



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 379 OF 2010

(From the Original Conviction and Sentence in Criminal Case No. 2271 of 2007 of the Senior Resident Magistrate's Court at Voi - M.S KHADAMBI– P.M)

GIDLIA MUCHAROAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

GIDLIA MACHARO was charged with the offence of House breaking contrary to Section 304 (a) and Stealing contrary to section 279 (b) of the Penal Code.

The particulars of the charge are that:

“On the 24th day of July, 2009 at about 2:00 p.m. at Ngora Village at Taita District within Coast Province broke and entered the dwelling house of DEVIS MWADIME with intent to steal therein and did steal 2 iron sheets, one mattress all valued at Ksh. 2,300/= the property of the said DEVIS MWADIME”.

She was also charged with an alternative count of Handling suspected stolen property contrary to Section 322(2) of the Penal Code.

The particulars of that count are that:

“On the 26th day of July, at about 2:00 p.m. at Ngora Village in Taita District within Coast Province otherwise than in the cause of stealing dishonestly received or retained 2 iron sheets knowingly or having reasons to believe them to be stolen goods”.

She was tried, convicted on the alternative Count and sentenced to serve **Seven years** imprisonment. She has appealed against both the Conviction and the sentence.

The brief circumstances of the case are that, on the 24th day of July 2009, the house of Devis Mwadime was broken into by one Cladius Mwadali (who was the 1st accused in the case). He subsequently admitted the offence and was convicted and sentenced.

After breaking into that house, he stole therefrom, two Iron sheets and one mattress, all valued at Ksh.

2,300/= the property of the said Devis Mwadime. Upon discovery of the offence, the complainant, commenced investigation, and the said suspect Claudius Mwadali was arrested. He then led the police officers to a house of one Munyoki where he had taken the mattress and it was recovered. He also led the officers to the house of the appellant herein and the two Iron sheets were recovered. The appellant was arrested and charged.

In her defence, the Appellant told the Court that she, bought the iron sheets from the said 1st accused and without knowledge that, they had been stolen. That she paid him Kshs. 500 as part payment, as they had agreed on a price of Kshs. 350/= for each Iron-sheet. She told the Court that she bought the iron sheets after that 1st accused told her, he had been given the same as payment by his employer he worked for, being the job of “Circus”. That Circus involves “**off loading goods from trucks**”.

The Learned trial Magistrate stated in the Judgment as follows:

“On the aspect the 2nd accused in her statement stated that she was informed that the iron sheets had been off loaded from a truck by the accused in what she referred to as a “Circus”. When the Court sought explanation of what she meant by Circus, the explanation given suggested she meant the stripping of goods from trucks transporting the same along Mombasa Nairobi Highway. This on its own is suggestion enough that she had reason to believe the iron sheets were stolen. The other reason to confirm that the 2nd accused knew or had reason to believe that the iron sheets were stolen was the fact that on 27th July, 2009, she was informed that the 1st accused had broken into the Complainants house and stolen some items. The fact that she did not proceed to the Complainants’ house to inquire what was stolen therefrom is suggestion enough that the 2nd accused wanted to retain the 2 iron sheets that she had received dishonestly. It is immaterial whether the 2nd accused received the 2 iron sheets for value or not. The issue to be determined is whether the 2nd accused person dishonestly received and retained the two iron sheets knowing or having reason to believe them to be stolen”.

As aforesaid, being aggrieved, the appellant filed the following grounds of appeal:

- 1. “That I bought the two iron sheets from accused No. 1 Mr. Mwidadi without knowing that they were stolen property.**
- 2. That I am a single mother of 6 (Six) children aged between 17 years and 2 years who really needs care.**
- 3. That my children are girls hence exposed to gender violence for there is no one to look after them.**
- 4. That my children are facing a danger of terminating their education since am the one who pays their school fees.**
- 5. That am a first offender hence a law abiding citizen”.**

To support the grounds of appeal, she filed written submissions. The appeal was opposed by the State. In opposing the appeal, Ms Macharia, the Learned State Counsel submitted:

- The appellant admitted she bought the iron sheets from the accused although she did not know they were stolen.
- That she alleged that, the 1st accused had obtained them from a “Circus” which means stripping of goods from the trucks transporting them from Mombasa to Nairobi.
- That on mitigation, she mitigated saying she has two children and in the grounds she says she has six children, but all the same, the mitigation was considered and she was sentenced to Seven years. That, the

sentence is lawful and should be upheld.

I have considered the grounds of appeal, and the submissions by both parties and re-evaluated the evidence on record as a first appellate Court. I find as follows.

The particulars of the count indicates that, the house that was broken into was a house of one **DEVIS MWADIME** and the goods stolen were the property of the said **DEVIS MWADIME**. That Devis testified as (PW 1). Analysis of his evidence reveals that, he told the Court:

“On the 24th July, 2008 I was at home at around 2:00 p.m. when one of my workers Donald kalama came and told me his house had been broken into and two iron sheets and a mattress stolen”.

