



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 18 OF 2011

*(Being an appeal from the conviction and sentence of E.H Keago, SRM delivered on 16th March.2011
in Busia SRMCR Case No.227 of 2011)*

PETER OCHIENG BWIRE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Peter Ochieng Bwire, the appellant herein was convicted after full trial by the Senior Resident Magistrate, Busia on the charge of **Stealing** contrary to **Section 275** of the **Penal Code**. The particulars of the offence were that on 22nd February 2011 at Busia law courts within Busia County, the appellant stole one mobile phone make Nokia 1110 valued at Kshs.2,000/-, the property of Omulemi Joseph. The appellant pleaded not guilty to the charge. He was sentenced to serve four (4) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred before this court this appeal. He raised three (3) grounds of appeal. He faulted the trial magistrate for convicting him despite the fact that the alleged stolen phone was not found in his possession. He faulted the magistrate for not considering his defence. He took issue with the fact that the trial magistrate had failed to take into consideration his mitigation before sentencing him to serve the custodial sentence.

This being a first appeal, it is this court's duty to subject the evidence adduced at the trial to a fresh and exhaustive scrutiny. In **KINYUA VS REPUBLIC [2003] KLR 301** at page 303 the court held as follows:

“In OKENO VS REPUBLIC (1972) EA the predecessor of this court made the following observation as regards the functions of the first appellate court;

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PADYA VS REPUBLIC (1957) E.A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (SHANTILAL M. RUWALA VS. REPUBLIC (1957) E.A 570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence in support of the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses

(See *PETERS VS SUNDAY POST*, (1958) E.A 424)."

During the trial, the prosecution called four (4) witnesses in support of its case. After the close of the prosecution's case, the accused was placed on his defence. The prosecution's evidence before this court was that on 22nd February 2011 PW1 Omulemi Joseph, the complainant, together with the appellant and other accused persons were being held at the cells Busia Law Courts while waiting to attend court. While in the cells, the appellant stole a Nokia 1110 phone from the complainant. He then ran with it to the toilet. The complainant attempted to get back his phone but the appellant hit him with his fist. It was then that the complainant screamed. PW2 Samuel Mutoto was among the persons held at the cells at the material time. He confirmed that the appellant had the phone and that the appellant had removed the sim card from the phone and refused to return it to the complainant.

The screams of the complainant alerted PW3 PC Julius Kioko, a police officer assigned to the said cells as a court orderly. He entered the said cells and found the complainant screaming that his phone had been stolen. The complainant pointed the appellant as the person who had stolen his phone. He conducted a search for the phone in the cells but he was unable to find it. PW3 then escorted the appellant to Busia Police Station. PW4 PC Robert Nyangau booked the complaint at the police station and recorded statements from the complainant and PW2. He relied on the statements of the complainant and PW2 to charge the appellant.

When he was put on his defence, the appellant stated on oath that on the material day he heard noise from other cells. He stood up to see what the commotion was all about. He was surprised when the complainant and himself were taken to the police station. He shocked to be charged with the present offence which he knew nothing about. DW2 Ali Wanja testified that he only saw the court orderly call the appellant and was later informed that the appellant had been booked for the offence.

In its judgment, the trial court stated thus:

"The accused's explanation on the charge is a mere denial. He has not dislodged the direct evidence of PW1 and PW2 who were all remandees with him... it is clear in my mind that the complainant had a phone and when it was taken away by the accused he screamed to attract the attention of the security. He could not have screamed if no wrong had been done to him... I have no reason to doubt their testimony and I'm satisfied beyond doubt that the offence has been proved beyond a shadow of doubt."

The appeal came up for hearing before this court on 7th November 2012. The appellant submitted that on the material day he had a fight with the complainant's brother in the cell and that as they fought the complainant raised false alarm that he had stolen his mobile phone. On his part, Mr. Kelwon, the learned state counsel submitted that the prosecution had proved the appellant's guilt beyond any reasonable doubt. He argued that the trial court was correct in rejecting the appellant's version of the events.

On this court's re-evaluation of the evidence, this court observed that the appellant gave two contradictory versions of events at the trial and at the hearing of the appeal in regard to what transpired at the said cells. At trial, the appellant testified that he heard screams from another cell. That is when he stood up to find out what was happening. He was surprised to be arrested and subsequently charged with the present offence. There was no mention of any phone at this point. During the hearing of the appeal, the appellant submitted that on the material day, he was involved in a fight with the complainant's brother where upon the complainant falsely accused him of having stolen his phone.

The prosecution proved its case to the required standard of proof beyond reasonable doubt that indeed it was the appellant who stole the mobile phone from the complainant. There was no reason why the complainant could falsely accused the appellant for stealing his phone more so within the precincts of the court. This court agrees with the trial magistrate's finding that the appellant's defence is not believable and constitutes mere denials. The complainant was a stranger to the appellant and he did not therefore have a reason to frame him with the offence.

In view of the foregoing, this court is satisfied that the charge of **Stealing** contrary to **Section 275** of the **Penal Code** that was laid against the appellant was proved to the required standard of proof beyond any reasonable doubt. The appellant's appeal on conviction is hereby dismissed. As regards sentence, taking into consideration the value of the property that was stolen, this court is of the considered view that the period which the appellant has been in prison is sufficient punishment for him. This court therefore commutes the sentence of the appellant to the period already served. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 31ST DAY OF JULY 2013.

F. TUIYOT

JUDGE