



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL CASE APPEAL NO.133 OF 2011

(From the original conviction and sentence of P.N. ARERI, RM at Kakamega, criminal case no 1779 of 2010)

VINCENT KHAKALI MZEEAPPELLANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

The appellant, Vincent Khakali was originally charged before the RM's court Kakamega with the offence of burglary contrary to section 304(2) and stealing contrary to section 279 (b) of the penal code. Particulars of the offence were that on the night of 11th and 12th September 2010 at Matende Village, Shirere Sub-location in Central Kakamega District within Western Province, Jointly with others not before court, broke and entered the dwelling house of Linet Minayi with intent to steal and did steal therein one mobile phone make Nokia 1110, four iron sheets, three pairs of shoes, assorted clothes, beddings, two radios make sony, sufuria and basin all valued at kshs 12, 400 the property of Linet Minayo

Alternatively the appellant was charged with the offence of handling stolen property contrary to section 322(2) of the penal code

The appellant was found guilty of the main charge of stealing and was sentenced to serve five years in jail. The prosecution called three witnesses who stated as follows;- P.W 1 the complainant stated that she left home on the night of 11th and 12th September 2010 for Kisumu where she was performing a dance at a wedding ceremony. She returned home on the 12th September 2010 and found her property as per the charge sheet had been stolen. Her children informed her that thieves had stolen the items. She reported the matter to the village elder who in turn reported to the Assistant Chief. On the 23rd of September, she met the appellant's co-accused's daughter wearing pink slippers that were part of her stolen property. The appellants co-accused informed her that she had been given the slippers by the appellant in exchange for changaa that she sold to the appellant. The appellant was subsequently arrested with the help of the woman whose daughter was found wearing the stolen slippers. At the appellants home more of the complainant's stolen property was recovered. The appellant also led them to other homes where he had apparently sold what he stole and the items were recovered. The complainant positively identified the items as hers.

The second witness P.W 2 the village elder confirmed that he was present when the items were recovered in places where the appellant led them. The third witness was the investing officer who recorded the statements of the witnesses and thereafter charged the appellant accordingly.

When put on his defence, the appellant stated that he never stole the items in question. He stated that he is a taxi driver and had been hired by some people to take them somewhere. As he waited for them to load their wares in his car, he was arrested and taken to the police station and eventually charged with this offence.

The trial court considered the evidence of the prosecution and the defence and found that the offence of burglary had not been proved as there was no eye witness to the same. The court also argued that there was no evidence that the house of the complainant had been broken into as alleged. Further, the appellant's co-accused had testified that the appellant sold her the pink slippers which were her daughter was wearing. From this evidence, the court found the appellant guilty on the limb of stealing and convicted him accordingly.

The appellant has now appealed before this court on both conviction and sentence on the grounds that he was convicted for an offence which was not established as there were no eye-witnesses to the same. Further that the trial court convicted him without hearing all the essential witnesses including the officer who visited the crime scene to ascertain that. Further that the trial magistrate failed to consider his alibi defence that he was on Kisumu when the alleged offence was committed. The appellant also submitted that the trial court failed to consider material contradictions in the prosecution case and convicted him on contradictory evidence.

Having considered all the submissions, I find that it is true that there was no eye witness to the stealing. However, the accused person was found with goods recently stolen. The theft occurred on the night of 11 and 12th September 2010 and on the 23rd of the same month these items were recovered from the appellant. In *R vs Loughin 35 Criminal Appeal R69 the Lord Chief Justice of England* held that:-

“If it is proved that the premises had been broken into and certain property has been stolen from the premises and very shortly thereafter a man is found in possession of that property, that is evidence which the jury can infer that certainly the man is the house breaker or the shop breaker”

This principle was applied by the C.A in criminal appeal no 613 of 2010 (court sitting at Nyeri) where the *Loughin Case* was quoted and applied by the Court of Appeal with similar findings. Basing my findings on the doctrine of recent possession I find that the appellant was found with property recently stolen within Mumias and given the nature of the property ten days was still very recent and therefore the appellants submission that he never stole does not hold any weight as the appellant himself led the village elder who arrested him, P.W 2 to where the items he had stolen were recovered.

On the issue of the alibi about being in Kisumu at the time of the theft, the appellant did not go beyond just stating that he was in Kisumu as he called no evidence to prove this fact and so this remained just a mere assertion.

The appellant further submitted that there were material contradictions in the prosecution case in that the complainant stated that the offence occurred on the night of 11th/12th Dec 2010 whereas his witnesses stated that it was in September. The charge sheet states that the offence occurred in September. The evidence of the Complainant in court states that this occurred in September. I do not find any material contradictions in the prosecution's case

The upshot is that I find the appeal lacks any merit and I therefore dismiss it accordingly and confirm his sentence.

DATED THIS 11th DAY OF December 2013

HELLEN WASILWA

JUDGE

DELIVERED THIS 11th DAY OF December 2013

S. J. CHITEMBWE

JUDGE