REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 24 of 2011

MOHAMED SHEIKH ABDULLAHI……..….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal from original conviction and sentence in Criminal Case No. 3010 of 2011 of the Senior Resident Magistrate, Garissa, Mr. D. W. Mburu)

JUDGEMENT

Background

1. Mohamed Sheikh Abdullahi (the appellant) was tried, convicted and sentenced by the Senior Resident Magistrate at Garissa for the offence of shop breaking contrary to section 304 (1) (b) and stealing contrary to section 279 (b) of the Penal Code. The offence is alleged to have been committed on the night of 3rd December 2011 at Hagadera Refugee Camp Market in Faafi District within Garissa County at a shop owned by Mohamed Hersi Mohamed. The items stolen are an assortment of Hijab material, fifteen shirts, five T-shirts, one Kikoi, five jeans trousers and five children's T-shirts all valued at Kshs 40,000. He faces an alternative count of handling one roll of hijab material valued at Kshs 6,000 on 6th December 2011 otherwise than in the course of stealing.

Grounds of Appeal

2. The appellant raises the following homemade grounds of appeal which he amended and was allowed by the court to present during the hearing of this appeal:

i. The learned trial magistrate erred in law and fact in basing my conviction on a charge that is fatally defective.

ii. The learned trial magistrate erred in law and fact in convicting me without considering that the prosecution witnesses did not prove the alleged materials to be the property of the complainant.

iii. The learned trial magistrate erred in law and fact in supporting his findings with the prosecution evidence (sic).

iv. The trial magistrate finding my conviction on the doctrine of recent possession was against the law due to the fact that I was arrested six days after the alleged stealing and there was no circumstantial

evidence to connect me with the alleged breakage (sic).

v. The learned trial magistrate erred in law and fact in shifting the burden of proof upon the appellant (sic).

Duty of the Court

3. This court is alive to the requirement of the court sitting on first appeal to re-examine and re-evaluate all the evidence adduced in the trial court with a view to coming up with its own independent findings. Allowance is given that this court did not observe the witnesses as they testified in order to form its own opinion in regard to their demeanour.

Submissions for and against

4. The appellant relied on his written submissions that the charge is defective since it does not state that he broke and entered into the building with the intent of stealing therein; that breaking into a building does not prove that the person intended to steal; that he was prejudiced as a result of relying on a defective charge; that none of the prosecution witnesses proved that the material belonged to the complainant and that there was no description on the material to confirm it belonged to the complainant; that the Hijab material is common at the Refugee Camp; that the trial magistrate stated in his judgement that the material was purple when there was no evidence to that effect; that the prosecution witnesses were not credible and the court ought to have acquitted him; that the doctrine of recent possession is applicable where someone is found in possession of the stolen items before the expiry of 24 hours; that the trial court shifted the burden of proof to the appellant.

5. The appeal was opposed by the learned state counsel who submitted that the appellant did not challenge the prosecution evidence especially on how he came by the material; that the appellant did not lay legal claim over the material. The learned state counsel asked the court to dismiss the appeal.

Available evidence

6. The evidence adduced before the trial court is simple. Mohamed Hirsi Mohamed (PW1) closed his shop on 3rd December 2011 and went home for the night. He returned the following morning at 8.00am and found his shop had been broken into and various items including 6 hijab materials, 18 shirts, 5 T-shirts, 1 Kikoi, 1 children's shirt and 5 jean trousers had been stolen. He reported the matter to the police. On 6th December 2011 Abdikaim Mohamed Hirsi (PW2) who is the son of PW1 went out looking for the stolen items. He found the accused selling a piece of hijab material and identified it as one of those stolen from his father's shop. At the time the accused had put the material in a sack. He arrested the accused and took him to the police station. This evidence is confirmed by that of Filis Sheikh Yussuf (PW3) who told the court that the accused went to her stall and offered to sell to her the hijab material. The accused had put the cloth in a sack. It was when PW3 was examining the cloth material that PW2 found them and said that the cloth had been stolen from his father's shop. PC Peter Kisembu (PW4) confirmed re-arresting the accused from members of the public and taking into custody the recovered hijab material. It was produced in evidence as exhibit 1. The accused opted not to say anything in his defence.

