



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 55 OF 2013

TIMOTHY GITONGA MICHAEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Timothy Gitonga, (accused 1) the Appellant herein, was jointly charged with Moffat Mawira (Accused 2) in Chuka Criminal Case No. 565/2012, for the offence of breaking and stealing contrary to section 306(a) of the Penal Code. The particulars of the charge were that on the night of 22.5.2012, at Nguruki Market, Ikuu Sub Location of Tharaka Nithi County, broke and entered the bar belonging to Veronica Wangari and stole different brands of alcohol and cigarettes all valued at Ksh.5,000/-. They were found guilty and convicted and each was sentenced to serve 5 years imprisonment. It seems Moffat Mawira who was the 2nd accused has not filed any appeal. However, the appellant is aggrieved by the conviction and sentence and he preferred this appeal. The grounds upon which the appeal is predicated are found in the grounds of appeal filed in court on 8.7.2013 and further grounds filed on 24.11.2014. They can be summarized as follows:

- (1) That the prosecution failed to prove their case beyond any reasonable doubt;**
- (2) That the appellants defence was not considered by the trial magistrate;**

The appellant relied on the said grounds and prays that the conviction be quashed and sentence be set aside. The appeal was opposed. Mr. Mungai, the Learned State Counsel opposed the appeal and stated that the appellant was found in possession of the stolen beer bottles and the court should take into account that the doctrine of recent possession. He urged the court to dismiss the appeal.

This being the first appeal, it is required of me to analyse the evidence afresh and draw my own conclusions. See **Okeno v. Republic [1972] EA 32.**

Briefly, the case before the trial court was as follows:

PW1 Veronica Wangari owns Embassy Pub at Nguruki Market at Ikuu. She had employed Rachel Wanjiru, PW2 and PW3, Josphat Kariuki as bar attendants, while accused 2 Moffat Mawira was the night watchman. All the witnesses knew accused 1 as a regular customer.

PW2 recalled that she was on duty at the bar on 22.5.2012 till they closed down at 11.00 pm. She said that Accused 2 was on duty. At 11 pm she closed the window to the counter that she manned and left. On

23.5.2012, PW3 woke her up and informed her that he found the door to the bar open. They proceeded to the bar together, and found the main door open, the padlock was hanging and counter was open. She checked and found 19 Pilsner ice, 16 bottled of pilsner larger, 2 packets of super match cigarettes and one Kenya cane missing. She said that accused 2 came to the bar and claimed to have taken shelter from the rain at night; Accused 2 then asked PW2 not to report to the owner of the bar because he was willing to repay for the loss slowly; that she told accused 2 that she would tell the owner of the bar (PW1) so that they could agree but when PW1 arrived at the bar at about 10.30 am, accused 2 ran off.

PW3 recalled that he was an employee at Embassy Pub together with PW2 and accused 2 who worked as the night watchman. He reiterated what PW2 told the court but added that he manned a different counter from Rachel's (PW2). He manned the counter with a keg while PW2 sold bottled beer and that each held their own key to the counter; that after locking the counters and main door, they went home about 11.00 pm but when he reported to work next day, he got Rachel's counter open and was broken. He called PW2 who took the stock and established what type of alcohol was missing. PW3 also said that when accused 2 arrived at 9.30 am and was told of the theft, he offered to pay for the stolen items but that when PW1 arrived at the pub accused 2 ran away.

PW1 Veronica Wangari the owner of the bar confirmed that she was informed of the theft on 23.5.2012. She also confirmed the breakage in her bar and theft. She reported to Nguruki Post and at 2 pm she was called to the Administration Police where she found the two accused arrested and some beers and empty beer bottles were recovered.

PW4 Cpl. Samuel Kamau Kinoti of Nguruki AP camp received the theft report, visited the scene and confirmed the breakage and theft at the bar. With help of the public, he arrested accused 2 at Nturiri. Upon interrogation he named the appellant as his accomplice. PW4 visited appellant's house and recovered one empty bottle of Kenya cane and after further investigation, they recovered 5 beer bottles and 3 empty bottles in a nearby farm. They handed both the appellant and accused 2 to Magutuni Patrol Base. PW5 PC Edwin Korir of Chogoria Police Station received the 2 accused at Magutuni Police Post. They also received the exhibits which he produced in court.

