



**IN THE HIGH COURT**

**AT HOMA BAY**

**CRIMINAL APPEAL NO. 41 OF 2013**

**BETWEEN**

**JOSHUA OUMA OUKO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 38 of 2013 at*

*Senior Principal Magistrate's Court at Oyugis, Hon. L.K. Mwenda, RM dated on 23<sup>rd</sup> May 2013)*

**JUDGMENT**

1. At the subordinate court the appellant faced two counts. The first one was that of stealing from a dwelling house contrary to **section 279 (b)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 12<sup>th</sup> January 2013 at Kawere East Sub-location in Rachuonyo District, he stole a Sonitek radio and a Nokia phone both valued at Kshs. 6,000 belonging to EAO. The second count was that of being in possession of papers intended to resemble and pass as currency notes contrary to **section 367(a)** as read with **sub-section (e)** of the *Penal Code*. It was alleged that on 12<sup>th</sup> January 2013 at Kosele Township, the appellant was found in possession of papers intended to resemble and pass as currency notes.

2. The appellant pleaded guilty to the second count and was fined Kshs. 15,000 or in default to serve 6 months imprisonment. He was tried on the charge of stealing, found guilty and sentenced to five years imprisonment. He appeals against the conviction and sentence in respect of the first count on grounds which may summarized as follows:-

- a. The learned trial magistrate erred in law in failing to establish that the circumstances of his arrest pointed to mistaken identity.
- b. That there was an error in the facts in the failure by the prosecution to avail independent or circumstantial evidence.
- c. That the learned trial magistrate lacked jurisdiction.
- d. That the learned trial magistrate's decision violated the appellant's constitutional rights to a fair trial.
- e. That the learned trail magistrate arrived at a decision that was not supported by evidence.

3. The appellant also filed written submissions to support the appeal. On its part, the State through Mr Oluoch, supported both the conviction and sentence on the ground that the same were supported by the evidence.

4. Before I consider the evidence let me deal with the issue of violation of the appellant's constitutional rights. The appellant states that he was not supplied with witness statements prior to the hearing of the case. Although the appellant is entitled to witness statements during the hearing, the appellant did not raise the issue at the hearing. I am also satisfied that he was prejudiced by the conduct of the prosecution as he was able to cross-examine the witnesses and defend himself by giving an unsworn statement.

5. The prosecution called two witnesses. PW1, the complainant, stated in her testimony that on 12<sup>th</sup> January 2013, the appellant came to her house at 7.00 pm and sought accommodation. She welcomed him and in the morning, she prepared for him water to take a bath. Thereafter, she left for her shamba. When she returned, the appellant had left and her sonitec radio and mobile phone were missing. Her neighbors told her that they had seen someone carrying a radio. She found the appellant at Kosele and reported to the police who recovered the radio and the phone and charged the appellant. PW1 provided the receipt for the radio and identified the phone which had a cracked screen. She denied that she had known the appellant previously and testified that did not buy the radio from the appellant.

6. PW2, the investigating officer confirmed that on 12<sup>th</sup> January 2013, PW 1 accompanied by members of the public brought the accused to the police station where PW1 made a report. The prosecution closed its case.

7. In his unsworn statement, the appellant denied the theft. He stated that on 10<sup>th</sup> January 2012 he sold some items to the complainant and she gave him notes that turned out to be fake. On 12<sup>th</sup> January 2012, he went to her home to confront her about the fake notes but she only stated that she was given the money by her 'chama.' He asked her to direct him Kosele where he could report the matter but upon arrival at the Police Station, he found the complainant there with the complaint about fake money.

8. This court as the first appellate court is called upon to review the evidence and evaluate and reach an independent conclusion bearing in mind it neither heard nor saw the witnesses (see ***Ngui v Republic [1984] KLR 729 and Okeno v Republic [1972] EA 32***).

9. The case against the appellant is based on circumstantial evidence as no one saw him steal the radio or mobile phone. It rested on the credibility of PW1 and the doctrine of recent possession. In ***Malingi v Republic [1989] KLR 225***, the Court of Appeal stated as follows, "*By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts, firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was ( from the nature of the item and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either stole or was a guilty receiver.*"

10. The appellant was found with recently stolen goods on the day they were stolen. The radio and the phone belonged to PW1. The appellant was required to provide a reasonable explanation as to their possession. The appellant contends that the receipt produced by PW 1 to support her ownership of her radio shows it was bought on 14<sup>th</sup> December 2012 yet in her testimony, PW1 stated that she bought it in 2002. This may be true but the appellant did not lay any claim to it or assert that it was his. Even if I exclude the radio from the evidence, the appellant did explain how he came into possession of PW 1's mobile phone which is a personal item. In his defence, the appellant stated that he sold some items to PW 1 but that she did not give him genuine notes. I find this defence incredulous as the appellant did not disclose which items he sold to PW1. In any event, PW 1's testimony that she had never met the appellant before was unshaken on cross-examination. On the whole therefore, the appellant was properly convicted on the evidence of PW1.

11. It is true that the prosecution did not call several independent witnesses to support its case. There is

no legal requirement that the prosecution call all or a certain number of witnesses to prove its case (see **section 143** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*). What the prosecution is required to do is to prove the charge against the accused and in this case the prosecution proved its case beyond reasonable doubt. I affirm the conviction.

12. I now turn to the issue of the sentence. In sentencing the appellant, the learned trial magistrate took into account that the appellant was a repeat offender having been convicted of the second charge. The general principle is that the trial court has discretion in imposing the appropriate sentence. The appellate court will only interfere where the discretion has not been exercised judiciously. It will only interfere if the trial court took into account irrelevant factors, failed to take into account relevant factors or that the sentence was manifestly harsh and excessive (see *Wanjema v Republic [1971] EA 493*).

13. In this case, I am constrained to interfere with the sentence as it was founded on the previous conviction based on the guilty plea recorded on the second count. A perusal of the record shows that after pleading guilty, the facts read to the appellant were as follows;

*PROSE: On 12.2.2013 at Kosele in Rachuonyo, the accused person was pursued on 1<sup>st</sup> count of stealing was arrested by police officers. At the police station he was searched. The police recovered 9 100 currency notes purported to be Kenyan currency. Police took possession of the papers. They were taken to Nairobi for forensic analysis. They are not in court today.*

*ACCUSED – Facts are true.*

14. It is clear that the prosecutor did not produce the forensic report which was intended to establish the genuineness or otherwise of the currency notes. The facts read to the accused could therefore not establish the offence charged in the second count. A plea that is based on facts that do not disclose an offence cannot be said to be unequivocal and therefore conviction cannot be sustained. Although, the said conviction was not appealed against and is not subject of the appeal, I am satisfied that the conviction is illegal. I therefore quash it in exercise of the powers of revision under **section 362** as read with **section 364** of the *Criminal Procedure Code (Chapter 75 Laws of Kenya)*. In view of the fact that the appellant has already served the sentence imposed for the infraction, I will not order a retrial on the said count.

15. As the sentence imposed on the first count was based on the fact that he had been convicted on the second count, it follows that the sentence has to be reconsidered. The appellant was a first offender. The items which he is alleged to have stolen were recovered. On the other hand the appellant took advantage of a lady to gain her confidence to enter into her house and steal her items. A custodial sentence was called for and I consider a sentence time served appropriate in the circumstances.

16. I affirm the conviction but allow the appeal to the extent that the sentence is varied to time served by the appellant. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY this 19<sup>th</sup> September 2014**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions, for the respondent.