7. The trial court found the accused guilty of theft by invoking the doctrine of recent possession. He reasoned that the hijab material having been recovered from the accused on 6th December 2011, three days after it was stolen, and therefore the accused, in the absence of any explanation from him, must have been the thief. He was sentenced to six years imprisonment on the shop breaking and seven years for stealing both sentences to run concurrently.

Determination

8. The appellant's first ground of appeal is that the charge is defective. He submits that the charge does not state that the appellant broke and entered with intention to steal. Actually what he failed to notice is that the charge is based on a wrong section of the Penal Code. The prosecutor in the lower court ought to

have noticed that the charge ought to have been brought under section 306 of the Penal Code which states as follows:

Any person who -

(*a*) breaks and enters a schoolhouse, 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; or

(*b*) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.

9. Instead the appellant was charged under section 304 (1) (b) combined with section 279 (b) of the Penal Code. Section 304 (1) reads as follows:

Any person who -

(*a*) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

(*b*) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

10. Under section 306 the component of 'with intent to commit a felony' is missing while in section 304 (1) it is specified. All the same, a wrong section of the law was quoted in this case. Did this mistake occasion injustice on the part of the appellant? Other than the wrong section being quoted, the element of breaking into a building is specified in the charge. The act of stealing from that building is also specified. Evidence was adduced to support stealing from the building (shop) and the items stolen specified. The appellant actively participated in the trial and cross examined the witnesses. In my view no miscarriage of justice occurred in this case and the findings of the trial court are based purely on the available evidence.

11. I have taken into account the appellant assertion that the material was not identified as belonging to the complainant. I note the evidence that the accused carried the material in a sack and he is the one who offered to sell it to PW3. There is also evidence of another person who had been with the appellant but who escaped. It is not normal to carry one's own items in a sack and sell it in suspicious circumstances. This court takes judicial notice of the fact that hijab materials are common within the community where the parties in this case come from. I also take note of the fact that the complainant did not have an identification mark on the material recovered from the appellant. However, while alive to the fact that an accused person has no duty to prove his innocence, had he laid any claim on the material this would have raised some doubt in this court's mind which would have gone to his benefit. I find that I have no reason to doubt the prosecution evidence that the material belonged to the complainant especially after taking into account the suspicious circumstances under which the appellant was selling the same.

12. The doctrine of recent possession is invoked by the courts **"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that shortly afterwards a man is found in possession of that property, that is certainly evidence which the jury can infer that he is the house breaker or shop breaker." (**see **R v. Loughlin 35 Cr. Appeal** and **Maina & 3 Others v. Republic 1986 KLR 301**). The following ingredients must be established for the recent possession to be applicable: that the item in question was stolen from the owner; that the said item was recovered in possession of the accused person so soon after the theft and that the accused did not offer reasonable explanation as to how he came to be in possession of the stolen item.

13. How recent is recent? To me this depends on the item stolen. In case of items that are not perishable

like in this case, three days after the theft is recent enough. A piece of clothe is not easy to dispose of. In my view therefore the appellant cannot be right to say that the stolen item must be recovered within 24 hours for the doctrine of recent possession to apply.

14. In respect of the trial magistrate shifting the burden of proof to the appellant, I do not agree with the appellant. The trial magistrate was explaining that when the court invokes the doctrine of recent possession, an accused person has duty to explain how he came by the stolen item and this is not shifting the burden of proof.

15. I find this appeal has not merit and I hereby dismiss it. I have however taken into account the value of the item recovered and that the appellant has been serving term for under one year. I hereby reduce the sentences to three years in each limb to run concurrently. The import of this is that the appellant will now serve a total of three years or the remainder of that period since he has been serving sentence. I make orders accordingly.

Stella N. Mutuku, Judge

Dated, signed and delivered this 26th day of November 2012.