REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 160 OF 2012 CONSOLIDATED WITH CRIMINAL APPEAL NO. 159 OF 2012

JACK MWANGI WARUI …….1ST APPELLANT

MOSES MUTHIE GICHANGI …….2ND APPELLANT

-VRS-

REPUBLIC……..……..RESPONDENT

(FROM THE ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 1028 OF 2010 IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT BARICHO - MR J.N. MWANIKI –(SRM)

JUDGMENT

The two appellants ***JACK MWANGI WARUI*** and ***MOSES MUTHEE GICHANGI*** were charged separately and also jointly with two others namely ***MARY WANGUI MUGO*** and ***NICHOLAS NJOMO NJURAI*** in three counts with the offence of breaking into a building and committing a felony **contrary to section 306(a) of the penal code.**

The particulars supporting the charge in each count were stated in the charge sheet but just to outline them in summary, it was alleged that on the night of 27th day of November 2010 at Kagio Trading Centre in Kirinyaga West District within Central province, the appellants and their co-accused broke into three shops belonging to ***FELISTUS WANGARI, JERUSHA WAKIAGA MUTHONJA*** and ***TABITHA WANJIRA*** and stole from therein sewing machines , assorted pieces of clothing material ,school uniform and dresses among other items all valued at different amounts of money as specified in the charge sheet.

In the alternative, the appellants were also charged with the offence of handling stolen goods ***contrary to section 322 (2)*** of the ***penal code*** in that on the 15th day of December 2010 at Kagio village otherwise than in the course of stealing, they dishonestly retained four pieces of clothes valued at kshs 3,000 and one incomplete dress valued at kshs 600 the property of ***FELISTUS WANGARI, JERUSHA WAKIAGA and TABITHA WANJIRA*** respectively knowing that they were stolen goods .

In count 4, the appellants faced another charge in which they were charged with the offence of stock theft contrary to **section 278 of the penal code** in that on the 11th day of December 2010 at Kagio village, they jointly stole four goats valued at kshs 20,000 the property of ***AMOS MUTUGI* .**

The appellants also faced the offence of handling stolen goods contrary to section 322 of the penal code as an alternative charge to count 4 in which it was alleged that on the 15th December 2010 at Kagio

village otherwise than in the course of stealing, they dishonestly retained four (4) kilogram's of meat valued at kshs 800 the property of ***AMOS MUTUGI*** knowing that they were stolen goods.

After full trial, the appellants were acquitted of the charges in count 2 and count 4 but were convicted together with their co-accused ***MARY WANGUI MUGO*** (3rd accused) in count 1 and count three subsequent to which they were sentenced to serve 7 years imprisonment in each count. The sentences were ordered to run concurrently .

Being aggrieved by the conviction and sentence , the two appellants filed their appeals separately which were consolidated when they came up for hearing.

In their respective appeals, the appellants raised similar grounds in which they mainly complained that they were convicted on the basis of contradictory and insufficient evidence. They also complained that the learned trial magistrate erred in not considering their defence and mitigation.

Briefly, the case for the prosecution in count 1 and count 3 was that on the night of 27th and 28th day of November 2010 , shops belonging to ***FELITUS WANGARI*** and ***JERUSHA WAKIAGA*** were broken into and several items stolen.

According to ***FELISTUS WANGARI*** (1st complainant) she had securely locked her shop on 27th November 2010 at about 7 p.m. and went home. On 28th November 2010 in the morning , she received a call from a neighbour informing her that her shop had been broken into. She proceeded to the shop and confirmed the information . She noted that the shops door was open and two sewing machines, customer's clothes and some cloth materials had been stolen. She reported the matter to the police at the Kagio police post .

It is important to note at this juncture that from the court record, this witness appears to have given evidence twice when she testified as PW1 on 24th March 2011 and as PW3 on 10th May 2011.

In both instances, she gave a similar account regarding how her shop was broken into and what had been stolen but contradicted herself regarding how four pieces of cloth materials which formed part of what had been stolen from her shop had been recovered. She was however consistent in her claim that she saw the materials when they were allegedly recovered from the appellants and she was able to identify them in court as part of her stolen items.

PW5 ***JOSEPH NDII*** the area elder and PW7 CPL ***PATRICK ITHIRI*** testified on how the four pieces of cloth materials stolen from PW1's shop were recovered and how the appellants were arrested.

In their defence, the appellants elected to give unsworn statement and did not call witnesses .

In their defences, the appellants denied having committed the offences charged and denied any knowledge of the four pieces of cloth materials produced as exhibit in support of the prosecution case which were allegedly recovered from them.

