



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 61 OF 2013

*(Appeal arising from the original conviction and sentencing of the Senior Resident Magistrate's Court
Tamu - Hon. M C Nyigei – Resident Magistrate)*

MICHAEL ONYANGO NYAUNDIAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

BACKGROUND

The appellant was charged with 5 court as follows: count one was burglary contrary to Section 304(2) and stealing contrary to Section 279(b) of the penal code. The particulars of the offence were that on the night of 29/7/2012 at Muhoro Township Muhoroni District, the appellant with others not before the court broke and entered the dwelling house of Irene Kimunto with intent to steal therein and did steal therein one TV set make LG S/No. 90751PLIL280, one DVD Sonny DV 480 S/No. 909TCHE 339089, three Remote controls, KCPE, KCSE and medical certificate all valued at kshs.15000, the property of the said Irene Kemunto.

In the alternative he was charged with the offence of handling stolen goods contrary to Section 322(1) (2) of the Penal Code. The particulars of the offence are that on 30/7/2012 at Kiptet Township of Kericho District, the appellant otherwise than in the cause of stealing dishonestly retained one TV make LGS/No. 9075PLIL 280 knowing or having reason to believe it to be stolen goods.

Count two was burglary contrary to Section 304 and stealing contrary to Section 279(b) of the penal Code. The particulars of the offence are that on the night of 29/7/2012 at Muhoroni Township Muhoroni District, the appellant with others not before the court broke and entered the dwelling house of Betty Omae with intent to steal therein and did steal therein one TV set make LG S/No. 0019TNU0087, one DVD make Armco S/No. DX800Ac3195, one sonny Radio and one fan make Vestpour all valued at kshs.22,515/ the property of the said Betty Omae.

In the alternative he was charged with the offence of handling stolen property contrary to Section 322(1) (2) of the penal Code. The particulars of the offence were that on the 30/7/2012 at Kiptet Township of Kericho district the appellant otherwise than in the cause of stealing dishonestly retained one DVD make Armco S/No. DX800Ac 3195 knowing or having he reason to believe it to be stolen goods.

County three was being in possession of ammunition without firearm certificate contrary to Section

4(2) (a) read with subsection 3(a) of the firearms Act Cap 114 laws of Kenya. The particulars of the offence were that on 30/7/2012 at Kipstet Township of Kericho District the appellant was found in possession of 2 rounds of 7.62mm ammunition without holding a firearm certificate in force at the time.

Count four was possession of public stores contrary to Section 324(2) as read with Section 36 of the penal Code. The particulars of the offence were that on 30/7/2012 at Kipstet Township Kericho District, the appellant was found in possession of public stores namely one black beret, and head budge christened Harambee of the provincial administration, such property being reasonably suspected to have been stolen or unlawfully obtained.

Count five was handling suspected stolen property contrary to Section 323 of the Penal Code. The particulars of the offence were that on 30/7/2012 at Kistat Townahip in Kericho district, the appellant having been detained by Inspector Geoffrey Muchai and corporal Douglas Nyange as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure Code, the appellant had in his possession one carpet, pair of black shoes, amplifier, sony speakers, window curtains, pliers, screw driver, one metallic chisel and makers reasonably suspected to have been stolen or unlawfully obtained. The appellant denied the offences and the prosecution called 5 witnesses in support of the charges.

PROSECUTION CASE

Irene Kemunto (PW1) went to Kisii on 27/7/2012 and returned to Muhoroni on 30/7/2012 at 8.00am. She found that her door had been broken into and goods stolen including LG TV and a suitcase containing personal documents. She went to record statement with the police and in the following day she was called to the police to identify some recovered goods. She identified the TV.

Hesborn Odhiambo (PW2) was travelling to Kipstet with Assistant chief Raymond Mbogo at 4.30pm. At the junction they saw a motorbike carrying a passenger who was holding a big carton. They got suspicious and trailed the bike upto Kipstet where they stopped the bike and found that the carton held by the passenger contained a LG TV and DVD. They arrested the passenger and took him to Muhoroni police station together with the TV and DVD. The passenger arrested was the appellant herein.

Charles Raymond Mbogo (PW3) is the Assistant Chief Muhoroni East sub-location. On 30/7/2012 at 4pm he was travelling to Kipstet from Muhoroni town with Hesborn Odhiambo in council's vehicle. While at Kogute he spotted a motorbike with a passenger (appellant) holding a carton and carrying a bag on his back. PW3 became suspicious because he knew the appellant as a petty thief. PW3 had also received information about stolen items at Muhoroni. They followed the motorbike to Kipstet Centre where it stopped and PW3 checked the carton and found LG TV and Remote control for Armco. He called Muhoroni police station and confirmed that the TV was among the stolen goods. PW3 arrested the appellant and took him back to Muhoroni police post where a search was done on the appellants bag. A black baret for D.O, jungle jacket and a set of master keys were found in the appellants bag. PW3 accompanied police during a search at the appellants house at kipstet where the recovered a pair of black shoes, 2 blanket, a PVC carpet, fliers, amplifier and speaker.

