



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 36 of 2012

OLIVA MOSHI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and sentence in Hamisi Senior Resident Magistrate's Court, Criminal Case No.241 of 2011)

J U D G M E N T

The appellant was charged with the offence of burglary contrary to **section 304(2)** and stealing contrary to **section 279(B)** of the **Penal Code**. The particulars of the offence were that the appellant on the night of 26th and 27th June 2011 at Hamisi Trading Centre, Hamisi Location in Vihiga District within Western Province, together with others not before court broke and entered the shop of **ZADOCK OUMA** with intent to steal therein and did steal from therein one amplifier, one shaving machine, one radio speaker and 4.3m cable wire all valued at KShs.35,000/= being the property of **ZADOCK OUMA**. He was convicted of the offence and sentenced to serve five (5) years imprisonment.

The appellant's grounds of appeal are that

1. No one testified that he saw the appellant stealing the alleged items.
2. None of the witnesses testified that he saw the appellant at the scene.
3. The prosecution evidence relate to a case of handling stolen property and not burglary and stealing.
4. The prosecution did not prove its case as required.
5. Three boys who were mentioned in the prosecution evidence were not called to testify.
6. His alibi defence was rejected.

The appellant relied on his grounds of appeal. Mr. Orinda, State Counsel, opposed the appeal and submitted that the appellant was found with recently stolen items. PW2, identified the items.

The prosecution case is based on the evidence of five witnesses. **PW1, ZADOCK OUMA OCHOLA**, testified that on the 25th of May 2011 at 10.30 a.m. he was at his house when he was informed that church property had been stolen from where it used to be kept at a barber salon. He went to the salon and found

that the items including amplifier, shaving machine, speaker and cable wire had been stolen. The window of the salon had been broken into. He reported the matter to the Hamisi A.P Camp. Three suspects were arrested namely: **BUKINYA, DUGUYA** and **MENGA**. Bukinya mentioned the name of the appellant who was arrested after two weeks. PW1's further evidence is that he heard that an amplifier was being sold by the appellant. He gave the details of his lost amplifier to a friend who was to pose as a buyer. His friend went to the appellant and established that the amplifier that was being sold was that of the complainant being number 810. PW1 sent a boy and his friend who went to collect the goods but the appellant escaped. The amplifier was taken to the A.P. Camp and was produced in court.

PW2, MERCY OPUNGA, was the owner of the salon where the items were stolen. She got information about the theft and went to her salon and confirmed that the salon had been broken into. Later police called her after the amplifier had been recovered. **PW3, APC JOHN KIPTANUI BET** was based at the Hamisi DC's office. He got information about the theft on the 25th of May 2011 from **VINCENT AMBANI**. Three boys namely **DUGUYA, MENYA** and **BUKINYA** were taken to him for interrogation but they mentioned the appellant. PW3's further evidence is that the appellant was arrested on 11th of June 2011 trying to sell the amplifier and was sent to the AP Camp. The appellant was later escorted to Serem Police station. **PW4, APC CYRUS MWENDA**, was also based at the Hamisi AP Camp. On the 11th of June 2011 he was at the camp when the appellant was taken to the station by PW1 and other people. PW4 re-arrested the appellant and took him to Serem Police station.

PW5, VINCENT AMBANI, used to operate the salon. On the 26th of May 2011 he closed the salon at 7.00 p.m. and on the following morning he found that some items had been stolen. He discovered the salon window had been opened from outside. He informed PW2 about the incident. He later came to know that the appellant was arrested.

The appellant was put on his defence and testified that he was arrested by AP officers when he had gone to withdraw money from MPESA. He was taken to the AP Camp and the officers who arrested him were not called to testify.

From the prosecution evidence it is established that PW2's barber salon was broken into and some items stolen as stated in the charge sheet. The main issue for determination is whether it is the appellant who broke into the salon and stole the items. From the evidence of PW1 it is contended that the recovered amplifier was found with the appellant. It was recovered on the 11th of June 2011. Although PW1 testified that he sent informers to the appellant's place to pose as purchasers it is not established why PW1 could not send the police to go and recover the stolen items. The prosecution evidence is not clear as to how the amplifier was recovered and whether it was indeed recovered from the appellant's house. It is also clear that PW1 did not go to the appellant's house. Those who posed as purchasers were not called to testify so that they could confirm that the amplifier was found with the appellant. None of the witnesses saw the appellant breaking into the salon. It is not proved beyond reasonable doubt that the appellant was found with recently stolen items.

In the end I do find that the prosecution case was not proved beyond reasonable doubt and the appeal is merited. The appeal is allowed and the appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 31st day of January 2013

SAID J. CHITEMBWE
JUDGE