



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO.174 OF 2010

PAUL ODHIAMBO OKUKU1ST APPELLANT

VERSUS

REPUBLICRESPONDENT

[Appeal from Original Conviction and Sentence of TAMU RM'S Court in Criminal Case No.295 of 2010: R.M. OANDA – R.M.]

J U D G E M E N T

The Appellant **PAUL ODHIAMBO OKUKU** was arraigned in court on the 26th of August, 2010 and charged together with one other person with the offences of Breaking and Committing a Felony, Contrary to Section 306(9) of the Penal Code.

Count 1: was that on the night of the 24th and 25th August 2010 they broke and entered a saloon and stole 4 plastic chairs, 1 trolley, 4 hair cream, 2 towels, 11 woolen seat cover, one jerricane and one bed cover at Kshs.8,450/=, **Count 11:** on the material day they broke into a butchery belonging to **ANIOS OTIENO OKOTH** and stole 2 weighing machines, 4 weighing stones, 3 kilograms of meat and one pair of gum boats all valued at Kshs.7,210/=. **Count 111:** on the 25th day of August, the second appellant was found in possession of one driving license **No.F7765612** radio cassettes make Sony, Radio Sonisong reasonably suspected to have been stolen or unlawfully obtained. The appellant had an alternative court of handling stolen goods contrary to Section 322 (1) & (2) of the Penal Code the particulars being that on the 25th of August, 2010 at Kandege area in Nyando otherwise than in the cause of stealing dishonestly retained 4 plastic chairs, 1 trolley, 3 hair creams and 1½ kg of beet meat knowing or having reason to believe them to be stolen goods.

The 2nd accused also faced an alternative count of handling stolen property.

The accused pleaded not guilty and were tried. They were jailed for 3 years. The sentence was to run concurrently. The appellant herein being dissatisfied with the judgment has appealed to this court.

He filed his petition of appeal on the 30th of November, 2011. At the hearing of the case on the 3rd of October, 2011 the appellant filed a supplementary grounds of appeal and submission.

He chose to abandon the earlier grounds and relied on the supplementary grounds as follows:

- “1. That the learned trial magistrate erred in law and facts by convicting me without prove of dusting on the scene of crime;
2. That the learned trial magistrate erred in law and facts by convicting me on the evidence of the items claimed by the complainant without prove by the receipt support ownership;
3. That the learned trial magistrate erred in law and fact and further failed to put into account that identification of exhibits by the complainant is not sound to support my conviction;
4. That the learned trial magistrate erred in law and fact by failing to consider that there was no special marks to prove that the exhibits belonging to the complainant as alleged;
5. That the learned trial magistrate convicted me while failing to consider that there was contradiction by the prosecution in their case.
6. That the trial magistrate convicted me on the basis of the charge which is doubtful and defective, it does not accord with the evidence on record;
7. That the trial magistrate erred in law by convicting me and failed to accord me fair hearing contrary to section 50(2)(92) of the Constitution of Kenya;
8. That the learned trial magistrate erred in law and facts by convicting me and failed to consider my alibi defence which was reasonable in all circumstances of the case;
9. That the learned trial magistrate erred in law and facts by convicting me and failed to comply with Section 169 in his judgment;
10. That the learned trial magistrate erred in law by convicting me on the basis of the evidence of the two complainants who did not corroborate in their referential evidence.

In his submissions the appellant argued that the prosecution did not prove its case beyond reasonable doubt, there was no corroborating evidence. No evidence of order-ship of the alleged items produced, **PW1, PW2 & PW3** did not identify him as the robber.

On its part the prosecution opposed the appeal on the grounds that the prosecution proved its case having called 5 witnesses.

This is the first appellate court it is under a duty to re-consider, evaluate and analyse the evidence on record in order to arrive at an independent decision always having in mind that the trial court had an opportunity to see and hear the witnesses. See **OKENO VRS REPUBLIC (1972) E.A. & NGULI VRS REPUBLIC (1984) KLR 729.**

The brief facts of the case are that the appellant herein together with one other person were charged with the offence of breaching and committing a felony, and appellant also faced an alternative count of handling stolen property. The evidence on record is as follows:

PW1 AMOS OTIENO OKOTH

- A businessman;
- On 24th August, 2010 at 8.00 a.m. he closed his business and went home;
- The next day he received information from a worker that the butchery was broken into and he lost 2 weighting machines, four stones, 3 kg meat, the padlock had been twisted.
- On reporting to the police he found 2 people arrested. He also found the stolen items and 1½ kg of meal. He saw the suspects at the police.

PW2 CAROLINE AKOTH ONYANGO

- a business lady running a saloon;
- on 24th August, 2010 at 7 p.m. she closed her business;
- the next morning her husband found the saloon door opened;
- on checking she found the following items stolen, 4 plastic chairs, 1 trolley, 5 lotions, 2 towels, white bedcover, one jerican and 2 sets of white table clothes;
- she reported the matter at Koru Police Station;
- later she was called to identify recorded items. She found the 4 plastic chairs, 1 trolley and 4 bottles of lotion. She learnt that they were recovered from the appellant;
- she confirmed on cross-examination that the saloon had been locked with a padlock.

