



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 77 OF 2011

JUDITH AKOTH OWINO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant has filed eleven grounds of appeal herein namely:-

1. That the learned trial magistrate erred both in law and fact by convicting the appellant without warning himself that the essential witness was not brought before court to testify i.e. the boy who was found in the house where the exhibit were claimed to have been recovered.
2. That the landlord of the house where the exhibit was recovered was not brought to proof.
3. That the magistrate failed to understand that arresting officer admitted that he arrested me with changaa and I was charged with the alleged offence.
4. That prosecution failed to proof the offence beyond reasonable doubt as essential witness were not brought to testify.
5. That the evidence adduced before the court were merely hearsay as there was no any eye witness before court.
6. That the trial magistrate failed to understand that my constitutional rights were denied as I was put in police cell for one week before taken to court.
7. That by the time of my arrest I was pregnant and now I gave birth in prison the child is now one and half month old and life in prison is honourable to a small child like that.
8. That trial magistrate failed to understand my mitigation where I said that I left three young children back home and there is nobody to take care of them thus their future life will be in problems.
9. That the sentence of three years imprisonment was too harsh for a first offender.
10. That I pray for non custodial sentence to enable me take care of my small children at home.
11. That I wish to be furnished with certified copy of proceedings to more grounds of appeal.

The appellant was charged in lower court with the offence of Breaking into a building and committing a felony contrary to section 306 (a) of the penal code, namely that on the night of 18th and 19th May 2010 at Bondo Township in Bondo district within Nyanza province jointly with others not before court broke and entered into a building namely Geno Women Group social hall and therein stole one hundred and twenty five plastic chairs, one solar battery, electric installation all valued at Kshs. 162,750/= the property of **Joannes Omolo Ayieko**.

The alternative count in respect to the appellant alone regards handling stolen property contrary to section 322 (2) of the penal code. The particulars of the charge are that on the 1st day of July 2010 at Bondo Township in Bondo district of the Nyanza province otherwise than in the course of stealing dishonestly retained three plastic chairs valued at Kshs. 2100/= the property of **Joannes Omolo Ayieko** knowing or having reason to believe them to be stolen goods.

At the end of the present case, the accused persons were found to have a case to answer and put on their defence. The rest of the two co-accused were acquitted and the appellant was convicted and sentenced to three years imprisonment hence this appeal.

PW1 was instructed by the NGO (the complainant) to prepare the venue for a meeting. When he went to the centre he discovered the theft of the NGO's properties. He informed his superiors in Nairobi. Later he heard over the radio that people should go to police station to identify some recovered items surely he identified three plastic chairs with inscriptions "**Jacobe**" under them. He was not told where they were recovered from. Neither did he get to know who had stolen them.

PW2 also got information for PW1 concerning the theft. She later went to identify the chairs after receiving the information from radio station that people should go to the police station to identify the recovered items. She identified the chairs.

PW3 is a volunteer with Geno Women Group. She equally got information from PW1 regarding the theft. She went to the place and identified the three chairs.

PW4 a police officer, P.C. David Barno recovered the items from the appellant's house after being led there by accused No. 3. PW5 the police officer who was mandated by the OCS to carry out the investigation. He went to the scene and confirmed that indeed the premises had been broken into. He also produced the items in court.

PW6 was the OCS Bondo police station. He said that he led the raid into a suspected hideout where assorted stolen items were recovered. Subsequently, an inventory was prepared. When the appellant was put on her defence together with her co-accused, she denied the charge. She however conceded that she sells changaa and what was recovered from her on the material day was changaa and not the chairs. She said further that she didn't know the rest of the co-accused. She further contended that she was incarcerated for seven days without knowing why she was never taken to court.

The rest of the two accused persons equally deny the charge.

The purpose of this court is to analyse a fresh the evidence on record with a view of reaching a conclusion based on what is available on record and the law. The fundamental question is whether indeed the stolen items (chairs) were recovered from the appellant's house. It must be noted that the trial court rightfully dismissed count one in respect to the appellant as there was no evidence of breaking.

In analyzing whether the chairs were recovered, I shall refer to the evidence of PW4 the police officer who participated in the arrest. There is no evidence to show that the third accused led the police to the appellant's home. There is evidence however that the police were well aware that the appellant was a changaa dealer. What is interesting though is that there seems to have been two incursions into the appellant's home. One done on 1-7-2010 and another one as per PW5 in cross examination PW5 said **"The chairs were recovered from your house. I visited the scene with you later. We went to recover more items from your house. The other items relate to a different case. I was not there when the**

chairs were recovered”.

The other case and which item relate to it has not been demonstrated.

The said officer on being cross examined by accused two said **“You led the officers to the house of the first accused. There is nothing to show that you led the officers to arrest of the first accused”.**

The prosecution further produced an inventory Pexh 3 dated 1-7-2010 showing several items that were allegedly recovered. The problem which I have with the said inventory is that the same seemed to lead to the items recovered on 1-7-2010. What about the inventory of the items recovered later as per the evidence of PW5 quoted above? Where are the inventory of the items recovered in the housed of accused No. 2 and No. 3? Wasn't it necessary to produce the inventory of the items recovered from the other accused persons? Further, where is the inventory of the items recovered later? It should be noted that accused No. 2 and 3 denied having taken the police to the house of the appellant.

If there was other recoveries as per the evidence of PW5 then it ought to have been shown.

Further, on being cross examined PW4 stated that he arrested the appellant opposite Shamrock hotel and other two at Sinapanga area this contradicts the evidence of the OCS who was very general on where they arrested the appellant. PW6 said in his evidence in chief that **“The second and third accused took us to the home of the first accused”.** Was the home opposite Shamrock hotel? Secondly why was the appellant's boyfriend not charged yet he was found in the house of the appellant. Surely he must have been an accomplice either of the changaa or the stolen items.

Surely these are glaring contradictions that the court failed to appreciate in convicting the appellant. It must be noted further on the issued of the inventory that accused No. 2 infact conceded that a search was conducted in his house and an inventory prepared. That inventory was not produced as a piece of evidence in court.

The appellant has further raised a fundamental constitutional point in regard to her arrest. She said that she was arrested on 1-7-2010 and only brought to court after 7 days. She said in her evidence **that “I stayed at the police station for one week asking to be taken to court. I was told investigation were going on”.** Of course the current constitution had not come into place but even then the bill of rights enshrined in the old constitution demanded expeditious justice. The police knew very well the home and place of the appellant. Infact they knew her to be a notorious changaa dealer. The state has argued that same was not inordinate. I find this explanation not convincing. Her liberty was curtailed for seven days without any reasonable explanation.

The offence she was suspected to have been committed was not capital in nature. No plausible reason was given. I conclude that her incarceration was unconstitutional. She stayed in police cells for a longer period that was necessary.

I do find therefore that the prosecution didn't prove their case beyond reasonable doubt. There was glaring inconsistencies in their evidence which the trial court should have considered and given the appellant the benefit of doubt. The bar for proving the criminal case is always high and if there is any doubt then the same ought to be in favour of the appellant or accused.

For the above reason I shall allow the appeal and order the appellant to be released unless lawfully held. Orders accordingly.

Dated, signed and delivered at Kisumu this 30th day of January, 2012.

**H.K. CHEMITEI
JUDGE**

