



REPUBLIC OF KENYA
IN THE HIGH COURT OF BUNGOMA
CRIMINAL APPEAL NO.109 OF 2010

(Appeal from original BGM CM. CR. NO.738 of 2009)

RONALD WAFULA MUREKA.....APPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Wafula Mureka was convicted by Kimilili Senior Resident Magistrate of the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. The Appellant faced an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code. On the main count he was jailed for four (4) years. The Appellant was acquitted of the alternative charge. The appeal is against conviction and sentence.

The grounds of appeal are that there was no sufficient evidence to convict; that the evidence was contradictory; the charge was defective and that the burden of proof was shifted to the Appellant.

The state opposed the appeal. Mr. Ogoti submitted that the Appellant was seen that night by someone carrying the poshomill handle. Around 4.00 a.m PW4 met with the Appellant who was carrying a heavy object on his head and a handle in his hand. The state further argued that the handle of the poshomill was later recovered in his house by police. It was later identified by PW1 as his stolen property. The evidence was therefore water tight according to the state.

The facts of the case are that PW1 was attending a funeral of her in-law away from home on 14/5/2009. She had left her 12 year old child at home. She received a telephone call that her poshomill engine had been stolen. A report was made to the police who later recovered parts of the poshomill from the house of the Appellant in the presence of his wife. The Appellant had by then been arrested and was at Kimilili Police Station.

PW1 testified that she was tipped by an informer one Juma Walubengo that the Appellant who used to service the poshomill for the complainant had been seen on the material morning carrying the poshomill engine on his head. PW1 gave that information to the police who visited the Appellant's house and conducted search therein. On a second search a few days later the handle of the posho will was found under the bed of the Appellant. PW4 Josphat Juma testified that on the material morning around 4.00 a.m, he was walking from Kimilili town to his home at Mungakha. He had a spotlight which he flashed it at a person who was carrying a heavy thing on his head. He recognized the person as the Appellant whom he knew before the incident. PW4 also saw the Appellant carrying a poshomill handle in his hand. PW5 P.C Mwalimu Hakim received a report from PW1 about her stolen property. He visited the scene and

witnessed the breaking in which had taken place at the poshomill house. Photographs of the scene were also taken. He got the name of the Appellant as a suspect and visited his home. During investigations, PW5 learnt that the Appellant used to service and repair the poshomill for PW1 before the incident. Police officers who went to the house of the Appellant the first time did not recover anything. It is during the second visit that, the poshomill handle was recovered and properly identified. The poshomill engine was never recovered.

In his defence, the Appellant did not explain the recent possession of the poshomill handle. He only gave an account of how PW1 led police to his house and a search was conducted. He further said that nothing was recovered in his house but police still arrested him. The Appellant alleged that he was tortured at the police station in order to reveal where the poshomill engine was. When he failed to do so, police asked him for a Ksh.10,000/=bribe in order to release him. The Appellant could not raise the cash and this resulted in his being charged with the offence. The Appellant called his cousin DW2 as a witness. She told the court that on 15/5/2009, she had gone to visit the Appellant in his home. Police came to the house and searched but failed to make any recovery. DW2 also told the court that PW5 demanded a bribe of Ksh.10,000/- from her and the family of the Appellant in order to release the Appellant.

The trial court did not buy the allegation of the defence on bribery and denial of the offence. The magistrate found that the recovery of the handle from the house of Appellant directly connected him with the offence.

I have analyzed the evidence of the prosecution and the defence of the Appellant. PW4 met with the Appellant around 4.00 a.m and saw him carrying the poshomill handle and something heavy on his head. The heavy object was the stolen poshomill engine as it was later discovered. PW4 is the one who tipped the complainant that the Appellant was a suspect. Although nothing was recovered from the Appellant's house on 15/05/2009, the handle was recovered on a second search on 22/05/2009. Police must have received further information in order to conduct a second search. PW4's evidence was not shaken by the defence on cross-examination. With a flash of the spotlight, PW4 saw and recognized the Appellant. The breaking of the building and stealing of the posho mill engine took place only a few minutes or hours before PW4 met with the Appellant.

The recovery of the handle came only eight (8) days after the theft took place. The Appellant had a duty to explain the recent possession. He did not do so in his defence. DW2 talked of 15/5/2009 while PW5 said recovery was done on 22/5/2009.

The allegation of bribery was rejected by the trial court. I agree with the magistrate when he said in his judgment that the allegation was only meant to divert the attention of the court from the overwhelming evidence adduced. Had PW5 demanded a bribe, the Appellant would have brought it up during cross-examination of the witness. The Appellant did not attempt to ask PW5 any question on the said allegation.

The charge sheet was alleged to be defective. On looking at it, the charge contains all the material particulars regarding the offence and which are correctly stated. The Appellant did not state what the defect was.

I found no major contradictions in the evidence of the prosecution. There was no hearsay evidence which the court relied on as the Appellant claimed.

The sentence was within the law given that the maximum sentence under section 306 (a) is fourteen (14) years.

The appeal lacks merit and must fail. The conviction and the sentence are hereby upheld.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 27th day of July, 2011 in the presence of the Appellant and the state counsel.

F. N. MUCHEMI
JUDGE