



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 22 OF 2013

(Appeal arising from the original conviction and sentencing of the Principal Magistrate's Court Maseno in Cr. Case No. 273/2011 – Hon. J. Ongondo – SRM)

JEREMIAH IMBITSI OCHAYOAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

INTRODUCTION

This is an appeal from the judgment of J. Ongondo SRM Maseno dated 25/2/2013 whereby the appellant was convicted and sentenced to 2 years imprisonment for the offence of handling stolen goods. The issue for determination in this appeal is whether the offence was proved beyond reasonable doubt against the appellant. This court is of the opinion that the conviction was not sustainable.

BACKGROUND

the appellant was charged jointly with Jackson Punga Ameya (second accused) with the offence of house breaking and stealing contrary to Section 304 of penal code. The particulars of the offence were that between 22/1/2011 and 3/3/2011 at unknown time at Ebukhaya sub-location in Emuhaya District, the appellant and second accused broke and entered the dwelling house of Pius Akunda Chitwa with intent to steal and did steal therein one mattress, Banco Spring bed, 15 second iron sheets, one blanket, a Masai sword, two sacks of dry maize and assorted clothes all valued at ksh.30,00, property of Pius Akunda Chitwa.

Alternatively, the appellant was charged with handling stolen goods contrary to Section 322 of the penal code. The particulars of the offence were that on 3/3/2011 at 22.00hours at Ebukhaya sub location at Emuhaya District the appellant otherwise than in the course of stealing dishonestly retained one blanket, one Masai sword and two small sacks of dry maize knowing or having the reason to know that to be stolen or unlawfully obtained. The appellant and second accused denied the charges and the prosecution called five witnesses to support the charges.

PROSECUTION CASE

Pius Akunda Chitwa (PW1) left for Kisumu on 22/1/2011 and left the second accused taking care of his house. He gave the second accused the key to the house and a mattress to sleep on it at the living room. The PW1 returned home from Kisumu on 3/3/2011 at 1330 hours only to find the main door of his house open and the bedroom door broken.

Two mattresses, 2 trousers, 3 shirts, 5 pair of socks, somali sword, 1 blanket and spade were missing from the master bedroom. In addition, 2 sacks of maize, 15 iron sheets, 26"bed", 1 drum and 1 wire mesh were missing from the second bedroom. The second accused was nowhere. The PW1 telephoned the chief who send the assistant chief and police officer who inspected the house and promised to investigate the matter.

On the same day at 10.30pm an administration police officer called the PW1 to the appellants house where the assistant chief and 2 other Aps were. PW1 identifies his somali sword, blanket and 2 debes (jericans) of maize. He believed that the maize was his because nobody had harvested maize in the area. He identified the blanket by a portion eaten by rat. On cross examination PW1 confirmed that in his statement at the police he did not record that the blanket was damaged by a rat.

Mary Gladys Omulala Chitwa (PW2) is the wife of Pw1. On 22/1/2011 she went with PW1 to Kisumu where they stay. They left the second accused taking care of their house. When they returned home on 3/3/2011, they found the house open and the bedroom door broken. The second accused was not present and several things were missing including 1 mattress, 2 dresses, 2 trousers, 5 pair of socks, 1 bed, 2 sacks of maize, 15 iron sheets, 26'blankets and 1 sword. A report was made to the chief who send administration police officers to the scene.

On the same day at 10.30 pm the village elder came for PW1 and returned with the village elder and the chief. She identified a blanket, somali sword and maize. Jackson Isiah Muliatsi (PW3) is a village elder for mwitukho village. On 3/3/2011 accompanied the assistant chief and 2 Aps to the appellants house whee they found the appellant asleep in his bedroom, a boy sleeping at the sitting room. They recovered maize in sack, Maasai sword and blanket. PW3 went for the PW1 who came and identified the said items as his property. The police then arrested the appellant.

On cross examination PW3 confirmed he saw the recovered items at the sitting room and that PW1 identified the blanket using a portion eaten by a rat. Joyce Owando odaka (PW4) is the assistant chief for Ebusibi sub-location. On 3/3/2011 at 3pm she received report of the PW1's case from the area chief. She visited the home of PW1 with the Senior village elder and noticed the main door of the house was intact but the bedroom and kitchen doors were broken. He recorded the items stolen and proceeded with investigations. They arrested 5 suspects including the appellant. They found blanket and panga inside the appellants house and maize at his sitting room. They arrested the appellant after PW1 identified the items as his.

On cross examination PW4 confirmed that they recovered a blanket, little maize and somali sword from appellant house. PW4 also confirmed that they recovered nothing from the second accused.

Robert Kisilu (PW5) was on duty at Luanda police station on 4/3/2011 at 9.30am when the appellant, second accused and 3 other people on allegation of house breaking. PW5 recorded statements from witnesses and took as exhibits 1 blanket, Maasai sword and maize in a sack which he produced as exhibits. PW5 interrogated the 5 suspects and released 3 but charged the appellant and the second accused.

On cross examination, PW5 said that the PW1 identified the blanket because it was torn as at corner. After hearing the prosecution case, the trial court found the appellant and th second accused with a case to answer and put them to their defence.

DEFENCE CASE.

The appellant gave a sworn defence denying the offence. On 3/3/2011 at 9.00 p.m. he was at home

chatting with his wife when police officers accompanied by village elder came to his house and searched his two bedroomed house. They said they were looking for brew and when they found none they demanded for money or else frame charges against him. They took away his household goods and told him to go for them at the chiefs office Omukuzi. The appellant went the said office the following day but never got the items and instead an AP took him to Luanda police station. He was later charged in court. On cross examination, the appellant said he had no wife. He further admitted to having a pending case of robbery with violence.

