



REPUBLIC OF KENYA

High Court at Garissa

CRIMINAL APPEAL NO. 56 OF 2012

APATRICK MUSEMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Patrick Musembi, the appellant, was convicted and sentenced on 4th April 2012 to serve three years imprisonment for handling stolen goods by the Mwingi Resident Magistrate. The appellant was the first accused in the lower court. He had been charged jointly with Kevin Musembi as second accused and Charles Kyalo as third accused in Count 1 of stealing from a locked motor vehicle contrary to section 279 (g) of the Penal Code. He faced an alternative charge jointly with Kevin Musembi of handling a radio and spare tyre contrary to section 322 (1) (2) of the Penal Code. There was second count of burglary contrary to section 304 (2) of the Penal Code and stealing contrary to section 279 (b) of the Penal Code jointly with Kevin Musembi and Charles Kyalo and an alternative count of handling stolen goods contrary to section 322 (1) (2) of the Penal Code jointly with Kevin Musembi. The prosecution withdrew from the record the second count.

Kevin Musembi, the second accused pleaded guilty to count 1 (Stealing from a locked motor vehicle) and was sentenced to one (1) year imprisonment. The prosecution tendered evidence against the appellant and Charles Kyalo, third accused. The latter was found not guilty after a full trial and was acquitted. The appellant was found guilty of handling stolen property, as per the alternative count.

The appellant being dissatisfied with both the conviction and sentence has preferred this appeal. In his amended petition of appeal, he has raised grounds of appeal challenging the prosecution evidence as being contradictory and insufficient; failure by the prosecution to discharge the burden of proof; failure by the trial court to consider his defence; failure to comply with section 211 of Criminal Procedure Code and failure by the trial court to consider probation report. The appellant submitted that he had gone to visit the Kevin Muthui Musembi (the appellant's co-accused who had pleaded guilty) in his house; that he found a radio on the table inside that house and that he did not know it had been stolen.

The appeal was opposed by the learned state counsel who submitted that there was sufficient and corroborated evidence to show that the appellant was found in the house where the stolen items were recovered from and that he attempted to run away while carrying the stolen radio; that the appellant did not explain how he came by the stolen radio. The learned state counsel asked the court to invoke the doctrine of recent possession as expounded in the case of Otieno Arum v. Republic in Cr. Appeal No. 85 of 2005.

The facts of this case are simple and brief. The complainant **Musili Muthisya (PW1)** parked his motor vehicle number KBH 207H Toyota Caldina outside his house for the night on 22nd August 2011. He remained indoors and about 3.00am he heard his car alarm go off. He went outside his house to check what was happening. He spotted some people running away. He made a report to the police the following day. With the police they traced footprints to the house allegedly belonging to the appellant. They found the appellant and his co-accused sleeping. The appellant was arrested as he attempted to run away while hiding the radio in his jacket.

What evidence did the prosecutor in the lower court possess? PW1 told the lower court that in the morning following the theft of his items, he reported to the police and also traced footprints to the home of the accused persons. PW1 puts the date when he parked his motor vehicle outside his house as 22nd August 2011. In his own words:

“I made a report to the police the following day. I also traced the footsteps (sic) which led to the accused’s home. I contacted policemen who went to the scene. The 2 accused were sleeping in an adjacent room. Musembi the 1st accused attempted to run away while hiding the radio in his jacket.....”

Isaac Kirimi Njeru (PW2) testified that he was asleep in his house on 21st August 2011 when at about 3.00am he heard PW1’s car alarm go off; that the following day he heard the complainant claiming that his car radio had been stolen; that he assisted PW1 in following the foot prints to a house about a kilometre away; that PW1 said he had spotted his radio inside the house. PW2 does not identify the house as belonging to the appellant or the other co-accused.

The only other witness to testify is **Police Constable Jackson Karumba (PW3)** who stated he was stationed at Mwingi Police Station. PW3’s force number is not given. He testified that the date was 21st August 2011 and the time was at 6pm when he received a report concerning breaking into a motor vehicle and stealing from therein from PW1. He gave the number of the motor vehicle as KBH 207Z. PW3’s evidence in his own words is that:

“He (meaning PW1) testified to retracing the footprints which led to the house of the accused where a radio of the car was also recovered.