Both accused were placed on their defence. The appellant (Accused 1) in his sworn testimony said that on 22.5.2012, he reported to his work place at 7.00 am. The work involved cleaning cow dung. He was with six others working for Ndirangu, where he stayed till 1.00 pm. They broke for lunch and resumed work till 2.30 pm when Cpl. Kinoti went there, told him "leo ni leo" (today is today) handcuffed him, and forced some people to open his house but nothing was found. He found accused 2 arrested. In cross examination, he said that on 22.5.2012 he was arrested while at home with one Dominic Kariuki and he thought it was because of a shamba.

DW2 Accused 2 opted to make an unsworn statement in his defence. He said that on 22.5.2012, he worked till 11.30 am; that a workmate took away two crates of beer which he claimed to have been told to take to another client. He was arrested at 1.30 pm and alleged to have stolen. He was beaten up and asked to accept that he was with the appellant in the commission of the offence whereas that was not true.

I have read the judgment of the trial court. From the outset, it is clear that the trial magistrate did not comply with the provisions of S169 of the CPC which provides how a judgment should be structured. The court did not summarize the evidence adduced by both prosecution witnesses and accused persons. Once the court made the introduction, it went straight into making determinations without reviewing the evidence adduced before it and analyzing it as required of it by dint of Section 169 (1) CPC. The section reads:

"Section 169 (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and reasons for the decision, and shall be dated and signed by the presiding Officer in open court at the time of pronouncing it."

The judgment did not meet the standard required of a well-structured and reasoned judgment. In fact the court did not give reasons for the decision that it arrived at.

The evidence against the appellant (accused 1) was that of an accomplice, accused 2. PW1 and 2 & 3 knew the appellant as a customer. They were not present when the bar was broken into. It is only after accused 2's arrest that he named the appellant as the person with whom he was involved in the theft. In his defence in court, accused 2 denied having been with the appellant during the commission of the offence.

According to PW4, after accused 2 named the appellant, he picked him up, escorted him to a neighbour's house where the appellant allegedly slept and PW4 recovered an empty bottle of Kenya Cane. PW2 who worked at the counter that was broken into said that one bottle of Kenya cane amongst other kinds of beers were stolen. Later on, PW2 was shown the items recovered by PW4. Although she saw the one empty Kenya cane bottle that was recovered, she did not positively identify it as the one stolen from PW1's bar. Kenya cane bottles look alike and finding one bottle with the appellant does not necessarily prove his involvement in the theft. Although the court did not specifically state it, since the accused persons were not caught red handed in the theft, they could have been found guilty of recent possession of the alcohol. For the court to find a conviction on the doctrine of recent possession the prosecution has to prove the following:

1. The stolen property was found with the suspect;
2. That the property was positively identified by the complainant;
3. That the property was recently stolen from the complainant.

See the case of **Arum V. Republic CRA 85/2005 Kisumu (2006 EA.)**

In the instant case, the property had been stolen during the night of 22.5.2012 and recovery was made on 23.5.2012. It was therefore recently stolen. However, PW1 and PW2 did not positively identify the Kenya Cane bottle as belonging to PW1. Besides, the Kenya Cane bottle was said to have been found in the appellants neighbour's house where he had led PW4 to. The said neighbor was never called as a witness nor was he called to confirm whether the appellant indeed slept there. PW4 also told the court that the two accused led them to a farm where the other exhibits 5 beer bottles and 3 empties were recovered. However, he did not specify who led to the recovery and exactly where.

As observed earlier, the appellant was arrested after accused 2 named him as his accomplice. Under section 141 of the Evidence Act, an accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.

It is however a rule of practice that the judge or magistrate has to warn himself of the danger of basing a conviction on uncorroborated evidence of an accomplice see **Karanja V. Republic (1990) KLR 589 and Ayor and Another UG (1968) 303.** In appropriate circumstances however, the court may convict on the uncorroborated evidence of an accomplice if it is convinced that the accomplice is telling the truth. (**Kinyua v. Republic (2002) I KLR 256, 269.**) In this case the magistrate never warned himself of the danger of basing the conviction on uncorroborated evidence of Accused 2 nor did he give the reasons for believing accused 2. The trial court's finding that accused was involved in the commission of the offence was not based on any evidence.

In the end, I am satisfied that the prosecution evidence was too weak to found a conviction against the appellant. The court may have been influenced by PW4's statement that he knew the appellant before and had arrested him for other offences. The appeal has merit and it is hereby allowed. The conviction is hereby quashed and the sentence set aside. The appellant is set free forthwith unless otherwise lawfully held.

DATED SIGNED AND DELIVERED THIS 11TH DAY OF DECEMBER, 2014

R. P .V. WENDOH

JUDGE

.....**For accused**

.....**For State**

.....**Court Assistant**

.....**Accused**