The second accused gave unsworn defence and called his mother as his witness. He denied the offence charged and maintained that he always slept in his mothers house.

Christine Amenya (DW2) is the mother of the second accused. She confirmed that the second accused was arrested while sleeping in her house where he always slept. She confirmed that the second accused never slept elsewhere except her house. On cross examination, she confirmed that the PW1 was cousin of her late husband and stayed in Kisumu. She denied that the second accused was staying in PW1's house.

After hearing the whole case the trial court acquitted and the second accused of the main charge but convicted and sentenced the appellant to 2 years imprisonment for the alternative charge of handling stolen goods. The appellant was aggrieved and brought this appeal.

GROUND OF APPEAL

1. THAT the trial magistrate erred both in law and facts by accepting the evidence of PW1 yet the exhibits were not all before court on material day of hearing.
2. THAT the trial magistrate erred both in law and facts since PW1 did not mark all the exhibits in court.
3. THAT PW2, complainants' wife did not prove all the exhibits that were before court.
4. THAT PW3 (assistant chief) did not prove in evidence that the exhibits belonged to PW1.

APPELLANTS SUBMISSIONS

The appellant submitted that there was no sufficient evidence to support the conviction. The PW1 allegedly lost 2 sacks of maize yet only 2 debs (jerricans) were found in the appellants house. PW1 and PW2 never indicated in their statements any identification marks on the stolen items and therefore the items recovered from the appellant were not positively identified.

RESPONDENT REPLY

Mr. Magoma learned state counsel opposed the appeal. He submitted that there was sufficient evidence to support the conviction. He pointed out that property belonging to the PW1 was recovered from the appellants house by PW4 of which the appellant failed to explain how he came into possession thereof.

The PW1 and PW2 identified the items as their own including a Somali sword, blanket and debes (jerricans) of maize. Mr. Magoma relied on **CRA NO. 82 OF 2004 CHRISTOPHER RABUT VS R** in which the court of Appeal dealt with the doctrine of recent possession.

ANALYSIS AND DETERMINATION

Under Section 322(1) a person handles stolen goods if (otherwise than in the cause of stealing) knowingly or having reason to believe them to be stolen goods dishonestly receives or retains the goods or dishonestly undertakes or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

In the present case, the appellant was found with the said items in his house. He was with a young

person in the same house sleeping when the PW4 visited his house. To prove the offence against the appellant a few questions needed to be answered by evidence. Firstly, who was in possession of the items recovered? Secondly, was ownership of the items established? Lastly, were the items recovered listed in the particulars of the offence?

Who had the possession of the recovered items?

The PW4 and her team never prepared any inventory of the goods recovered from the appellants' house. The appellants talked of household goods which they never recovered. Failure to prepare the inventory weakened the prosecution case in view of the defence submissions that other goods were taken away.

In addition to the foregoing there were two persons in the house and any of the two could have been the one responsible for the custody of the goods. Charging one and leaving the other was fatal to the charge. The burden of proof was on the state to prove possession before the appellant became liable to explain the possession. In the alternative the state should have jointly charged the two persons found in the house to avoid any doubt. To that extent the element of possession was not proved against the appellants and the appeal succeeds.

The precedent cited by the learned state counsel is not relevant in this appeal because we were not dealing with the main charge of housebreaking and stealing here but the alternative charge of handling stolen goods.

Was ownership of the recovered goods proved?

The items recovered were a Somali sword, a blanket and maize in debes (jericans). The PW1 and PW2 never mentioned to the police or any one before recovery of the items any special identification marks on the stolen goods. It is only after recovery of the blanket that the PW1 mentioned a portion eaten by a rat. No special identification mark was on the maize except the PW1's allegation that there was no person who had harvested maize in the area at the time.

As regards the Somali sword, the PW1 merely pointed at it saying there were markings on it which he did not state what they were. The appellant never stated that the said 3 items were his. He only stated that household goods were carted away and therefore he was arrested when he went to pursue them. The prosecution did not have any concrete proof that the goods produced as exhibits and allegedly recovered from the appellant were actually belonging to the PW1. There was no proper description like colour or size of the blanket or material used to make it or even the manufacturer. A mere destruction by a rat on one corner was not a unique identification mark limited to the PW1 alone. In any case that was an act of God which can happen to any other person in the same village.

As regards the maize, the lack of harvest in the area at the time did not mean that other people did not own maize. In any case the stolen sacks were not found in the appellants' possession. This court therefore finds that the issue of ownership was not proved in favour of the PW1. The goods could not be of certainty said to belong to PW1.

Where the items recovered included in the particulars of the offence

The items listed in the particulars of the offence included one blanket, one Maasai sword and two small sacks of dry maize. PW1, PW2, PW3 and PW4 said they recovered a Somali sword, 2 debes of maize and a blanket. The Maasai sword and 2 small sacks of maize were not part of the recovered goods. The charge and the evidence are therefore not supporting each other.

Consequently this court finds that there was a ray of doubt running through the prosecution case. Accordingly the trial court fell into error by convicting the appellants in the circumstances.

DISPOSITION

The appeal is therefore allowed and the appellant set at liberty forthwith unless otherwise lawfully held.

Signed dated and delivered this 21st day of November 2013

ONESMUS MAKAU

JUDGE