



REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 167 of

ALEX MUGENDI NDWIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 633 of 2012 at the Principal Magistrate's Court at Runyenjes by HON. J.P. NANDI – RM on 13/11/2012

**J U D G M E N T**

ALEX MUGENDI NDWIGA the Appellant herein was charged and convicted of the offence of shop breaking and stealing contrary to section 306(A) of the Penal Code. He was sentenced to two (2) years imprisonment. The particulars as set out in the charge sheet were as follows;

**ALEX MUGENDI NDWIGA: On the 14<sup>th</sup> day of June 2012 at Runyenjes Township, Runyenjes East location in Embu County jointly with others not before Court 868887000434317/868887000434325, 86888700060414/868887000634641 and C-6-01 serial number 355068481241535/2355068481241543 and the cash all valued at ks.82,760/= the property of the said JOHN NZIOKI KASAMBO.**

He also faced an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. This count was not considered as he had been convicted of the principal count. And being aggrieved with the Judgment he filed this appeal raising several grounds as listed below;

- 1. THAT the learned trial Magistrate erred in both law and fact when he misled himself by relying on evidence adduced by PW2 which was not proven beyond reasonable doubts yet the said PW2 was the one who was found and booked in possession of the exhibits recovered.**
- 2. THAT the learned trial Magistrate erred in both law and fact when he failed to consider that the alleged offence before the Court was not the one that was booked in the occurrence book and during the Court proceedings the arresting officer confirmed that in Court.**
- 3. That the learned trial Magistrate erred in both law and fact when he failed to consider that no documentary evidence like agreement or receipt was adduced in Court to support whether the alleged business transaction between PW2 and the Appellant took place i.e. no document was produced being signed by PW2 and the Appellant.**
- 4. That the learned trial Magistrate erred in both law and fact when he failed to consider that there was no independent witness called before the Court to support PW2's evidence that the Appellant**

had sold the said phone to PW2.

**5. That the learned trial Magistrate erred in both law and fact when he failed to consider the fact that Appellant's fundamental rights were violated since he was retained in police custody for a period exceeding 24 hours before he was apprehended in Court.**

**6. The learned trial Magistrate erred in law and facts when he failed to consider that PW2 was found in possession of alleged phone which was booked in police occurrence book and instead of charging PW2 the alleged offence was framed to Appellant.**

**7. The learned trial Magistrate erred in law and facts when he rejected the Appellant's defence that there was grudge between the arresting officer and the Appellant in addition there was no evidence linking Appellant to alleged offence without giving reason.**

When the appeal came for hearing the Appellant presented to Court written submissions in which he reiterated his grounds of appeal. He referred the Court to the 1<sup>st</sup> report which was of Robbery with Violence. He further stated that PW2 was found in possession of the phone, and mentioned him yet there was no proof of that. He also submitted that he was taken to Court after 24 hours hence violation of his constitutional rights.

M/s Ingaidzu the learned State Counsel opposed the appeal. She submitted that the Appellant's rights were not violated as he was taken to Court within 24 hours having been arrested on night of 11<sup>th</sup> – 12<sup>th</sup> July 2012. She supported the learned trial Magistrate's reliance on PW2's evidence to convict. There was no need for documentation for this kind of transaction. She further submitted that the charge of robbery with violence was a holding charge as police carried out their investigations.

Being a 1<sup>st</sup> appellate Court I am bound to re-evaluate and reconsider the evidence adduced and draw my own conclusions without ignoring the findings and conclusions of the trial Court. I must also bear in mind that I did not have the opportunity to see or hear the witnesses. I am guided by the following cases;

**1. PADYA -VS- REPUBLIC [1957] E.A. 336**

**2. KINYANJUI -VS- REPUBLIC [2004]2 KLR 364**

**3. CHARO -VS- REPUBLIC [2007]1 EA 43**

The Prosecution called a total of four witnesses. Its to be noted that there was no eye witness to this incident. PW1 the manager of Nokia investment Runyenjes received a report on 14/6/2012 at 8.30am about the breakage. He confirmed that cash 72,000/= and some phones were missing from the shop. A report was made to the police. On 16/6/2012 at 11am PW2 was selling at the market when the Appellant approached her asking her to lend him shs.200/=. He had a phone he wanted to sell. She bargained and he sold it to her at shs.800/=. She paid him shs.600/=. On 19/6/2012 he came and on seeing four police officers he ran away.