Fred Juma Okello (PW4) operated motor cycle KMCW 555G. on 30/7/2012 he was hired by the appellant to transport him from Muhoroni factory junction to Muhoroni town and back. At Muhoroni town the appellant went to a shop and picked a carton and returned to the junction but then the appellant requested PW4 to take him to Kipstet. After agreeing on the fare, the appellant disappeared and returned with the carton packed with items and also a bag on his back. On the way he saw the PW3 in a councils vehicle trailing them and the appellant became restless. The motor vehicle followed them hooting and he stopped the bike at the request of the appellant. The chief searched the appellants carton and saw a TV. He arrested the appellant and released the PW4.

Inspector Geoffrey Muchai (PW5) was in charge of Muhoroni police post. He received report of burglary on 30/7/2012 and notified the area Assistant Chief (PW3). The the same day in the evening PW2 and PW3 called him and stated that they had intercepted a motorcycle ferrying a TV and DVD in a carton whose description matched those of the stolen goods. The PW3 and PW2 brought the appellant to

the police post.

Afterwards PW5, PW3 and others accompanied the appellant to his house at Kipstet where a search was done after the caretaker of the premises confirmed that the house belonged to the appellant. They recovered from the appellant's house a chiefs helmet, Mattress, 2 bicycles, a jungle jacket and other items which PW5 produced as exhibits. On cross examination PW4 stated that they took the other items from the appellant house because there had been a spate of burglary in the area. He however confirmed that the appellant had not been brought to the police before 30/7/2012. After the close of the prosecution case, the court found that t the appellant had a case to answer and put him to his defence.

DEFENCE CASE.

The appellant denied the charges. He stated that he was a scrap metal dealer and stays at Kipstet. On 29/7/2012 he brought copper wire at the Kodoka from Arwa. He put it in a sack and tied it on his mountain bike and rode towards Kipstet. On the way he was stopped by the PW3 with other persons and was taken to police station where he was locked up in a cell.

The following day 30/7/2012 he was taken to his house none of the alleged stolen goods were recovered from the appellant's house. A police officer then removed bullets from his own pocket and called others to see. On 31/7/2012, a car brought mattresses, star wheel spanner among others allegedly from the appellants house but he denied that he had any other house in Muhoroni except the only house at Kipstet.

He blamed his arrest and charges to the grudge between him and the PW3. He maintained that he was already in the police custody when the offenses were committed. When the trial court called for the OB book for 29/7/2012 and 30/7/2012, it was confirmed that the appellant was arrested on 30/7/2012 at 21.45 hours. After the close of the hearing the trial court dismissed count 1 (main charge) and 2 but convicted the appellant on count 1 (alternative charge), 3,4 and 5 and sentenced the appellant to 3 years, 10 years, 1 year and 1 years for count 1,3,4 and 5 respectively. The sentences were to run concurrently. The appellant was aggrieved and brought this appeal.

GROUND OF APPEAL

1. THAT the learned trial magistrate erred in law in not taking into account that the investigations were carried out at Kipsitet in Kericho County where the recovery of the said exhibits was made but the appellant never faced the charge before Kericho Law Courts.
2. THAT the learned trial magistrate erred in law in not taking into account that every criminal offence is triable within the court of jurisdiction.
3. THAT he learned trial magistrate erred in law in not taking into account that count 3 of the said original charge ought to have been corroborated by more than two witnesses if the public members were present.
4. THAT the learned trial magistrate erred in law in not taking into account that neither photography nor dusting was conducted.
5. THAT the learned trail magistrate erred in law in not taking into account that I was arrested out of the place of recovery and the recovered items could have been planted there by a different person.
6. THAT the cause of action arose at kipsitet township within Kericho county beyond the jurisdiction of the trial court.
7. THAT the learned trial magistrate erred in law and fact in not taking into account that counts 1 and 2 and their alternatives ought t have been preferred separately due to different items claimed, scenes of crime, time of occurrence and complainants to avoid mixing up of evidence.
8. THAT the learned magistrate erred in law and fact in not taking into account that counts 3,4 and 5 ought to have been preferred separately on the basis of jurisdiction with refer to scene of recovery which was at Kipsitet in Kericho county.