This being a first appeal, this court has a duty to re-evaluate and consider a fresh all the evidence adduced in the lower court to arrive at its own conclusions of course bearing in mind that it did not see or hear the witnesses.

Having re-examined the evidence on record , I wish to state from the outset that though the appellants were convicted and sentenced in count 1 and count 3, no evidence was adduced by the prosecution in support of the charges in count 3. The prosecution for undisclosed reasons did not call any witness including the complainant ***Tabitha Wanjira*** to confirm or deny that her shop had been broken into as alleged and that the items stated in the charge sheet had been actually stolen from therein. There was therefore no evidence to prove that the offence had been committed in the first place and the learned trial magistrate consequently misdirected himself when he held that there was evidence to prove that

the appellants had committed the offence. There was absolutely no evidence to support such a finding . I am therefore satisfied that the appellants were wrongly convicted in count 3.

As regards count 1, my analysis of the evidence adduced in support thereof reveals that the evidence was contradictory in material particulars especially the evidence regarding recovery of the materials allegedly stolen from the 1st complainants shop.(***Felistus Wangari)***

As noted earlier, for reasons which are not stated in the court record, this witness testified twice as PW1 and PW3 and contradicted herself on the issue of recovery of the said cloth materials. As PW, she claimed that the materials were recovered from the appellants house in her presence and that both appellants had been found asleep in the house when the recovery was made.

When she later testified as PW3, she claimed that she went to Kagio police post on hearing that some stolen items had been recovered and arrival, she was shown pieces of cloth material which she identified as some of the property stolen from her shop contradicting her earlier evidence that she saw the cloth material when it was recovered in the appellant's house.

These two versions of the witnesses testimony are impossible to reconcile considering that they were given by the same witness in relation to the recovery of the same exhibits which she identified in court. The contradiction regarding the recovery of the exhibits was further compounded by the evidence of PW7 the investigating officer who claimed that the exhibits had infact been recovered from the house of the 3rd accused who was acquitted by the lower court and not from the house allegedly rented by the appellants.

Another discrepancy regarding the recovery of the exhibits is to be found in the evidence of PW5 who contradicted PW1's earlier claim that both appellants were found in the house in which the exhibits were recovered . He maintained that he arrested the 2nd appellant while running away from the direction of the premises in which he later found the 1st appellant. He had arrested him not because he was aware that he had committed any offence but out of suspicion because he knew him to be a person of questionable character.

It is clear from the judgment of the trial court that the appellants were convicted in count 1 on the basis of its finding that the prosecution had proved beyond doubt that they had been found in possession of the materials which had recently been stolen from the 1st complainant's shop bringing into operation the doctrine of recent possession.

However, the doctrine of recent possession only applies where there is proof beyond doubt that there are stolen items which had had been recovered from either the actual or constructive possession of an accused person not long after their theft.

In this case, taking into account the contradictions in the prosecution's case generally and particularly the evidence of PW1 and PW7 regarding how the exhibits in question were recovered, it is my finding that there was a possibility that the said materials were recovered from the house of the third accused person in the lower court and not from the appellant's house especially given that the two houses were in the same compound.

As the appellants had denied having committed the offences, it was the duty of the prosecution to prove the charges against them beyond any reasonable doubt. And the only way that the prosecution would have done so would have been by proving beyond doubt that the exhibits produced in the course of the trial formed part of the property stolen from the complainant's shop and that they had actually been recovered in the possession of the appellants not long after their theft.

In this case, as demonstrated earlier, a reasonable doubt existed whether or not the exhibits were recovered in the possession of the appellants. And because the alleged recovery of the exhibits from the possession of the appellants was the only piece of evidence linking the appellants with the

commission of the offence charged in count 1, doubts concerning whether they were found in possession of those exhibits translated into doubts whether they had committed the offence as alleged.

The learned trial magistrate ought to have given the appellants the benefit of that doubt .

Instead of doing so, the learned magistrate wrongly convicted the appellants on the basis of evidence which did not prove their guilt beyond any reasonable doubt.

In view of the foregoing, I am satisfied that the appellants conviction in count 1 was not well founded. It was unsafe and it cannot be allowed to stand.

In the end therefore, I find that the appeal is merited and it is hereby allowed. The convictions of the appellants in count 1 and count 3 are hereby quashed and the sentences set aside.

Each appellant is to be set free forthwith unless otherwise lawfully held.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED at KERUGOYA THIS 10TH DECEMBER, 2013 In the presence of

Both appellants

Mr Sitati for state

Kariuki Court Clerk