The 1st accused Patrick Musembi was found hiding the car radio in his jacket pocket. The 2nd accused was also present in the house. We arrested both of them. They took us to the house next door where we recovered the spare tyre.....”

There is something in the evidence of PW3 that leaves me feeling like he was not present when the appellant was arrested. If he was present it is not clear why he should testify that PW1 retraced the “...**footprints which led to the house of the accused where a radio of the car was also recovered**” and that “**The 1st accused Patrick Musembi was found hiding the car radio in his jacket pocket. The 2nd accused was also present in the house.**” If PW3 was present, then his evidence ought to sound like evidence of a witness who was present.

Be that as it may, the evidence of both PW1 and PW3 does not agree. First the motor vehicle is quoted differently by both witnesses. PW1 says the vehicle was KBH 207H while PW3 says it was KBH 207Z. It is worth noting that according to the facts read out after a plea of guilty by 2nd accused, the same motor vehicle is quoted as number KBH 301H. Further contradictions are revealed in PW1’s and PW3’s evidence. PW1 says the appellant was arrested as he attempted to run away while hiding a car radio in his jacket. PW3 says that the appellant was found hiding the car radio in his jacket pocket. This contradiction may be minor and not fatal to prosecution case if there was strong evidence. I however find that the prosecution evidence is not strong in this regard. For instance the manner in which the appellant was

arrested is not clear. If he and his co-accused were found sleeping and they attempted to run, how did the appellant manage to take the radio from wherever it had been and hide it in his jacket or jacket pocket? Where was the radio before this happened? Was it on the table as the appellant claims it had been or elsewhere in that house? I also find evidence regarding the owner of the house not clear. Who was the owner of that house, is it all the accused persons, one of them and if so which one? The appellant told the trial court that he had gone to visit the 2nd accused (at his 2nd accused's house). He said that he found a radio on the desk in 2nd accused's house. He maintains the same in this appeal.

The evidence of PW2 is not useful as far as the ownership of the house or the recovery of the stolen items is concerned. He did not identify the house to where the footprints terminated.

I have carefully analysed the evidence of the three prosecution witnesses. As I have shown in my analysis, there is a lot left out in that evidence leading to an unanswered questions as who owned the house where the appellant and his co-accused were found; how the appellant managed to wake up from sleeping take the car radio, hide it in his jacket or jacket pocket and attempt to run away; at what stage were the appellant and his co-accused arrested, whether it was when police were present and if so which police officers were present since the evidence of PW3 casts doubts as to his presence during such arrest; what time of the day were they arrested?

With more questions than answers, I agree with the appellant that the evidence is contradictory and insufficient. Insufficient and contradictory evidence as indicated leads to the conclusion that the prosecution in the lower court failed to discharge its mandate of proving the case beyond all reasonable doubt. I have also considered the appellant's claim that the trial court did not comply with section 211 of the Criminal Procedure Code. It is true the record does not show this was done. However, I tend to think that the court may have explained the requirements of the section to the appellant and his co-accused for them to choose to tell the court that they would give unsworn statement with no witnesses. The above notwithstanding I fault the trial magistrate for the casual manner in which he handled the case. Courts of law ought to be managed in a manner that shows that the judicial officer is and has been alert all through the trial that she/he is handling a case that impacts on the rights of individuals. This calls for great care and attention to detail to ensure justice is done to both the accused and the complainant and is seen to have been done.

In conclusion, the evidence in the lower court is not sufficient to persuade this court, sitting on appeal, to uphold the findings and conviction of the trial court. I find the evidence insufficient and contradictory. The burden of proof has not been discharged and I will give the benefit of the doubt to the appellant. The consequence of this finding is that this appeal is hereby allowed, the conviction quashed and the sentence set aside. The appellant shall be set free forthwith unless for any other lawful reason he is being held. These are the orders of this court.

S. N. MUTUKU

JUDGE

Signed, dated and delivered this 12th day of April 2013 in open court in the presence of the Appellant and Mr. Mulama for the State.