



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 198 of 2011

ALI HASSAN ABDALLAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(From Original Conviction and Sentence in the Criminal Case No. 142 of 2009 of the Senior Resident Magistrate's Court at Voi- M.S.G. Khadambi – P.M.)

JUDGMENT

The appellant **ALI HASSAN ABDALLAH** was charged in the lower court with the offence of shop breaking and stealing contrary to Section 306(a) of the penal code. He pleaded not guilty and subsequently his case was heard and he was Convicted and Sentenced to five (5) years imprisonment on the first limb and two(2) years imprisonment on the second limb. The sentence was ordered to run concurrently.

He now appeals against that Conviction and sentence. On Conviction, the main ground is that the trial Magistrate did not bear in mind, while evaluating evidence adduced against him that the complainant bore a grudge against him on account of a boundary dispute existing between the complainant and the appellant.

Further to that, the complainant organised prosecution witnesses **JOSEPHAT MWASINGO (PW 3)** and **AMON MWAIVU MDIO (PW 5)** to fix him.

A perusal of the Judgment (at page 34, last paragraph) the trial Magistrate has this to say;

“The Accused statement that he had a prior grudge with all the witnesses is not supported by any evidence on record. The only thing he said is that he had a boundary dispute with PW 1's brother. He did not put this to either PW 1 or his brother (PW8). I can only treat this as an afterthought and of no evidential effect”.

I have gone through the record of proceedings and I am in agreement with the trial Magistrate. The appellant broached the issue of an existing grudge at the defence stage.

He had the opportunity to cross-examine the witnesses at length on the issue of the existence of a grudge but this he did not do prompting the finding that this must have been an afterthought.

The second ground of appeal revolves around Section 137(f) of the Criminal Procedural Code which provides;

“Subject to any other provisions of this Section, it shall be sufficient to describe a place, time, thing, matter, act or omission to which is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to”.

A perusal of the charge sheet shows that **“time”** is indicated thus, **“on the night of 7th and 8th December, 2008”**. The place is indicated as **Mackinon Road Trading Centre”**.

There is reasonable clearness as envisaged by the Section above mentioned. It would not be feasible to indicate the exact hour and minute that an offence is committed.

On the weight of the evidence before the Court the Magistrate did evaluate it. He did reject the evidence of PW 6 (**RASHID BASHIR MALICHA**) and that of **ABEL MWAIVU** (PW 7) as forfeited.

He placed reliance on the evidence of recovery of an ATM card belonging to the complainant, foreign currency in various denominations and other calling cards. Items some of which were stolen from the complainant's shop on the fateful night and which items the complainant identified as his.

He was of the view that the doctrine of recent possession was applicable in the present case.

I do not find a good reason to depart from that conclusion. The Conviction is on sound basis.

The appellant's main grounds are not on the conviction itself but on the Sentence.

The appellant was sentenced effectively to serve a term of five (5) years.

Section 306 (a) of the penal code provides;

“Any person who (a) breaks and enters a School house, Shop, Warehouse, Store, Office, Counting- house, Garage, Pavilion, Club, Factory or Workshop or any building belonging to a public body or any building or part of a building licensed for the sale of intoxicating liquor or a building which is adjacent to a dwelling-house and occupied with it, but is not part of it, or any building used as a place of worship and commits a felony therein, is guilty of a felony and is liable to imprisonment for seven (7) years”.

Before Sentencing the prosecution did indicate that the Accused had no previous Convictions. The court also did call for a probation report. Those interviewed painted the Accused in good light.

Bearing in mind that the appellant is a first offender and the value of the goods stolen, I am of the view that a sentence of five (5) years is harsh and excessive. During much of the trial period the appellant was out on bond which was subsequently canceled on 28th January, 2012 after his Conviction.

The sentence of five (5) years is reduced to two (2) years imprisonment in respect of each of the two limbs. Sentence to run concurrently.

Judgment read and delivered in open Court this **31st** day of **October, 2012**.

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M. MUYA
JUDGE

In the presence of:-

Mr. Gioche for the state

Court clerk - Musundi

Accused