



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 137 OF 2013

PETER NGOVE MUSUMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court
Criminal Case No. 107 of 2012*

by Hon. R. Yator, RM on 17/9/2012)

JUDGMENT

1. The appellant, **Peter Ngove Musumbi**, the appellant herein was jointly charged with another with the offence of store breaking and committing a felony contrary to **Section 306(a)** of the **Penal Code**. Particulars thereof being that on unknown date during the month of October, 2011 at Wote Location in Makueni District of the Makueni County jointly broke into the store of **Monicah Sila**, with intent to steal therein and did steal from therein one water pump , generator make Robin KY200 valued at Kshs. 50,000/= the property of **Monicah Sila**.
2. He was tried convicted and sentenced to three (3) years imprisonment.
3. Being aggrieved by the conviction and sentence he appealed on grounds that the trial magistrate erred in law and fact by:-
 - i. Failing to observe that PW2 never produced documents in court to confirm that the machine was taken to him for repairs.
 - ii. PW2 alleged that the machine was taken to him for welding yet it had been dismantled which meant it was for repairs.
 - iii. The machine was in possession of PW2 as identified by the complainant.
4. The case as presented by the prosecution was that on the 14th day of March, 2012, PW1, **Monica Muketi** got information that her (*water pump*) machine that she lost on the 10th October 2011 had been traced. It was recovered at the workshop of PW3, **Benard Mulinge Nzioki alias Mrefu** after the police were compelled to break in. PW3 led the police to where the generator was recovered. PW3 explained that the machine was taken to him by some two (2) men to be welded and modified. He stated that they were referred to him by PW2, **Bascol Michael Kiio Nguli**. He identified the machine recovered as resembling the one the persons had. He identified them as the appellant and the person he was jointly charged with. They were arrested and charge.
5. When put on his defence the appellant stated that he encountered the police on the 8th May, 2012 while on his way from hospital. They took him to the Police Station and charged him with an offence he knew nothing about.

6. At the hearing of the appeal the appellant stated that he was not found in possession of the machine and **Mrefu** who had its custody did not produce any receipt to prove that the machine had been delivered to him for repair as alleged. There was also no proof of ownership of the machine.
7. In response thereto, **Mr. Mwangi** the learned State Counsel opposed the appeal. He reiterated facts of the case as presented by the prosecution and urged the court to uphold the conviction and sentence imposed.
8. This being the first appellate court, my duty as a court is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial court. **(See Okeno versus Republic (1972) E.A. 32).**
9. The appellant having been charged with the offence of store breaking and stealing, the prosecution had a duty of proving that indeed the store was broken into. In the particulars of the offence it is stated that the store was broken into on an unknown date in the month of October, 2011. In her testimony, the complainant stated how she got information about a machine she lost on 10/10/2011. She did not state how she acquired the machine and how it got lost. The question of ownership was crucial. This was not proved.
10. The machine that was produced in evidence was recovered from a workshop owned by PW3. At the outset, PW3 was uncooperative. He began by denying ownership of the workshop. Thereafter the police sought permission from the officer commanding the Police Station to break into the workshop. Inside was a water-pump and stand that PW1 identified as hers. The items were recovered at Kasarani. PW3 was then taken to a godown at Kamwelli towards Mwaani to a house that he personally opened. He removed a generator that PW1 identified as hers. He did not explain how he got the machine at that point in time according to PW1. It is later that PW1 came to learn that the two (2) were arrested.
11. In his testimony, PW3 stated that the machine was taken to him to be welded in November, 2011 at a cost of 450/=. Thereafter in April, PW1 went to the workshop with the police looking for the machine. He told them that it was delivered by the appellant and another.
12. It was the evidence of PW2 that the appellant and another had taken to him a whitish water pump and he referred them to PW3. When it came to identification of the machine he stated that it resembled the one before the court.
13. A machine resembling another would mean that it could have been the one stolen or not, that is why it was important for specific identification marks to be given.
14. Looking at the conduct of PW3 at the time of recovery of the machine, he had to prove that indeed the machine was delivered to his workshop by the appellant and for purposes of being welded. It was also important for PW3 to explain why he retained the machine for 5 months or thereabout.
15. Evidence of how the machine went missing having not been adduced and there having been no proof beyond reasonable doubt that the appellant is the one who took the machine identified by PW1 to PW3's workshop, it was unsafe for the learned trial magistrate to convict the appellant on evidence adduced.
16. In the premises the appeal succeeds. The conviction thereof is quashed and the sentence imposed set aside. The appellant shall be released forthwith unless otherwise lawfully held.
17. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 19TH day of DECEMBER, 2014.

L.N. MUTENDE

JUDGE