not invalidate the trial and the conviction in the circumstances of this case.***
21. In the instant case there was no corroboration of the evidence of PW2 or of what PW4 stated about Anne Nyambura. The learned trial Magistrate relied on some alleged Mpesa transaction

- between PW2 and the Appellant. PW2 stated that the Appellant sent him money (amount not stated) on Mpesa which he withdrew and took to the Appellant who paid him.
22. There was no transaction sheet from Safaricom produced in Court to confirm what PW2 was saying. The Court relying on this Statement from PW2 found him to have been truthful. The fact is that PW2 was found in possession of the phone and was even charged. He became an accomplice and any evidence from him implicating anyone else had to be treated cautiously. And that is why the rule of practice requires that it should be corroborated unless the accomplice witness is found to be a credible witness.
23. My finding is that since the Appellant was not found in actual possession of any of the two phones, any evidence trying to link him to the recoveries had to be watertight. And it could only be watertight if PW2's evidence had been corroborated. Without corroboration a doubt lingers in my mind as to the truthfulness of the said evidence.
24. A reading of the learned trial Magistrate's Judgment does not show that he applied the doctrine of recent possession to convict the Appellant. This is what he says at page 14 lines 27 – page 15 line 1;

***“Having accepted the explanation given by PW2 and rejected the first accused's defence, I find that the Prosecution has been able to prove its case beyond any reasonable as against the first accused. I find first accused guilty of the offence of shop breaking and stealing contrary to section 306(a) Penal Code and convict him under section 215 CPC”.***

25. It's clear that he found him guilty of the offence of shop breaking and stealing direct. He therefore misapplied the law to the facts presented.
26. It is also worthy to note that the offence the Appellant was charged with has two limbs i.e.,
- i. Shop breaking
  - ii. Stealing

When found guilty one should be sentenced on each limb followed with an order that the sentences run concurrently. The learned trial Magistrate sentenced him to only 3 years.

27. After evaluating the evidence as a whole I am of the view that it is unsafe to leave the conviction against the Appellant to stand. I allow the appeal and quash the conviction. The sentence is also set aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**DATED & SIGNED AT EMBU THIS 29<sup>TH</sup> DAY OF APRIL 2014**

**H.I. ONG'UDI**

**J U D G E**

**DELIVERED IN OPEN COURT AT EMBU ON 30<sup>TH</sup> APRIL 2014 ON BEHALF OF JUSTICE  
H.I. ONG'UDI BY;**

**D.S. MAJANJA**

**JUDGE**