PW3 found PW2 in possession of the stolen phone and arrested her. He does not state which date. The Appellant gave an unsworn statement in his defence and denied the charges. He said he had only visited home when he was arrested.

The Appellant raised several grounds of appeal which I will consolidate and deal with together. It is clear that the learned trial Magistrate wholly relied on the evidence of PW2 to convict the Appellant. PW2 was at her place of work at the market. For the Appellant to have approached her to lend him money they must have known each other. She however doesn't mention this. She ended up buying a phone and parting with shs.600/=. She says there were several people who witnessed this sale of the phone. The investigating officer appears not to have found it prudent to call any of these witnesses especially after the Appellant denied the charges. So how was the Appellant arrested? PW3 a police officer traced the phone to the possession of PW2. PW4 indicates that the Appellant was arrested even

before the phone was traced and before PW2 mentioned him. So who led to the arrest of the Appellant? Upon this suspicious arrest of the Appellant he was booked with the charge of Robbery with violence by PW4 because PW4 had learnt that two watchmen had been killed. Its not clear whether two watchmen had been killed at PW1's business premises or where. At page 8 line 9-12 PW4 told the court;

**“On 11/7/2012 I and P.C. Nzomo were on surveillance mission at Embu town when we received information that Alex Mugendi had sold a phone to Christine (PW2) at Kiritiri stage. We proceeded there and arrested the 1<sup>st</sup> accused (Appellant). We tracked the phone and managed to arrest PW2 with the phone. She told us it was the 1<sup>st</sup> accused (Appellant) who had sold her the phone”.**

This is very interesting investigation by a police officer. It is not clear who told him that the Appellant had sold PW2 a phone. Acting on this information he arrested the Appellant and had him charged with the offence of robbery with violence. Thereafter he went to trace the phone and arrested PW2. After arrest of PW2 the said PW2 told him it was the Appellant who sold her the phone.

At page 8 line 25-26 while under cross examination PW4 states;

**“We arrested PW2 with the phone and she told us that you were the one who sold her the phone”.**

There is nowhere on record where PW2 stated that she knew the Appellant prior to 19/6/2012. The question that begs an answer is where the Appellant was when PW2 was telling PW4 that it was the Appellant who had sold her the phone. Most likely PW4 had paraded the Appellant before her at the police station. There is no other logical answer. It was illogical for PW4 to arrest the Appellant without any evidence then go looking for evidence to pin him down. If indeed PW2 had many people who witnessed the Appellant sell her this phone how come none of them was ever called to give support to PW2's evidence? I do find that without any other supporting evidence it was not safe for the learned trial Magistrate to wholly rely on PW2's evidence to convict the Appellant.

A perusal of the record shows that the learned trial Magistrate did not record anywhere the language used in Court. In the case of **KATIKENYA -V- REPUBLIC [2007]1 E.A. 133** it was held that it was the duty of the Court to indicate the language used. According to section 197 and 198 Criminal Penal Code failure to show by demonstration the language used in criminal proceedings vitiates the trial. It's further constitutional right of the accused person to have an interpreter provided where the proceedings are being conducted in a language that the accused is not familiar with. The duty of the Court is to ensure that the interpretation is provided. This is provided for under Article 50(2) (m) of the Court.

The Court can only demonstrably show that this Constitutional Provision has been complied with if the Court's record shows that. This has been the case Ref: KIBATHA -V- REPUBLIC [2007]2 EA 245. The case of **IRUNGU -V- REPUBLIC [2008]1 EA 126** further emphasized that it is the duty of the Court to ensure that the accused's right to interpretations is safe guarded and to demonstratively show its protection.

In the these proceedings save for the date of plea where the language of interpretation was indicated there is no record to confirm the language used **EVEN** by the four witnesses, and the two accused persons in their defence.

From the foregoing discourse I do find that the conviction of the Appellant cannot be left to stand.

I allow the appeal. The conviction is quashed and the sentence set aside. The Appellant is set free unless otherwise lawfully held under a separate warrant.

The learned trial Magistrate **MUST** get a copy of this Judgment.

**DATED AND DELIVERED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF APRIL 2013.**

**H.I. ONG'UDI**  
**J U D G E**

**In the presence of;**  
M/s Ing'ahizu for State  
Appellant  
Njue C/c