



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
HCCRA NO. 33 OF 2012

PETER MWISUKHA }
MOSES MWISUKHA }APPELLANTS

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence of M. L. Nabinya RM, at Butali SRM's Court, Criminal Case No. 117 of 2011)

JUDGEMENT

The appellants herein Peter Mwisukha and Moses Mwisukha were charged before the CM's Court Kakamega with the offence of stealing contrary to Section 275 of Penal Code. Particulars of the offence are that on 27th day of February 2011 at 8.30 hours at Manda area, Manda Sub – Location, Silungai Location, within Kakamega North District in Western Province stole AE1 Canon camera valued at Ksh 22,000/= passport photographs and cards of Kshs 9,500/=, the property of Richard Ouma Ododa all valued at Kshs 31,500/=.

The appellant faced another charge of assault contrary to Section 251 of Penal Code of which they were acquitted. The prosecution led evidence and called 5 witnesses. The prosecution evidence was that the complainant in this case was hired by PW3 a brother to the appellants to come and take some photos on their land. As the complainant was taking these photos, the appellants and another attacked him injuring him and also snatched his camera and also stole some money from him. The complainant reported this matter to the area chief and later to the police station. He was also treated at Webuye District hospital and the doctor who treated him gave evidence and also produced his P3 form as evidence. At the end of the hearing the appellants were both found guilty of the offence of stealing and were each fined Ksh 20,000/= in default 2 years imprisonment. They were acquitted of the assault charges.

The appellants have now appealed before this court on the grounds that though they presented the camera bag to the police station on same day of the offence, the camera came in appellants possession after a fight in the home between the appellants and their brother. The appellants argue that there was no *mens rea* on their part – they had no intention to steal the camera. They argue that the photo man was the trespasser on their land. They argue that the trial magistrate erred by refusing to consider their evidence by giving meaning to stealing as taking without permission without considering the circumstances of the case. That by handing back the camera bag to the police, the appellants had no intention of keeping it and therefore there was no stealing.

The State represented by Miss Opiyo argued that the appellants indeed stole and slapped the

complainant and took the bag which had Ksh 9,400/= which did not belong to them. The State urged the court to uphold the conviction and the sentence.

Upon hearing the submissions of both the appellants and the State, the single issue for determination is whether there was evidence to convict the appellants for an offence of stealing.

Blacks law dictionary, Ninth Edition at page 1548 defines stealing as:-

“to take (personal property) illegally with intent to keep it unlawfully”

The ingredients here are two fold:-

1. **the illegal taking,**
2. **the intention to keep it unlawfully.**

From the evidence of prosecution, the appellant is said to have stolen, a camera bag containing Kshs 9,500/=-, Posta keys No. 975, passport size photos, camera make Canon AE1, photographs, cable, camera flash Vivila make and a film.

What was recovered was the camera Canon, Posta keys, camera bag and cable. The cash Ksh 9,400/= was not recovered. It was however not explained how these other items other than the camera bag were recovered because the prosecution evidence was that the appellants brought the camera bag to the police station yet the prosecution were able to identify and mark the other items for identification MF1 to 5.

There is also evidence that the whole incident occurred following a dispute in land between the appellants and his brother PW2. The complainant was therefore not a target in the dispute but an innocent photographer. Given the circumstances of this case, the intention would therefore not have been to steal but to disenable the complainant from taking photos of the disputed property.

I do agree with the appellants that the intention to steal was not proved by the prosecution and therefore it was unsafe to convict the appellants in the circumstances.

I therefore allow this appeal. I set aside the conviction and sentence accordingly.

DATED THIS 10TH DAY OF DECEMBER 2013.

HELLEN S. WASILWA

JUDGE

DELIVERED THIS 11TH DAY OF DECEMBER 2013

S. J. CHITEMBWE

JUDGE