He went on to testify as follows:

“I identified my iron sheets at the 2nd accused’s house”. They had a 2 inch nail hole and had a green colour. Marks identified. As for the mattress, I identified the same from the colour. The mattress is 6 by 3 feet greenish in colour”

The question is this: **whose house was broken into?** Was it the house of Devis Mwandime or someone else. In an attempt to get the answer, I came across the evidence of PW 3 DONALD NGALA, he testified as follows:-

“It was on 27th July, 2009 at around 6:00 p.m. when I came back from herding. I went out shortly and when I came back to my house I found the padlock had been broken and the door a Jam. The latch was still at the door. The padlock was missing. When I entered I found my mattress missing. The mattress was on my bed. The mattress was yellow in colour. The mattress was 6 inches. Also missing were 3 iron sheets of 5 feet”.

A keen analysis of the evidence as aforesaid reveals the following:-

1. That the particulars of the charge sheet states the house broken into was the house of **DEVIS MWADIME** and the evidence of (PW 6), reveals the house was (**DONALD NGALA**.)
2. The particulars of the charge sheet indicates the stolen items as 2 iron sheets and one mattress. The evidence of PW 2 Donald Ngala states, the iron sheets stolen were 3 and one mattress.
3. The evidence of Devis Mwandime is that, the mattress stolen and recovered was **green in colour**. He stated:

“the mattress is 6 feet greenish in colour”.

On the other hand PW 6 Ngala testified:

“The mattress was yellow in colour”. The mattress was 6 inches”.

It is therefore clear that, the particulars of the charge are not supported by the evidence and so the charge sheet not having been amended, the charge is not proved, and on that ground alone, the appellant deserved the benefit of doubt and should have been acquitted under section 210 of the Criminal Penal Code.

All the same, a further analysis of the evidence reveals that, after the iron sheets (Whatever the number) were stolen and the mattress, the 1st accused disposed them off to two different people. According to (PW 1) **Devis** and (PW 6) **Ngala** the mattress was recovered from one **Munyoki**. That Munyoki was either **charged** nor **called** as a prosecution witness. No reason was given. To the contrary, the iron sheets were found with the appellant, and she was charged. **Why?** No reason was given.

Finally, the appellant has been convicted on an offence of handling suspected stolen property. She naturally and legally was duty bound to explain how she came into possession of the Iron sheets. She testified she bought the iron sheets from the 1st accused herein. She testified she inquired from 1st appellant as to where he got them from and, he told her from **“Circus”**. That Circus is said to mean **“stripping from nearby trucks along Mombasa Nairobi road”**. I have critically looked at the proceedings and I note the appellant stated as follows:-

“I asked him where the rest of the iron sheets were but he said, that the boss who had asked him to off load the iron sheet had changed his mind and was willing to give him only 2 iron sheets and the balance in cash. I was supposed to give the 1st accused a goat in return for 10 iron sheets. I refused and he pleaded with me to buy the 2 iron sheets. Because my house was leaking, I decided to buy the 2 iron sheets. The accused guaranteed me the iron sheets were his. He had been paid from a circus”.

Although it's alleged, she offered the explanation for the meaning of the word **“Circus”** to the Court, the same is not reflected in the proceedings. It only appears in the Judgment of the Learned Magistrate. With due respect, therefore the meaning of the words **“Circus”** cannot thereof, be attributed to the appellant. When she was asked about the same, the question put to her, and the answer ought to have been recorded so that the Learned Magistrate could rely on it in the Judgment.

All in all, I find that from the time the appellant was arrested and found with the iron sheet, she admitted to **all** that she had the iron sheets and that she bought the same. She maintained the same story during her defence. I believe she was sincere when she said that she bought the iron sheets in good faith and for value. Although the Learned Magistrate said value is immaterial I find value is material, because it introduces, the issue of normal commercial transaction. She ought to have been given the benefit of doubt if she bought it for value.

Even more so due to the fact that she was charged and the other person who had the mattress was set free.

I note from the Learned magistrates Judgment, that the Court argued that the appellant should have **“gone to the Complainants’ house to inquire what was stolen therefrom”**. That is not a normal and usual practice. People don't keep inquiring from others what is stolen from their home unless they are related or have an interest in it.

All in all I find no evidence she knew the 1st accused had stolen the iron sheets prior to her arrest and in deed the charges were not proved against her. I also find that, even if they were proved, the sentence imposed on her was too harsh for a offence of handling suspected property whose value is below Kshs. 2,300/=.

I therefore quash the conviction and set aside the sentence imposed on the appellant. I allow the appeal. I order that, the appellant be set free forthwith unless otherwise lawfully held.

Orders accordingly.

**G.L. NZIOKA
JUDGE**

21ST MARCH, 2012

Dated, signed and delivered at Mombasa.

**G.L. NZIOKA
JUDGE**

21ST MARCH, 2012

In the presence of:-

The appellant in person

Ms Macharia for the state

Cc Maroro