REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 80 of 2011

NZUKI MUTAMBU…….APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Criminal Case No.14/2011 by Hon. S.K. Mutai on 5/4/2011)

JUDGMENT

Nzuki Mutambu, the appellant was charged with the offence of kiosk breaking and committing a felony contrary to section 306(a) of the Penal Code.

Particulars thereof being that on the 13th day of January, 2011 at Kathima Trading Centre, Kanziku location in Mutomo District within Kitui County jointly with others not before court, broke and entered the kiosk of **Nzuki Kisilu Malei** and stole from therein one bicycle tyre, a packet of wheat flour, a bicycle free wheel, a packet of tea leaves, 75kgs of sugar, 5 boxes of batteries, 5kgs of cooking fat and 10kgs of tea leaves all valued at Kshs. 22,700/= - the property of **Nzuki Kisilu Malei**.

In the alternative he faced a charge of handling stolen goods contrary to section 322(1) (2) of the Penal Code.

Particulars thereof being that on the 14th day of January, 2011, at unknown time at Kanziku location in Mutomo District within Kitui County, otherwise than in the course of stealing, dishonestly received or retained one bicycle tyre, a packet of wheat flour, a bicycle free wheel, a packet of tea leaves, ½ Kg of sugar, a packet of salt, a bottle of lotion and 1kg or rice all valued at Kshs. 10,000/= the property of **Nzuki Kisili Malei** knowing or having reasons to believe them to be stolen goods.

The appellant pleaded not guilty. After the trial he was convicted and sentenced to serve five (5) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant appeals on grounds that the trial magistrate erred in law and fact by convicting on a defective charge sheet; not considering the fact that he(appellant) was injured by robbers; failing to evaluate evidence adduced and contradictions in evidence adduced.

At the hearing the appellant relied on his grounds of appeal.

The learned state counsel **Mr. Mukofu** conceded to the appeal. He stated that the appellant was convicted on a defective charge. It was also not clear if the lower court had convicted the appellant on the main charge or alternative count.

To prove its case the prosecution called three (3) witnesses.

PW1, **Nzuki Kisilu Malei** , the complainant closed down his kiosk at 8.00pm. At midnight he heard sounds of same breakage. He went to check only to find people taking away merchandise from his kiosk. He ordered them to stop but they declined. He shot an arrow that hit one of them. He then recovered a bicycle with items that had been taken away from his kiosk. The owner of the bicycle surrendered to the police. He then mentioned the appellant as one of the suspects. Hence his arrest.

PW2, No. 2006065838 **APC Samuel Chege** arrested the appellant. PW3, No. 91697 **Haron Yator** re-arrested the appellant, took possession of the stolen items and caused the appellant to be charged in court.

In his defence the appellant elected to give sworn evidence. He stated that on 13th January, 2011 he woke up went to the bus stage where he encountered three (3) men who demanded money from him. They stabbed him with a knife and ran away. He was taken to hospital only to be arrested by the police.

The trial magistrate analysed the evidence and found that the appellant had been positively identified as one of the persons who had broken into the complainant's kiosk. He convicted him and sentenced him to five (5) years imprisonment.

This being the first appellate court, I do remind myself of my duty to re-evaluate evidence afresh and come up with my own conclusions and inferences (vide **Okeno vs Republic [1972] E.A., also Njoroge vs Republic [1987] KLR 19.**

The main charge as drafted is kiosk breaking and committing a felony contrary to section 306(a) of the Penal Code.

The marginal note to section 306(a) of the Penal Code stipulates as follows:-

"***Breaking into building and committing a felony"***

A form of the charge would ordinarily be as provided in the second schedule to the Criminal Procedure Code

According to the schedule, Section 306 is in respect of a charge of breaking into a building and committing a felony. There is no offence such as ***"kiosk breaking"*** under that section of the Penal Code.

In the case, the court having heard the case reached a finding as follows:-

"… I find that the prosecution has proved its case of kiosk breaking and committing a felony and handling stolen property contrary to section 306(a) and 322(1) (2) respectively of the Penal Code beyond reasonable doubt against the first accused… I therefore, convict the first accused accordingly".

This renders the charge defective.

In convicting the appellant the trial magistrate did not state whether the conviction was on the main charge or alternative. It is established principle of law that where the evidence does not support the main charge the court convicts on the alternative charge if there is sufficient evidence to support the charge.

The decision of **MBO vs Republic – Criminal Case No. 342/2008** lends credence to the principle. It was held as follows:-

"…***if the main charge is not proved, either because it is defective or because the evidence on record does not support any element of the offence, the evidence does not evaporate into the air! It may be examined to see if it supports a minor cognate offence and if it does prove such offence beyond doubt, a conviction shall follow…"***

In the case however, there was no evidence to link the appellant with handling of stolen property. From the foregoing it is apparent that this was miscarriage of justice. Consequently, I do allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall be at liberty unless lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **5TH** day of **FEBRUARY, 2013.**

L.N. MUTENDE

JUDGE