



**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL NO.7 OF 2014**

**BETWEEN**

**ISAIAH OWANGE ONGORO..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 274 of 2012 at Chief Magistrate's Court at Oyugis, Hon. S.N. Makila, RM dated on 6<sup>th</sup> February 2012)***

**JUDGMENT**

1. The appellant **ISAIAH OWANGE ONGORO** was charged with another person (“the 1<sup>st</sup> accused”) with the offence of store breaking and committing a felony contrary to **section 306(a)** of the **Penal Code (Chapter 63 Laws of Kenya)**. He also faced an alternative charge of handling stolen goods contrary to **section 322(2)** of the **Penal Code**. The particulars of the charges were as follows:

***Store breaking and committing a felony***

*On the 24th day of April 2012 at Oyugis township, RachuonyoSouth District within Homa-bay County [he] jointly with another broke and entered a building namely store with intent to steal and did steal therein 17 bales of sugar (Sony) all valued at Kshs. 53,200/= the property of PM.*

***Handling Stolen Goods***

*On the 27th day of April 2012 at Oyugis township, RachuonyoSouth District within Homa-bay County otherwise than in the course of stealing [he] dishonestly retained 3 bales of sugar and six pieces of 5kgs sugar knowing or having reasons to believe that they were stolen.*

2. After hearing, the 1<sup>st</sup> accused and the appellant were acquitted on the main charge and convicted on the alternative charge of handling stolen goods. They were both sentenced to 5 years imprisonment. The appellant appeals against the conviction and sentence.
3. The prosecution marshalled six witnesses to prove its case. PW1, the complainant, testified that on 25<sup>th</sup> April 2012 when he went to close his store, he realized that 17 bales of sugar were missing. On 27<sup>th</sup> April 2012, a lady informed him that some sugar was being loaded onto a motorcycle at her place of work. He went there and met the motorcycle rider, PW2, who told him that he had been given the sugar by the 1<sup>st</sup> accused. PW1 asked the appellant whether he had any information about the sugar but he denied such information. Nevertheless he opened the door to where the sugar was stored and informed PW1 that he shared that house with the 1<sup>st</sup> accused. The 1<sup>st</sup> accused was then called and when asked about the sugar, he admitted to having it and requested to

- be allowed to pay for it in monthly instalments. PW1 took him to the police station so that they could sign an agreement on the mode of payment but on reaching there, the 1<sup>st</sup> accused denied having anything to do with the sugar.
4. PW2, the motorcycle rider, testified that on 27<sup>th</sup> April 2012, the 1<sup>st</sup> accused requested him to carry some luggage for him to the market. He testified that PW1 arrived when he was loading the sugar and asked him where he was taking the sugar. He told PW1 that he had been instructed by the 1<sup>st</sup> accused to take it to the market. He left with PW1 to meet the 1<sup>st</sup> accused. He further testified that the 1<sup>st</sup> accused initially denied stealing the sugar but he later agreed to pay for it in instalments. However, when PW1 took the 1<sup>st</sup> accused to the Police Station so that they could sign an agreement, the 1<sup>st</sup> accused denied having anything to do with the sugar. PW2 confirmed that he was with PW1 when they went to the 1<sup>st</sup> accused's premises where they met the appellant who let them in.
  5. PW3, PW1's neighbour, testified that he was with PW1 on 27<sup>th</sup> April 2012, when they found PW2 loading the bales of sugar on the motorcycle. He also went to the 1<sup>st</sup> accused house where they found the appellant who informed them that he shared the house with the 1<sup>st</sup> accused but he did not know how the sugar got there.
  6. PW4, a police officer, testified that on 27<sup>th</sup> April 2012 he was at Oyugis Police Station when PW1 brought the 1<sup>st</sup> accused on allegations of store breaking and stealing. He went to the 1<sup>st</sup> accused's residence with PW 1 and other officers. When they arrived, the appellant opened the door for them. They recovered the bales of sugar from the premises. He decided to arrest and charge the appellant as he could not account for the sugar.
  7. PW5, a shop keeper along the same street with PW1, testified that on 25<sup>th</sup> April 2012, the 1<sup>st</sup> accused approached him and told him that he had some sugar that he was selling at a price lower than the normal price. He later met a worker from PW1's shop who informed him that some sugar from their shop had been missing and that it had been traced to the 1<sup>st</sup> accused whereupon he informed PW1 that the 1<sup>st</sup> accused had offered to sell him some sugar. He stated that he knew the appellant as a tailor.
  8. When put on his defence, the appellant gave sworn testimony. He stated that he was a tailor at Oyugis and that he stored his tailoring tools in the 1<sup>st</sup> accused's shop. He said that when he found the sugar in the house, he asked the 1<sup>st</sup> accused where it was from. The 1<sup>st</sup> accused told him that he had sold a bull and bought the sugar for his wife to start a business. He testified that he opened the house for the police because he had a spare key which he used to access the house to store his tools.
  9. DW3, the appellant's witness, stated that he heard that stolen sugar had been found where the appellant stored his tailoring tools. He informed the court that he and the appellant shared the same house in Kendu Bay and that the appellant only stored his tailoring tools in the house where the stolen sugar was found.
  10. Following his conviction, the appellant has appealed to this Court and the main issue in this appeal urged by his counsel is that the learned magistrate erred in failing to consider the appellant's explanation as to possession of the bales of sugar. Mr Oguttu-Mboya, counsel for the appellant, submitted that the appellant supplied details of the house where the stolen sugar was found and said that the house belonged to the 1<sup>st</sup> accused. He argued that the appellant was a tailor and that he stored his tailoring tools in the said house thus, the appellant gave a reasonable account of the stolen sugar. In his view, these facts provided a reasonable explanation which entitled him to an acquittal. Counsel cited the case of ***Kipsaina v R* [1975] EA 253**.
  11. In opposing the appeal, Ms. Andabwa, learned counsel for the State, submitted that the necessary