PW3 CHARLES OTIENO ONDEGO

- on 25th August, 2010 at 7 a.m. on his way to work he found his wife's (PW2) saloon open;
- he informed her and on checking she found several items missing;
- he learnt from one Valentine of a person he saw carrying seats and a trolley. Valentine accompanied him to look for the said person. They found him at Kandege with 3 seats as he had given, 1 to Valentine;
- they called the police who came and arrested the appellant;
- they searched the house and found a trolley, weighing machine, weighing stones and some meat;
- the appellant was taken to the police station with the items;
- he identified the items found in the appellant's possession.

PW4 VALENTINE OKUNE OCHIENG

- a cyclist staying at Koru;
- on 25th August, 2010 he was at a place called Murram to fuel;
- he was stopped by a client who wanted to be ferried to Kandege;
- he had 4 plastic chairs, box with some items, a trolley and a basin;
- he asked to be ferried to Kandege but did not have enough fare and he offered a seat;
- he learnt later that a saloon was broken he suspected the seat may have been stolen from the saloon;
- he looked for the owner of the saloon and informed him;
- he went with his to Kandege and traced the appellant's house. They called the police and recovered the plastic chairs, trolley, weighing machine, weighing stones and lotion;

PW5 SERGEANT FABIAN WANJOHI

- stationed at Koru;
- on 25/8/2010 he received one Valentine who reported that he had carried passenger with plastic seats and who gave him one;
- later the complainant reported that her saloon was broken into;
- valentine PW4 was called to help trace the person;
- later PW4 called and reported that they had traced the person. The appellant was found with the items allegedly stolen;
- the appellant named accused 2;
- they went to accused 2's home and found 3 radios a driving license of a Mr. Ochieng;

The trial court put the appellant on his defence. He gave a sworn statement as follows:

- he is from Kandege. He is a security guard with Bedrock Security Services Limited;
- he used to have 3 white seats for his saloon. He bought 5kg meat at Kshs.1,500/=;
- was 7.30 a.m. He boarded a vehicle that developed mechanical problem at Onyango stage. He met PW4 a boda boda cyclist who stopped him at 11 a.m.
- later PW4 returned in the company of one other person who informed him that seats similar to his had been stolen. Thereafter a police came, arrested him and confiscated the 3 chairs, hair oils, and weighing machines and took him to Koru Police Station;

Having considered the evidence on record the issue for determination herein is whether or not the prosecution established to the required standard whether the appellant broke and committed a felony at the saloon and butchery as alleged.

PW1 who runs a butchery in Okumu testified that on the 25th of August 2010 he learnt from a worker that items were stolen from his butchery a weighing machine, four stones and 3kg of meat. He went and confirmed the items were missing and his padlock to the door tempered with.

PW2 on the part stated that on the 25th of August, 2010 she found her saloon open and several items missing.

From their evidence and that of **PW3** it is obvious that the 2 premises were broken into. I have no reason to doubt that they lost their wares. This is fortified later by evidence of their recovery.

Was the appellant linked to the items? No one gave evidence that they saw the appellant break or indeed take away the items. However **PW5** saw the appellant's with the seats and the trolley due to suspicion on learning that a saloon was broken into he looked for the owner and reported the matter. He assisted to trace the appellant who was found in possession of the stolen items. And although he was found with the same I find that his evidence does not shake the cogent evidence by the prosecution. It does not add up why he carried the seats from his alleged saloon business and why he bought meat so early at 7 a.m. even if it was his son's birthday.

I do concur with the trial court that the doctrine of recent possession is applicable in this instance. In the case of **RUHI VERSUS REPUBLIC (1985) KLR** the court held that:

“By the doctrine of recent possession, strong presumption arose in this case, that the appellants, who had been found with the motor vehicle, were the same persons who had earlier forcibly driven it out of the University premises.”

In **ISAAC NG'ANG'A KAHIGA** alias **PETER NG'ANG'A KAHIGA VRS REPUBLIC Criminal Appeal No.272 of 2007** the C.A. stated at **P. 70** inter-alia:

“it is trite law that before a court of law can rely on the doctrine of recent possession as basis of conviction in a criminal case, the possession must be positively proved in other words, there must be positive proof; first, that the property was found with the suspect, secondly that the property is positively identified as the property of the complainant. Thirdly that the property was stolen from the complainant; and lastly that the property was recently stolen from the complainant. The proof of time as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.”

The parameters set by the Court of Appeal in the above cited case squarely fit the case before me. The appellant was found with recently stolen items. These was positive prove of the same. The doctrine of recent possession is applicable no doubt.

In his judgment the trial court stated:

“Accused 1 says he was traveling from Kisumu with the chairs to attend to his son's birthday but failed to mention anything about the weighing machines and weighing stones. After careful perusal of the evidence I do find that none of the accused herein was seen breaking into any of the two business premises. Unfortunately the stolen items were recovered from the house of accused 1 at Kandege area. Even if he was not seen in the actthe doctrine of recent possession applies and he is therefore culpable.”

I agree in total with the finding of the trial court and I cannot therefore fault the finding of the court. I find that the court's finding was sound.

As regards sentencing this depends on the discretion of the court. 3 years meted out for each of the offences and to run concurrently is reasonable. I see no reason to interfere with the same either.

For the above reasons the appeals stands dismissed.

DATED and DELIVERED this 4th day of November 2011

ALI-ARONI

J U D G E

In the presence of:

.....State counsel

.....**Appellant in person**