APPELLANT'S SUBMISSIONS

The appellant submitted that the charge was defective because count one and two improperly incorporated both the main offence of burglary and theft with the alternative offence of handling of stolen goods. He further submitted that the court which tried him had no jurisdiction because the arrest and the recoveries were made within the jurisdiction of the Kericho magistrate's court. He further submitted that the PW3 who was present during the search of the appellants house did not mention bullets as some of the items recovered.

He also took issue with the failure by PW2 and PW3 to state the registration number of motor bike he was traveling on. He also contended that the PW4 only recorded his statement with the police on the day he came to testify in court.

RESPONDENTS REPLY

Mr. Magoma, learned state counsel opposed the appeal. He submitted that the offences were committed in Muhoroni but recoveries made in Kericho. He submitted that the trial court had jurisdiction to entertain the case. The PW2 and PW3 arrested the appellant and recovered a TV and DVD player which were positively identified by PW1 as her stolen property. A further search of the appellant bag yielded a beret for a D.O, Jungle jacket and master keys.

PW4 confirmed that he transported the appellant from Muhoroni to Kipstet carrying a packed carton and a bag on the day the appellant was arrested by PW2 and PW3. The learned state counsel submitted that all the recovered goods were produces as exhibits and the appellant failed to justify his possession of the same. The bullets were confirmed by a report prepared by a ballistic expert.

According to the learned counsel, there was reasonable believe that the goods found in the possession of the appellant were stolen goods.

ANALYSIS AND DETERMINATION

The issues for determination are

1. whether the trial court had jurisdiction to hear the case.
2. Whether the charge in count 1 and 2 were defective.
3. Whether the charges were proved beyond reasonable doubt.
4. Whether the sentence ought to be reviewed.

In answer to the first issue, Section 3(2) of the Magistrate Court Act Cap 10 laws of Kenya provides that a Resident Magistrate court shall have jurisdiction throughout Kenya. No provision in the said Act bars a resident magistrate's court from entertaining cases which involve crimes partly committed within their local limits and partly outside the said courts local units. No authority either was cited to support the appellants submissions on the issue of jurisdiction.

As regards the second issue, the learned state counsel did not say anything in reply. However, this court does not see anything wrong with the main charge and the alternative charge being charged under one count as it happened to the first and second count in this case. There was also no prejudice demonstrated by the appellant which resulted from such a charge. The allegation of defects in the charge is therefore dismissed.

As regards the third issue for determination this court agrees with the trial court that there was no evidence whether direct or circumstantial to support conviction for the main charge of house breaking and stealing under the first count. The court however is satisfied that conviction for the alternative charge of handling stolen goods under the first count was in order. The PW1 positively identified her TV set which was found in the possession of appellant while en route to Kipstet township. PW2,3 and 4 confirmed that the TV was in the possession of the appellant. This court agrees with the acquittal of the appellant with regard to count 2.

Count 3 was with respect to possession of ammunition without firearm certificate. There was no ballistic expert called to testify in court. The appellant being unrepresented by counsel was not able to appreciate some of his rights to fair trial and as such the trial court ought to have explained to him his right to object to the report. In this case no reason was given why the ballistic expert's report could not be produced by the maker. The production of the report marked exhibit 17 was therefore in violation of the rules of evidence and the lapse will be resolved in favour of the appellant.

As regards the fourth count of possession of public stores, the court is satisfied that sufficient evidence was adduced by PW2, PW3 and PW5 to sustain a conviction in the absence of any reasonable explanation by the appellant. The record is clear that no explanation was tendered by the appellant's during his defence before the trial court. The conviction was therefore in order.

Lastly count 5 dealt with the offence of having suspected stolen property. The reason for the charge was that the appellant did not produce receipts for the items which were found in his house. No one had reported the items as having been lost or stolen and no one showed up to claim them. The question that arises is whether in normal circumstances people keep receipts for all their items in the house. This court finds that no reasonable person would keep receipts for each item in their houses and such obligation would be too heavy to bear. Consequently there was no basis to suspect that all the goods in the appellant's house were stolen goods otherwise such suspicion would be unreasonable. The charge was not proved beyond reasonable doubt. The conviction on count 5 was not safe in the circumstances. It is not only draconian but also a bad precedent to allow every one without a receipt for the household goods to be jailed.

DISPOSITION

Consequently, and in view of the above reasoning, the conviction and sentence in respect of count 3 and 5 is quashed but the conviction and sentence for count 1 and 4 by the trial court is affirmed.

Signed and dated this 21st day of November 2013

ONESMUS MAKAU

JUDGE

Delivered this 21st day of November 2013

ONESMUS MAKAU

JUDGE