*mensrea* of common possession was established from the testimony of PW2, PW3 and PW4 and that appellant failed to give a reasonable account of the stolen sugar which was found in his house.

12. As this is a first appeal, the court is enjoined to conduct an independent evaluation of all the evidence and reach an independent conclusion taking into account that it neither heard nor saw the witnesses testify (see **Okeno v Republic**[1972] EA 32).
13. In considering the appellant's defence in a prosecution for handling stolen property, the Court of Appeal in **Kipsaina v R** [1975]EA 523, has this to say, "As regards the second conviction of handing, the appellant defence was that the documents – an identity card, an employment relief card and a note book – had been left in his home by a man who had slept there one night but whose name he did not know. The magistrate rejected the defence, commenting that he found it very difficult to believe. With respect, this was a misdirection, The law in East Africa is well settled. When an accused person is charged with receiving stolen property, his guilt is not established if the explanation that he has given is one which is reasonable and might possibly be true, even if the trial court is not convinced that it is in fact true ...."
14. I have analysed the evidence in light of the broad principle elucidated by the Court of Appeal. The fact that the sugar was stolen was established by the testimony of PW1. Under **section 4 (a)** of the **Penal Code**, possession is defined as follows, "be in possession' or 'have in possession ' includes not only having one's personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person." Thus the sugar, having been found in the house occupied by the 1<sup>st</sup> accused and the appellant, was in their possession. Each of them was therefore required to provide a reasonable explanation as why they had the stolen sugar in their possession. The appellant gave an explanation that he stored his tailoring tools in the house and that when he came across the sugar, he asked the 1<sup>st</sup> accused where it came from, he was informed that he had sold a bull and bought the sugar for his wife to start a business. PW5, who ran a shop on the same street, testified that he knew the appellant as a tailor as did DW3. DW3 testified that he resided with the appellant at Kendu Bay.
15. Taking the whole evidence, I am satisfied that the appellant gave a reasonable explanation. He was a tailor and that he stored his tailoring tools in the said premises. He resided in another town. This explains why he had the key to the premises and readily opened the premises for PW1, PW2 and PW4 when they came to inquire about the sugar. The testimony of PW1, PW2 and PW3 confirms that the 1<sup>st</sup> accused initially admitted that he took the sugar and he did not implicate the appellant. On the whole the appellants conduct was inconsistent with that of someone who knew that the sugar had been stolen.
16. In light of the evidence, the learned magistrate erred in convicting the appellant on the basis that, "The 2<sup>nd</sup> accused may have simply turned a blind eye to the suspicious activities of the 1<sup>st</sup> accused person. He never raised alarm or reported to the authorities that there were goods suspected to be stolen in the house he shared with the accused person. The 2<sup>nd</sup> accused person therefore aided and abated the illegal activities of the 1<sup>st</sup> accused person and for this reason he is just as guilty of the offence of handling stolen goods." This conclusion that the appellant aided and abetted the 1<sup>st</sup> accused was not supported by the evidence. Besides, the charge against the appellant was not that of being an accessory to the theft.
17. The learned trial magistrate failed to consider the reasonable explanation given by the appellant. In the circumstances the appellant's conviction cannot be supported and is unsafe. In view of this finding it is not necessary to address all the other issues raised in the appeal.
18. I allow the appeal and quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY this 16<sup>th</sup> September 2014**

**D.S. MAJANJA**

**JUDGE**

MrOguttu-Mboya instructed by Oguttu-Mboya and Company Advocates for the Appellant.

MsAndabwa, Prosecution Counsel, instructed by the Director of Public Prosecution for the Respondent.